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W. B. Owens
c/o Law School.

CASES

ON

BUSINESS LAW

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PREFACE

THIS collection of cases is designed for the use of students in schools of commerce and business administration.

The scope, content, and method of treatment of materials for such a course depends largely upon the ends sought to be accomplished thereby. If the acquisition of specific legal information were the chief goal toward which the nonprofessional law student were to direct his efforts, the treatment of the subject intended for his study would be extensive, perhaps, over the greater portion of the entire field of the law. On the other hand, if the chief end of such study were the adequate equipment of the student for acting as his own legal adviser, a complete course in a law school would be necessary.

The ends to be attained from the study of law by this class of nonprofessional law students lies somewhere between these two extremes. The future business man may well obtain such a knowledge of law as will be of value to him in avoiding some litigation. From its study, he should be enabled to appreciate with greater certainty the time and the circumstances under which the guidance of competent counsel is needed, and his knowledge should constitute additional equipment for intelligent co-operation with counsel. As a student, irrespective of his future work, he may well be permitted to gain whatever of educational value there may be in the study and discussion of legal problems. As a citizen, he should know something of the nature and development of the methods by which organized society encourages initiative, controls human action, and advances individual and social interests through the administration of justice.

An extensive treatment of law, it is believed, is not calculated to produce the best results. Some intensive work is indispensable, for otherwise some of the chief ends of the study are likely to be defeated. The materials placed in his hands and the nature of his study should emphasize, upon the mind of one who spends but a short time in the study of law, the truth that he has surveyed but a limited portion of a broad field of study and that his observation thereof has not penetrated to any great depth. But this same material and his work upon it should, however, unmistakably reveal to the student some of the chief sources of controversy and litigation, and should impart to him a knowledge of the problems involved in the formulation and interpretation of legal principles and of the difficulty inherent in their application to the limitless variety of economic and social facts. The picture drawn cannot be complete, but it should be true as far as it moves within the range of vision. There exist just as strong reasons, therefore, for the belief that judicial decisions constitute the materials best suited for conveying to the business student some definite notions

concerning the nature of law and its relation to human affairs, as there are for the belief that the same materials are best adapted to equip one for the legal profession.

But there is a possibility of error in the direction of too intensive treatment. The business student will not as a rule be justified in spending as much time in the study of law as is spent by a professional law student in one semester's work. If he does choose to go this far, it is believed that professional law courses are better suited to his needs. Whatever time is allotted, he could, with profit, employ this time in taking one or two regular law school courses. But it is believed that the average business student may spend, with greater value to himself, the same amount of time upon a larger number of law subjects. By so doing there is some loss in educational value, in the knowledge of the law's historical development and in other respects; but there is a gain in acquaintance with a greater variety of legal problems common to modern business, which, it is believed, exceeds these losses.

Confronted, therefore, with the problems of selection and apportionment of topics, the present compilers have thought that the law of contracts in its general and some of its special aspects and the law relating to business associations should be treated, that approximately one-third of the time should be devoted to the general law of contracts, about one-fifth to partnerships and corporations, and the principal portion of the remainder to agency, negotiable instruments, and sales.

This material has been organized with the view of aiding, as much as possible, the student's understanding of the subjects presented. The subjects are introduced in a natural order. The law of sales could have been taken up before negotiable instruments; but the reverse order was selected, so that the sections dealing with negotiable documents of title would appear more intelligible. Each part, obviously, deals with a particular legal relation or group of closely related legal relations. In each part, as a rule, the cases first taken up are concerned with the question: What facts will operate to produce the particular relation under discussion and what facts will not so operate? When we have once established what facts are essential to create a certain relation, cases dealing with the nature of the relation and the effects of facts subsequent to its creation are taken up.

Obviously there is a fairly wide range of possibilities in determining the order of treatment of facts subsequent to the creation of a particular relation. In fixing this order the compilers have been influenced chiefly by the desire so to arrange the topics that the student will be aided in visualizing the subject in its constituent parts and as a whole, and, it is hoped, in gaining some real knowledge concerning it. In the general law of contracts, after the development of the topics of offer, acceptance, and consideration, these ideas have led to the treatment of the important facts relating to performance and breach as they affect the normal contract. After noting the collateral operative effect of the contract upon third parties, attention is then paid to the facts that operate to discharge the relation, thus completing the picture of the

origin, nature, and termination of the normal contractual relation. With these ideas in the background, the student is then led to note the variation in operative effect caused by the introduction of the abnormal elements of fraud, mistake, duress, illegality, incapacity, and the noncompliance with the statute of frauds. The same ideas have been carried out in the other parts of the book, each chapter featuring either some distinctive and closely related groups of facts, or the nature, extent, and operation of a particular relationship between two parties.

It has also been thought desirable to introduce, very briefly indeed, some aspects of the pledge, the bailment, the contracts of affreightment, insurance, and suretyship, and some leading ideas of the law of damages and legal remedies, including a short summary of the Bankruptcy Act. It is conceded that, in the absence of a fairly extended development of some special topics, this fragmentary introduction of other special topics would be ill-advised. But it is believed that, with these correctives in plain view, there is some value in permitting the business student, for example, to read a few cases dealing with the special defenses of the surety, his rights of reimbursement, contribution, subrogation, and exoneration, and in taking some note of the nature and operation of common-law, equitable, and statutory remedies.

Here and there throughout the volume, the opportunity presenting itself, cases drawn from other branches of the law were availed of, in part to illustrate the main subject then being developed, and in part to show concretely the existence of other departments of the law not taken up. This policy it was thought would tend to widen the student's perspective of the field of the law and also to make that portion of it which was selected for more intensive cultivation to appear in its true light, as a portion only of a legal system. This policy explains the use of several cases in agency dealing with various kinds of torts, the insertion of a case in the sections on assignment of contracts dealing with the declaration of trust, and it explains the use, in the chapter on performance of contracts, of a case concerned with the right of specific performance against a vendor of land whose wife refused to release her dower. A few cases from quasi contracts and equity, particularly on its remedial side, were set out for the same reason. Obviously there are many such topics of equal, perhaps greater, importance, which might have been dealt with in like manner. The law relating to the delivery of deeds is certainly of as much importance as the law relating to the delivery of a negotiable instrument, but no case dealing with the former problem was inserted. The idea, however, was not to bring into the discussion from other departments of the law only those cases which were deemed to be of more importance than those omitted, but rather to introduce a sufficient number of cases from other branches, to show that there were other fields of the law, and also to mark out some of the boundary lines of the legal system as a whole.

The various sections have not all been developed to the same degree. To some has been given a more intensive treatment than to

others, not always because of the actual or supposed importance of the matters involved over those not so intensively developed, but because of a desire to impress upon the mind of the student the fact that the legal aspects of any particular group of circumstances is capable of a much more extended study. If the leading idea were to impart information as to what should be done in certain eventualities, then the organization of materials would have been quite different; but it is believed that the value in such treatment would be of a transitory nature, obtained at too great a sacrifice of the scientific principle to be desirable.

In the selection of cases, the compilers have been guided by several considerations. In the first place, limitations of space prevent the development of the law historically and comparatively. Occasionally, however, modern cases have been inserted which contain historical discussions of the rules involved, and also some cases have been used to present conflicts of authority, enough, it is hoped, to show that the history of the law is a part of it, and that courts may differ, in a given case, as to what the rule should be, or as to the interpretation of an accepted rule, or as to its application to facts.

As a rule the older cases have been omitted, although they may be leading cases, and modern cases included, which discuss the leading authorities and show how they have been applied. This policy has caused the omission of such cases as Shadwell v. Shadwell, Price v. Neal, and Northern Pacific R. R. Co. v. Boyd. But it has not always been found possible to do this. Many cases have been inserted because of their facts, facts with which the student is likely to be familiar, or because of their present-day business importance, their dramatic value, or merely because they were modern. In the editing of cases, citations of authorities, as a rule, have been omitted. In the selection of all cases the compilers have kept in mind the important fact that the student is engaged in his study to learn something of the law as it is, and it is hoped that the cases selected will be found well adapted to this end.

Fully aware of the objections which may be raised to the use of the texts of the Uniform Acts relating to Negotiable Instruments, Sales, and Partnership as the points of departure for the study of these subjects, the compilers have nevertheless felt that the policy of setting out portions of the text at the beginning of chapters or sections before the introduction of cases was not only justifiable, but desirable. It is believed that this method makes for clearness, and also tends to facilitate the student's comprehension of the subject as a whole. Even in jurisdictions which have not enacted these Uniform Acts, it is believed that the common-law rules there in force may just as easily, if not more easily, be taught in this way. Moreover, the use of this method in the codified subjects, appearing alongside the development of uncodified branches, calls attention to the difference in juridical method, shows that concepts behind a statute are not solids, but fluids, that codification does not arrest development, and, perhaps, may furnish the occasion for noting the existence of some of the problems of juristic

science. Most of the cases dealing with negotiable instruments and sales have been cases decided under the Uniform Acts. Out of a total of 580 cases contained in the volume 379 have been decided since 1900.

The compilers have also thought that it would be of some assistance to the student, in understanding the cases and in organizing the results of his work, to make some comments at the beginning of each subject, and also at the beginning of some of the chapters and sections, not, however, for the purpose of informing him with respect to certain principles of law to be taken up, but rather to indicate the nature of the legal problems with which the material immediately following is concerned. The short statement used as an introduction to the study of law was included for the purpose of giving the student some advance information as to the nature of the subject, the material used, the methods of study, and also to designate that portion of the law with which the book deals. A fairly extended list of definitions of legal terms was added for the convenience of the student.

In the preparation of this volume the compilers have been much assisted by the works of Professors Williston, Corbin, Mechem, Goddard, Brannan, Gilmore, Wormser, and Richards. A large part of the merit which this collection may possess is traceable to their scholarship and to the scholarly works of many others who have made contributions to the subjects surveyed in this book. A special debt is owed to Professor Corbin, whose writings have influenced to a marked degree the character of the introductory statements and the organization of material throughout the book. Grateful acknowledgment is also due Professor Lewis for his kind permission to reprint his scholarly notes to the Uniform Partnership Act and to the members of the faculty of the College of Commerce and Business Administration of the University of Illinois, for their helpful suggestions.

W. E. B.
R. S. B.

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CASES ON BUSINESS LAW

INTRODUCTION TO THE STUDY OF LAW

Section

1. Nature of Law.
2. Systems of Law.
3. Objects of Law.
4. Legal Relations.
5. Divisions of Law.
6. Legal Procedure.
7. Judicial Decisions.
8. History and Development of the Law.

SECTION 1.—NATURE OF LAW

Law exists only in the state. Law assumes the existence of a government, and of agents thereof, through whose actions law manifests itself. When a governor of a state calls an extra session of the legislature, pardons a prisoner, or appoints some individual to office; when a legislative body in some proper form registers its will that certain things shall or shall not be done; when a court, as a result of a proceeding before it, formally declares that A. owes B. a specified sum of money; when a sheriff seizes A.'s property and delivers it to C. in exchange for money which is in turn given to B. in payment of the debt; when a policeman halts the stream of traffic on a busy thoroughfare—these physical acts are the manifestations of state life; they are manifestations of law. It is only in a figurative sense that we speak of certain words as constituting a legal principle, or that law is to be found in certain kinds of books.

Law is a science. Like all sciences, its study involves the examination of data and the acquisition of all possible knowledge concerning it, with the view of determining the sequence of events which are certain or likely to follow a given set of conditions. When a ball is thrown into the air, one may determine the equation of the curve thus described, and that the ball will strike the earth in a certain number of seconds. In so doing one is studying the sciences of physics and of mathematics. When an electric current is passed through water under certain conditions, the liquid separates into its constituent gases. In such a case the investigator is studying the sciences of physics and of chemistry. When one has ascertained the relation between exports and imports between two countries, the quantity of gold in each, the amount of debts owed by persons in each country to persons in the other, and many other analogous facts, and his problem is to determine what the ex-

change rates will be, the inquirer is studying the science of economics. And so in the study of law the task is to accumulate the necessary data, to learn all that may be learned about it for the purpose of being able to prophesy with a fair degree of accuracy what the agents of the state will or will not do under any particular group of circumstances out of the multitudinous facts of human life. Under what circumstances will the governor pardon a prisoner; when will the court direct the sheriff to seize a person's property and deliver it to some other person; when will the sheriff confine persons in the jail or prison; when will a person be permitted to exercise dominion over property which theretofore had been within the control of another person? When one accumulates data for the purpose of answering these questions, he is studying law.

Most persons know a great deal about law, although they may never have studied law books. It is impossible for one to observe the everyday facts of life without being able to prophesy with considerable accuracy what the agents of government will do under various circumstances. But knowledge derived exclusively in this way, however extensive, is likely to be disorganized, and the data wholly insufficient as a basis for safe prophecy in all cases. The average case of theft is readily recognizable by all persons as a criminal act, but there would be a difference of opinion as to whether one is guilty of an attempt to steal by thrusting his hand into an empty cash drawer with intent to steal its contents. Knowledge, until it passes beyond the stage of accumulated details into the field of generalization, is not scientific, although the acquisition of such information involves the study of science. One does not become an astronomer by observing the movement of the heavenly bodies, nor a philosopher by conjuring with the concepts of time and space. Nor will one be able to comprehend the criminal law by witnessing, however frequently, the incarceration of offenders in the state prison and the county jail.

Law, while a science, in and of itself, is related to and dependent upon all other sciences and upon philosophy. Like other sciences, law must take account of and utilize knowledge, from whatever source derived. The determination of the question of liability to respond in damages for negligent acts may involve the truths of mathematics, of chemistry, of geology, or of botany. The question as to the existence, performance, or discharge of contractual relations, under a given state of facts, may be largely a question of geography, of biology, or of the rules of English grammar. In prosecutions for crime, guilt or innocence may depend upon knowledge acquired from medical science, or from investigations into the pyschology of the human mind. A particular science is not developed, nor does it exist as a field of knowledge, independent of other fields of knowledge. Each makes contributions to the other. Each in turn is sustained and vitalized by truth discovered in allied fields. The study of law, therefore, is not a study of materials

unrelated to the materials of other fields of study. All branches of learning possess some object in common. Whether in scientific or philosophical study, man, in some sense, is the central figure. The study of Mendel's law of heredity, of the Malthusian theory of population, of the federal law for the taxation of incomes, though pursued in volumes widely separated from each other on the shelves of the library, leads the inquiring mind into channels of investigation which converge upon a common point.

But, more particularly, law is one of the social sciences. The facts which make it what it is are in great measure the same facts which engage the attention of the economist, the sociologist, the political scientist, and the historian. The desirability of obtaining a perspective of the law in its relations to other branches of knowledge leads us in this connection to call to mind the larger objects of its companion sciences. "Economics is the social science which treats of that portion of human activity which is concerned with earning a living. * * * It analyzes wants, classifies goods with reference to them, and considers all of the circumstances which affect the production and distribution, or sharing, of goods among the individuals who compose society."[1] "Political science begins and ends with the state. Its fundamental problems include an investigation of the nature of the state as the highest political agency for the realization of the common ends of society and the formulation of fundamental principles of state life; an inquiry into the nature, history, and forms of political institutions; a deduction therefrom, so far as possible, of the laws of political growth and development."[2] "Sociology, is ethical, regarding the weal and woe of all men as facts to be accounted for. It views the facts of human experience as caused, and belonging to the orderly course of nature. * * * Sociology sets itself to the task of synthesis, and searches out those principles which operate throughout the realm of social realities. In the study of these facts, it aims to dissolve all bonds of party, sect, and prejudices. * * * Sociology aims at nothing less than the transfer of ethics from the domain of speculative philosophy to the domain of objective science."[3] "History, in the broadest sense of the word, is all that we know about everything that man has ever done, or thought, or hoped, or felt. It is the limitless science of past human affairs, a subject immeasurably vast and important, but exceedingly vague."[4] With these notions in the background, the declaration that "law is the body of principles recognized and applied by the state in the administration of justice"[5] takes on a fairly definite meaning. At least, law cannot be conceived of as a system created for the mere preservation of the peace, or as the establishment of the

[1] Seager, Principles of Economics, p. 1.
[2] Garner, Introduction to Political Science, p. 15.
[3] Hayes, Introduction to the Study of Sociology, pp. 4 and 8.
[4] Robinson, History of Western Europe, p. 1.
[5] Salmond, Jurisprudence, § 5.

machinery for the regulation of private vengeance. In its larger aspects, the administration of justice will mean what science and philosophy make it mean.

SECTION 2.—SYSTEMS OF LAW

There are two great systems of law in the world to-day; the common law, and the civil law. The common law is that system which developed in England, for the most part, after the Norman conquest. This system of law is in force quite generally throughout the British Empire and in the United States. The civil law is that system which developed in the main from the Roman law, and prevails generally throughout the world. The codes of continental European states, and of South American countries, are based upon the Roman law. Some portions of the British Empire, Quebec and Scotland, are civil-law countries. In the United States, Louisiana has adopted the civil law. These two great systems of law should not be conceived of as different, in the sense that legal controversies are decided in one way under the common law and a different way under the civil law. The larger aspects of the conception of justice are very much the same everywhere. There are such differences, of course. Some controversies would be decided one way under the common law and another way under the civil law. For that matter, there are differences of decision on the same facts in different civil-law countries, just as there are quite frequently differences in the decisions of particular cases in the various states of the United States. The same court may even decide a case in one way on one occasion, and reach a contrary result in the same kind of case on another occasion. As a general rule, however, there is not this kind of break in the history of a rule of law. The two systems of law, like nationalities, oftentimes, are different, chiefly, in the sense that they have had different histories.

There are a few differences of a rather fundamental character. The Roman law, which prior to the time of Justinian was expressed in the decisions of the courts, in statutes, and in the writings of legal scholars, during his reign passed into the form of a code, covering all branches of the law. In civil-law countries to-day, the basic principles of the entire field of the law are expressed in the form of legislative enactments. In deciding particular controversies the courts are then called upon to interpret and apply the code. In England and the United States the major portion of the law is not expressed in the form of statutes, but is to be found expressed for the most part in the decisions of the courts. The courts in England and the United States must therefore decide controversies upon some basis other than by interpreting and applying some statutory generalization of the law. It should be remarked that, both in England and in the United States, the importance of statutes in the legal system has been growing very rapidly since the middle

of the nineteenth century. In some states nearly the whole field of the law has been codified, and in all states the tendency to increase the number and variety of governmental functions, and a similar, but independent, tendency to organize and systematize existing law, has caused a notable increase in legislation.

There is a further difference between the civil law and the common law, to be found in the attitude which the courts under the two systems assume toward former decisions involving the same or analogous facts. Courts which are a part of the civil law system are chiefly concerned with the text of the code. They apply the code directly, or, if interpretation is necessary, they interpret the language according to some accepted standard of interpretation, and then apply the interpreted statute to the facts. The civil-law courts do not regard as binding upon them former determinations of the meaning of the code as reached by the same or other courts. Just the contrary is true under the system of the common law. If a court once decides a particular question, that decision is regarded thereafter as a precedent binding upon them. This attitude to prior decisions is called the doctrine of stare decisis. Much of the work of a court applying common-law principles is taken up in the endeavor to ascertain what the same or other courts have decided on the same or analogous set of facts. The decisions of the Supreme Court of a particular state are regarded as binding precedents in that state. Decisions of the Supreme Courts of other states are not deemed binding precedents, but they are often relied upon as a basis of decision. Such decisions from other jurisdictions are of persuasive authority, varying in persuasiveness according to the state where rendered, to the strength of the reasoning employed, and even with the reputation of the individual judge who wrote the opinion. There is some tendency in civil-law countries to regard former decisions to some extent as binding precedents, while in the United States and in England there is some tendency, especially in certain departments of the law, to break away from precedent, when changed economic or social conditions seem to demand a change. Thus the two systems tend toward the same general policy. For the most part, change in the law comes as a result of legislation, and not by judicial decisions, but the process of change by judicial decisions is distinctly traceable.

SECTION 3.—OBJECTS OF LAW

The problems of the law are not all of the same nature. They do not have the same immediate objects. They sustain various relations, one to the other and to the conduct of human affairs. Some problems of the law are primary and of overshadowing importance. Others are secondary, subordinate, or derivative. The broad concept of the administration of justice, as a primary object, breaks up into a number of more detailed, but nevertheless fundamental,

conceptions. As formulated by an eminent thinker, Roscoe Pound,[6] these fundamental conceptions arrange themselves into the following jural postulates:

I. In civilized society men must be able to assume that others will commit no intentional aggression upon them.

Corollary of Jural Postulate I: One who intentionally does anything which on its face is injurious to another must repair the resulting damage, unless he can (1) justify his act under some social or public interest; or (2) assert a privilege because of a countervailing individual interest of his own which there is a social or a public interest in securing.

II. In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.

III. In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith, and hence

(a) Will make good reasonable expectations which their promises or other conduct reasonably create;

(b) Will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto;

(c) Will restore specifically or by equivalent what comes to them by mistake or unanticipated situation whereby they receive what they could not reasonably have expected to receive under the actual circumstances.

IV. In civilized society men must be able to assume that others, when they act affirmatively, will do so with due care with respect to consequences that may reasonably be anticipated.

V. In civilized society men must be able to assume that others, who maintain things likely to get out of hand or to escape and do damage, will restrain them within their proper bounds.

Hence one is liable in tort for—

I. Intentional aggression upon the personality or substance of another.

II. Negligent interference with person or property—i. e., failure to come up to the legal standard of due care under the circumstances, while carrying on some affirmative course of conduct, whereby injury is caused to the person or property of another.

III. Unintended non-negligent interference with the person or property of another through failure to restrain or prevent the escape of some dangerous agency which one maintains.

These sweeping generalizations represent the ends to be realized in society. They mark out the bold headlands of the substantive law. The preservation of the institution of private property, the guaranty of individual liberty, the balancing of individual and so-

[6] An Introduction to American Law, pp. 36–44.

cial interests under the influence of social, economic, and political controversy, and the furtherance of the public welfare generally, are the great ends of the existing legal system.

SECTION 4.—LEGAL RELATIONS

Turning our attention now to the more detailed aspects of the problem, it will appear that the idea of law involves the notion of the existence of legal relations between persons. Prominent among them is that relation where a right is said to reside in one person and a duty in some other person or persons. For example: Where A. and B. have entered into a contract, A. has a right that B. shall perform; B. is under a duty of performing. A. has a right not to be struck by B. B. is under a duty of refraining from striking A. In both cases the consequences are that, if B. violates his duty, A. may successfully sue B. for damages, or he may be entitled to some other appropriate legal remedy. Illustrations might be multiplied, but the point to be noted is that, if a person possesses a legal right, there exists another person or persons who are under correlative legal duties, which, if violated, will enable the person possessing the right to obtain, through legal proceedings, some appropriate remedy against the person who violated his duty.

A legal relation of different character exists where a person, A., is privileged to do an act under circumstances where another person, B., or perhaps all other persons, have no rights that A. shall or shall not exercise his privilege. An owner of land may cultivate it, erect buildings upon it, or do many other physical acts with respect to the land. While these acts are often spoken of as rights, they may more accurately be spoken of as privileges. B. might, of course, by physical interference prevent the exercise of the privilege. This act of B., however, would be a violation of his duty not to assault A.

A third legal relation exists where A., by an act of his, may enable B., by an act of his own, to create, alter, or extinguish some legal relation then existing between two or more other persons. A. makes an offer to enter into a contract with B. By accepting, B., by an act of his own, creates a contract between himself and A. B. may be said to possess a power, and A. is under a correlative liability to have his relations changed by B.'s act. An owner of property has power to transfer his interests with respect to the same to other persons. Frequently the term "right" is employed to describe that which is here described as a power.

Finally, a legal relation of different nature exists where, under a given state of facts, one person, A., is under a disability, and some other person possesses a correlative immunity, as, for example, a person in rightful possession of another's chattels—a bailee—has no power to transfer title to the same to an innocent third party.

The party in possession is under a disability. The owner possesses an immunity.[7]

SECTION 5.—DIVISIONS OF LAW

Having adverted briefly to the fundamental conceptions of the law, we may now proceed to indicate in a somewhat more detailed manner the boundaries of the field of legal study, for the primary purpose of noting what particular portions of this field will engage our attention in this book. It might be stated that we shall be concerned largely with the law of contracts, and of the special types of contracts, agency, negotiable instruments, and sales, and with the law of partnership and corporations, but that the law of torts, criminal law, personal property, real property, equity, trusts, wills, conflict of laws, constitutional law, etc., are not taken up in this book. This statement would be true, but it does not indicate very definitely the subject-matter of the courses bearing these labels. It may aid in visualizing the field of legal study to look upon it through the various legal relations which may exist between persons. What facts give rise to legal relations? What is their content? How may they be employed; how protected, altered, or extinguished?

A person possesses many legal rights merely because of his existence in society. One has a right not to have his physical person interfered with; a right not to be defamed; a right to enter into legal relations with others. Such rights are possessed by each against all other persons. Violations of these personal rights are called torts. Accordingly, assault, assault and battery, false imprisonment, malicious prosecution, libel and slander, harms to one's person resulting from negligent acts, constitute special kinds of torts. This list is not exhaustive. A person possesses rights against all other persons which arise out of the existence of domestic relations. The law protects the relation of husband and wife; of parent and child. Interferences therewith are torts. The same act, therefore, may be a tort to more than one person. A person also possesses rights against all other persons by reason of his ownership or possession of real and personal property. Accordingly trespass to land or personal property, conversion of personal property, the obtaining of property or other thing of value by fraud, constitute torts. The law of torts is, therefore, that branch of the law which protects legal relations which one has with respect to his physical person, his reputation, his domestic relations, his property, and which, to a large extent, protects him in the acquisition of other relations. The purpose of this brief paragraph is merely to call attention to the existence of an immensely broad field of the

[7] The above brief reference to legal relations is based on the masterly papers of the late Professor Wesley Newcomb Hohfeld on Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 Yale Law Journal, 16, and (1917) 26 Yale Law Journal, 710.

law, which, except incidentally, is not discussed in this volume. Here and there throughout this volume a case appears which deals with the law of torts, but in no sense is there any attempt here made to develop this broad and important field of the law.

The criminal law, closely allied to the law of torts, is not taken up in this book. Often an act which constitutes a tort will also constitute a crime. Crimes are acts, usually accompanied by some kind of mental element, called criminal intent, which are more serious invasions of personal and property rights than are those torts which are not crimes. There are some kinds of crimes which are not directed against any particular persons or property, and which are not torts, as, for example, gambling, violation of the laws prohibiting the manufacture and sale of intoxicating liquor, violations of pure food laws, treason, violations of the revenue laws, etc. The list is a long one, as is also the list of crimes which are directed against some particular person or property. All crimes have this element in common: The proceeding in the courts against the alleged offender is instituted by some officer of the state, and is under his control, and is not under the control of the person who may have been injured by the act. For his injury he has his independent remedy against the wrongdoer.

We turn now to another field of the law, which may be called the law of property. Having noted that one important object of the law is to protect interests with respect to property, the question arises: How may interests with respect to property be acquired? To enumerate some of the methods: Property may be acquired by gift; by contract of sale; by deed; by will; by inheritance. Property may also be acquired by confusion; that is, where the property of one person becomes so mixed with that of another that it cannot be separated. The whole mass, as a result, may belong to the one or the other, depending upon circumstances. So, also, property may be acquired by adverse possession; that is, by exercising dominion over it for some prescribed period of time. A riparian owner of land becomes the owner of the land added to the shore line by accretion. Ownership in things, not theretofore the subject of ownership, and in things abandoned, may be acquired by asserting and maintaining control over them. This field of the law, and it is but dimly and partially sketched here, occupies a most prominent position in the law generally. The law with respect to the acquisition and transfer of titles to land, the law with respect to wills, and of intestate succession alone, might readily engage the attention of a scholar for years. But this branch of the law, like the law of torts, is not taken up in this book, except in so far as titles to personal property may be acquired by sale, and of negotiable instruments by negotiation.

Another portion of the law of property, in itself vast in extent, deals, not with the methods of acquiring interests in property, but rather with the kinds of interests which may be acquired. Ownership of property is a very complex set of legal relations. When a

person owns property, his dominion over it reaches its highest stage. He possesses all legal relations with respect to it. He has the privilege of user. He has the power to substitute other persons in the position which he occupies with respect to the property. He has a right that it shall not be injured or used by other persons. If other persons attempt to exercise powers with respect to the property, such as by attempts to sell it, such acts do not affect the owner's position with respect to the property. All of these relations are involved in the concept of ownership. The idea that an owner of property may dispossess himself of all of his legal relations with respect to his property is a fairly simple one. The question here is: How may the owner transfer his interests? But the further question arises: May an owner transfer some of his relations with respect to his property, and retain all other relations? May he transfer some relations to one person, and other relations to other persons? Observation shows that this is done constantly. For example, the mortgaging or pledging of property is a separation of the total relations constituting ownership, and a transfer, in some mode permitted by law, of some of these relations, and a retention of those remaining. So, also, property may be held in trust for other persons, in which case it is said that the trustee possesses the legal title and the beneficiary of the trust has the equitable title. This statement does not disclose what interests are held by the trustee, and what interests are held by the beneficiary; but it does declare that the sum total of the relations constituting ownership may be so divided, and that when a sufficient number of these, of the appropriate kind, are possessed by one person, such person will be called a trustee, and the persons who possess the remaining interests will be called beneficiaries of the trust, or cestuis que trustent. Possession of property alone may be transferred under various circumstances. The party in possession is called a bailee; the party with whom he dealt, the bailor. Here again we have a division of the interests with respect to property.

There are various other terms used in the law to describe particular situations when interests of property have been separated and possessed by different persons. Property may be left by will to A., and upon his death to B. The possibilities for creating various sorts of future interests in property are numerous. Property may be leased. A right to use another's land, or to take something of value from it, may be acquired. These interests are called easements and profits. The point of emphasis here is that the legal relations with respect to property are exceedingly complex, and that the possibilities for segregating various combinations of these interests, and of transferring them to different persons, is limited only by man's ingenuity and by principles of public policy. Like the law of torts, the law relating to the methods of acquiring interests in property, though most important and extensive, does not constitute the subject-matter of this book. For answers to the questions suggested above, we would be obliged to consult works

on the law of mortgages, leases, pledges, trusts, bailments, future interests, and easements. There will appear, in the volume, an occasional reference to some aspect of the law of mortgages, of pledges, of trusts, and of bailments; but such references are incidental to the main theme.

There is still another aspect of the law of property, likewise not taken up in this book. This branch of the law marks the outer limits of the relations constituting ownership. How much water may a riparian owner take from the stream? May he drain the surface water from his land upon adjoining land? May one use his land for any purpose he sees fit? Are there any restrictions with respect to the manner in which one may use his land? A riparian owner does not own the water that flows by his land, although he may use it; in some states only a reasonable amount; in others, under certain circumstances, he may take all. Likewise there are different rules with respect to drainage. In some states one may not interfere with the natural flow of the water; in others he may lawfully build dikes against it. The restrictions upon the use of land are numerous. One has a privilege of using his land only in a reasonable manner. He may not so use his land as to interfere with a reasonable use of adjoining land. Certain kinds of improper uses are called nuisances. Modern legislation has added greatly to the number of restrictions upon the use of land. The height of buildings is regulated by statute. Certain kinds of industry cannot be conducted in close proximity to residential districts. These questions open up broad fields of inquiry in other portions of the law of real property, into modern legislation and constitutional law. In this connection one should call to mind the various statutory regulations applicable to the conduct of business generally.

This brings us to the consideration of that portion of the law which constitutes the subject-matter of this volume. It has been noted above that legal relations—legal rights and duties, and other legal relations—attach to individuals by the edict of the law alone merely because they are individuals, and that other legal relations arise out of the acts of parties themselves. In both cases, of course, the legal relations exist by virtue of the law, but in the first group they exist independent of the acts of the parties, while in the second group the relations do not arise until the parties have done certain acts. A particular group of facts which operate to create or change existing relations may constitute a will; another, a conveyance; another, a license; another may be a contract, and so on. The first four parts of this book deal with the various groups of facts, called contracts, which have the effect of creating or changing existing legal relations between persons. The reason for throwing the emphasis upon this branch of the law is because the greater volume of business transactions in everyday life are transactions which do create, or otherwise concern, contractual legal relations. While the average person, in the course of a lifetime, will, no doubt, be interested many times in conveyances of land, wills, mortgages,

pledge agreements, trusts, etc., it will nevertheless be true that the number of these transactions, compared with the number of contracts in which he will be concerned, will be relatively few. Hence the emphasis is thrown on contracts. Part I deals with the general principles applicable to all contracts. Parts II, III, and IV deal with special kinds of contracts. Parts V and VI are devoted to some of the special problems which arise out of the form in which business is done; i. e., the partnership and the corporation.

SECTION 6.—LEGAL PROCEDURE

Some attention may now be given to the matter of legal procedure, to the end that it may contribute something to the understanding of the materials which constitute the chief basis for legal study; i. e., the decisions of the courts. The party who institutes a proceeding at law is called the plaintiff. In a suit in equity such party is usually called the complainant. In either case the party proceeded against is called the defendant. The first step consists in notifying the defendant that an action has been begun against him. For very just reasons the law does not permit a person to be sued unless such person has notice of the action. The defendant is notified by the service upon him of a document usually called a summons. In some states the law permits the plaintiff or his counsel to serve the summons. In other states the law requires the clerk of the court to issue the summons. The expression "service of summons" means the act of bringing to the defendant knowledge of the fact that a suit has been instituted against him. Usually statutes require that the defendant be personally served with the summons; that is, the party serving the same will be required either to read the same to the defendant or to leave a copy of the summons with him. Some statutes authorize the service of summons upon any member of the family wherein the defendant resides, and sometimes service may be made by publication. The next step consists in the filing of a document, variously called a declaration, a statement of claim, or petition, by the plaintiff, containing an orderly statement of the essential facts out of which the litigation developed.

The defendant then interposes his defense. The defense may be of various kinds: First, the defendant may admit the truth of the facts alleged, but contend, as a matter of law, that they do not entitle the plaintiff to recover. This issue is raised by a pleading known as a demurrer. The question as to whether or not the plaintiff has stated a cause of action is then decided by the judge. A second kind of defense arises when the defendant denies the truth of the facts alleged by the plaintiff. This raises an issue of fact. A third type of defense exists when the defendant admits the truth of the facts alleged in the declaration, but sets up other facts which he contends defeat plaintiff's cause of action. This raises an issue of fact. Issues of fact are tried by the court, with or without a jury,

depending upon the nature of the action and desire of the parties. It may here be mentioned that the Constitutions of the various states contain provisions which guarantee trial by jury. This guaranty does not apply to all kinds of actions. In general, there are three kinds of cases wherein there is a constitutional guaranty of jury trial: First, criminal cases; second, breaches of contract; third, actions of tort. In all other cases, as a rule, there will not be a constitutional guaranty of jury trial, although statutes may, in some instances, give the right of jury trial where there was no such right under the Constitution. Unless authorized by statute, there is no right to jury trial in proceedings in equity, as distinguished from proceedings at law.

The first step in a trial consists in the impaneling of the jury. The process of impaneling the jury consists in questioning the prospective jurors with respect to their competency to serve. Statutes prescribe what the qualifications of jurors shall be. In general, a juror will be competent to serve if he has no fixed opinion with respect to the cause in which he is to sit as a juror, and if he has no prejudices for or against either of the parties to the action or their counsel. Following the impaneling of the jury, counsel may make an opening statement. This statement is merely for the purpose of informing the jury of the general nature of the action and of what the parties expect to prove. Following the opening statement comes the examination of witnesses. Generally the plaintiff is required first to introduce his evidence. Upon him, as a rule, rests the burden of proof. The defendant is not called upon to introduce any evidence until the plaintiff has completed his case. The evidence is then heard.

There are many restrictions with respect to the obtaining of evidence. A witness may not relate on the witness stand every fact which he may deem germane to the case. The rules of the substantive law of property, of contract, tort, crimes, etc., the rules of pleading, and the rules of evidence prescribe the circumstances under which evidence may be given. In a suit upon a negotiable instrument by a holder in due course against the maker, evidence that the instrument was not delivered to the payee is inadmissible, because a rule of substantive law declares that this fact constitutes no defense. In an action for assault and battery where the only issue of fact tendered by the pleadings was whether the defendant did the act, evidence tending to show justification or excuse would be excluded. The law of pleading fixes the issues. Evidence of facts not in issue is inadmissible. Only that evidence relevant to the issues as framed by the pleadings is admissible. The scope of the law of evidence is indicated by Professor Wigmore in the following language: "The law of evidence * * * includes the rules applicable when any knowable fact or group of facts is offered before a legal tribunal for the purpose of producing persuasion, positive or negative, on the part of the tribunal, as to the truth of a

proposition, not of law or of logic, on which the determination of the tribunal is to be given." Wigmore on Evidence, § 1.

Evidence may be real, testimonial, or circumstantial. This is a broad field of inquiry. Not all evidence which satisfies the general requisites of relevancy is admissible. Relevant evidence is sometimes excluded because it is untrustworthy. Oral evidence of the contents of a written instrument is generally inadmissible. The best evidence of its contents is the document itself. The original writing must be produced, or its absence accounted for, before secondary evidence is admissible. Hearsay evidence is inadmissible, although there are many exceptions to the rule. A witness is frequently not permitted to state his opinion as regards the truth of certain facts in issue. Relevant testimony is sometimes excluded, not because it is untrustworthy, but because a rule of public policy forbids its admission. Parol evidence, tending to vary or contradict the terms of a written instrument, is generally inadmissible. A rule of substantive law forbids. There are a number of real or apparent exceptions to the rule. The process of eliciting the evidence upon the issues in a trial is therefore hedged about by a great many rules of law. With these branches of the law this book is not concerned. Here and there some detailed aspects of these rules present themselves in the cases.

At the close of the taking of testimony, the controverted questions must be decided. This determination involves the exercise of two functions: (1) The finding of facts; and (2) the application of the law to the facts. The facts will be found either by the court without a jury or by the jury. Where a court sitting without a jury decides the issues, the formal entry of judgment operates both as a finding of fact and as the application of the law to the facts. Sometimes the court will make a special finding of fact, separate and distinct from the entry of judgment. Where the trial is by jury, the jury will be directed to find the facts; that is, to make necessary inferences from the detailed evidentiary facts, and, in the event of conflicts in the testimony, to determine whose witnesses are to be believed. In a jury trial, the jury, as a rule, applies the law to the facts. The usual procedure is for the court to give a number of instructions to the jury which declare what the law is with respect to the various possible states of facts. The jury then determines what the facts are, and applies those instructions which fit the facts as found, and bring in their verdict accordingly. Sometimes the jury is directed to bring in a special verdict, which contains a recital of the facts only, in which case the court applies the law to the facts as found. When the jury finds the facts, and applies the law as given them by the court, the resulting verdict is called a general verdict.

Upon the return of a verdict, an opportunity is given to the trial court to correct errors which may have occurred during the course of the trial. This opportunity formally arises upon a motion for new trial, made by the losing party. The possible errors which may,

at this point, be urged as grounds for a new trial, in general, are as follows: (1) The erroneous admission of evidence; (2) the erroneous exclusion of evidence; (3) the giving of erroneous instructions to the jury; (4) the erroneous refusal to give correct instructions to the jury; (5) that there is a fatal variance between the pleadings and the proof; (6) that the evidence is insufficient to support the verdict; (7) that the misconduct of the court, of counsel, or of the jury during the course of the trial was prejudicial to the losing party. If, upon the argument for new trial, the court believes that any of these errors occurred, and if he believes that such errors were so far prejudicial that the losing party did not have a fair trial, a new trial will be granted. Sometimes the court will even enter judgment for the losing party notwithstanding the verdict. If the court overrules the motion, judgment on the verdict usually follows as a matter of course.

This action terminates the cause as far as the trial court is concerned. If the losing party is still of the opinion that substantial error occurred, he may take the case to a court of review, sometimes called an appellate court, or Supreme Court, and there urge the contentions unsuccessfully made in the court below. This procedure is sometimes called an appeal. Sometimes the action of the losing party in the court of review is called the suing out of a writ of error to review the action of the trial court. There are methods of review other than by appeal and by writ of error. In any event, the purpose is to get before the upper court a complete record of what occurred in the trial court, for the purpose of making the contention that the trial court erred in entering judgment against the appellant. Sometimes this party, instead of being called the appellant, is called the plaintiff in error. The party who won in the trial court is called the appellee, or the defendant in error.

No new trial is had in the court of review. The cause is submitted on the record. The reviewing court has before it copies of all the papers filed in the court below, copies of the testimony, the verdict, judgment, and all other orders entered with respect to the litigation. Briefs of counsel for each party are filed, which present arguments in support of their respective contentions. The cause is then decided by the court, and to one of the members of the court is assigned the duty of preparing a written opinion. The opinion sets forth the reasons for the affirmance, modification, or reversal of the action of the trial court. These opinions are collected and printed in book form, and are called reports. The reports of the courts in the United States number several thousand.

SECTION 7.—JUDICIAL DECISIONS

It is to these decisions and to the argument advanced in support thereof that one looks, in the first instance, for the law applicable to any situation not specifically covered by statute. Even where

there is a statute, the decision of a court interpreting that, or some closely analogous statute, in the light of similar situations of fact, will be the index as to what the law is. This volume consists in a compilation of judicial decisions which develop the general principles of contracts, agency, negotiable instruments, partnership, and corporations.

A final word may be added with respect to the attitude with which one should approach the study of judicial decisions. This attitude is determined by an appreciation of the nature of a judicial decision, by a knowledge of the data employed by the court in arriving at its conclusion, and also of the process of reasoning by which the result was reached.

As a practical matter to-day, the data employed by a court in deciding a legal controversy consist of former decisions of the same or other courts. The principle of stare decisis leads the court to assume, at the start, that the case then before them must be decided in the same way in which they have always decided such cases. Where a former decision by the same court can be found which is identical with the case then pending, the decision is readily arrived at. Where there is no such decision, the search among the precedents is for some case analogous on its facts and issues presented. The process of reasoning by which it is determined that a particular decision is analogous to the case at bar is a process of noting similarities and differences between the case at bar and the precedent under examination. If, in accordance with the established principles of inductive reasoning, the similarities strongly predominate, the former decision will be deemed to control the decision of the case at bar. The process of determining that a particular decision is analogous to a given case is not entirely a process of inductive reasoning. To some extent it is deductive. Where no former decision analogous on its facts and issues can be discovered, the first process of reasoning is, by induction, to discover some wider generalization of the law therein involved, a testing of the validity of this generalization by comparing it with other cases, and a final formulation of the generalization by induction. This generalization then constitutes the major premise for deductive argument. The minor premise will then consist in a declaration that the facts and issues in the case at bar fall within and are comprehended by the operative facts which constitute the subject of the major premise. The truth of this subordinate assertion must have first been proved, largely by inductive reasoning. The predicate of the major premise is a statement of the legal effect of the facts generalized in the subject. The decision is thus arrived at both by inductive and deductive reasoning.

Of course, this is but a theoretical explanation of the process of judicial reasoning. The actual solution of a legal controversy, arising, as it does, out of the complicated facts of economic and social life, cannot be worked out by the mere application of the technical rules governing inductive and deductive reasoning. Too many

forces beat upon the situation to permit the confinement of the process of administering the law to the straight-jacket of a syllogism. And it is well that this is so, for courts are established in the interests of the administration of justice. There is an evolution of business and social life, just as there is an evolution of plant and animal life. The present cannot be understood without a knowledge of the past. Any attempt to divorce the present from the past, to strike out on new lines, without regard for historical knowledge, is likely to prove unfortunate. And yet the truths of history do not constitute the sole data for the formation of judgments in the law, or with respect to any other phase of human activity. The courts do take the present into consideration, and the judicial decision is the result of an appreciation of the value of historical precedent, of logical processes of thought, and of present-day affairs. The most conspicuous changes in the law, and also by far the more numerous changes, are the result of legislation; but the process of change in the scope and content of common-law principles does go on as a result of judicial action.

In the study of judicial decisions, one should therefore be keenly aware of the marked differences between this kind of material and that found in a text-book. The study of judicial decisions is a study of source materials, while the study of a text-book is the study of secondary materials. A writer, in developing a book, will assert general propositions, and establish their truth by the introduction of the detailed evidence which has led him to these conclusions. The material is well organized and developed, with due regard to emphasis, force, and clearness. Immaterial and irrelevant matters have been eliminated as a result of the research.

The study of original materials, such as decisions of the courts, presents quite a different situation. There will often be found, in judicial decisions, matter which is immaterial to the issue, or, if material, only remotely so. They will not always be carefully organized, and the really important parts may not stand out with proper emphasis. Occasionally the major portion of the opinion may not be germane to the issues. In explanation of this situation it should be remembered that judicial decisions are not prepared with a view to their use as materials for educational purposes. A decision is prepared to justify some action taken by the court, and the language therein is directed to those who are directly concerned in the administration of the law, and are trained in it. In the study of judicial decisions, attention is not directed, in the first instance, toward the generalizations of the law which appear in the opinion and to the proof introduced to support them. On the contrary, the successive steps necessary to the understanding of a judicial decision involve the ascertainment of (1) the ultimate material facts in the case; (2) the issues, or points involved, as disclosed by the errors alleged by the appellant party; (3) the judgment of the court, whether for appellant or appellee; (4) the vari-

ous principles of law necessarily involved in and to be inferred from the judgment on the issues as raised.

The first and third aspects of a case—the facts, and the judgment—are readily discoverable. The real problem concerns the determination of points 2 and 4: What are the issues? And what are the inferences of law necessarily involved in the judgment? These two points are interrelated. Point 2 merely raises a question, or series of questions, of law. Point 4 is an inference, or series of inferences, which contain the reply to the questions raised in point 2. It appears, therefore, that the purpose of the study of a judicial decision is to obtain the inference of law which arises from the force of the judgment. It is impossible for a court to decide a controversy without that decision giving rise to necessary inferences of law. Judicial decisions should be studied with the end in view of determining what is involved by the action taken by the court. This inference of law, arising from the judgment, is sometimes called the decision of the court, using that term in a narrow sense. The terms "judgment" and "decision" are not always employed with the same meaning. In this discussion the term "judgment" is used to describe the order of affirmance, reversal, or modification of the final orders of the trial court. The decision is the necessary inference of law arising from the judgment. This aspect of the case is also quite commonly called the "holding" of the court.

It will be noticed that, so far, but little mention has been made of the discussion which the court advances in support of the action taken. This portion of the case is usually called the opinion. The opinion is the argument presented by the court in reaching the judgment. In addition to the opinion proper, there will appear in the discussion some statements which are not necessary steps in the argument. These judicial generalizations or expressions are called dicta, or obiter dicta. The dicta in the case bear no necessary connection with the decision. The dicta are of secondary importance—at least this is so from a standpoint of determining what principle of law the case actually stands for. Other consideration may make the dicta highly valuable, as, for instance, the fact that it was expressed by a particular judge. A court actually makes law by what it does. What the court says by way of dicta, or opinion, is not necessarily law.

The opinion, however, while it does not necessarily express law, is more important, for the purpose of determining what the case stands for, than statements made by way of dicta. The opinion states the reasons for the actions taken by the court. But it should be borne in mind that the opinion and the judgment are two very different things. It is possible that the opinion may not express the reasons which actuated the court in reaching the result. There exist the strongest of reasons for believing that the prepared opinion does state the reasons which did bring about the decision and judgment. Nevertheless there is a vital difference between the in-

ference of law necessarily arising from the judgment and the opinion of the court as to why it reached that judgment. It is very common to find courts in various states reaching the same result in cases involving the same issues, but upon different lines of argument. Sometimes the arguments differ widely from each other. It occasionally happens, that the courts will reach a particular result on a certain course of argument, and later repudiate the reasons and support the decision on other grounds.

The object of the study of a judicial decision is, therefore, to ascertain what the case actually decides. This decision springs from the judgment in the light of the issues involved in the case. The opinion and dicta constitute evidence—in fact, the strongest kind of evidence—of what that decision is; but still there is a difference between the decision, the necessary inference of law arising therefrom, and the reasons assigned for that decision.

SECTION 8.—HISTORY AND DEVELOPMENT OF THE LAW

The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament made in aid of and to supply the defects in the common law, down to and including a part of the colonial period, have been made the rule of decision by the various states of the United States. The history of American law, in large measure, is the history of English law. English law is not a direct descendant of the Roman law, as is true in most European states. The long period of Roman occupation of the British Isles, from 55 B. C. to the middle of the fifth century, might well have led to a different result; but the development of a strong government in England by the Normans before the reception of the Roman law by European states caused an independent development of legal institutions. The early legal systems of the English, Saxons, and Danes, such as they were, which prevailed on down until the middle of the eleventh century, influenced later English law but little. The Codes of Alfred and Knut, mere fragments in comparison with a complete legal system, did not survive the invasion of William the Conqueror.

The Norman conquest of England in 1066 caused a break in the continuity of the governmental and legal order, and an independent development began. The centralization of political power and the reign of feudalism under the Norman and Angevin kings established the guiding principles of the law during the two centuries following the conquest. The Curia Regis, the great court of the Norman kings, forced the local courts of the Anglo-Saxons into the background, and maintained its sway for nearly 200 years. Early law did not have for its objects the carrying out of the dictates of ethics and of economic expediency. The early forms of trial bear ample testimony to these facts. Trials by ordeal, by battle, and

by procuring a certain number of witnesses to take oath to the truth of a litigant's claim were not calculated to terminate controversy justly. The feudal system of land tenure, representing a fusion of economic and political organizations, produced a body of law quite dissimilar to that of to-day. The bulk of the law related to tenures. The law of torts was narrow. Only the more violent injuries to person and property were the subject of redress. Contracts were of a formal character. The beginning of the jury system in the latter half of the twelfth century was the forerunner of many legal reforms. Magna Charta, in 1215, made great contributions to English liberty. The breaking up of the Curia Regis into the Courts of Common Pleas, King's Bench, and Exchequer produced a better judicial organization. Nevertheless the law tended to formalism. One's legal rights were measured by his legal remedies, and his legal remedies were no wider or more numerous than those which had theretofore been allowed. Growth to meet new conditions was checked.

Beginning with the reign of Edward I (1272–1307), a number of influences became operative, which greatly expanded the scope of legal rights, emphasized individual liberty and property rights, and tended to convert the administration of law into the administration of justice; that is, these tendencies are traceable to that time, although their development cannot be said to have reached reasonable completeness until the seventeenth century. Some of the incidents of feudalism were abolished during this reign. Statutes were passed which had a tendency to expand the field of tort liability.

The most notable development concerns the origin and establishment of the principles of equity by the king's Chancellor, and later by the Court of Chancery. Beginning in the fourteenth century, a practice grew up of petitioning the king for relief from the rigors of the hard and fast rules of the common law. Some of these petitions were referred to the Chancellor for action. The right of the petitioner was frequently recognized, and relief accorded to him in circumstances where the rules of the common law denied him a remedy. The Chancellor usually was a dignitary of the church, learned in the canon and Roman law, and no doubt in many instances possessed a keen appreciation of what constituted justice. This process of the amelioration of the common law, at first by the extrajudicial action of the Chancellor, soon developed an established court, presided over by the Chancellor, and called the Court of Chancery, or Court of Equity. This result was not accomplished without opposition from the judges of the courts of common law, an opposition which continued and reached its climax in the early years of the seventeenth century, when it became established that the Court of Chancery was supreme.

The changes in the law accomplished by the Court of Chancery were of two kinds—changes in the rules of the substantive law, and changes in legal remedies. It is beyond the scope of this book

to develop independently the nature of these changes in the body of legal doctrine, although in many of the decisions herein collected the nature of equitable doctrines and equitable remedies is distinctly seen. Some of the leading notions of equity may, however, be indicated. Some of the so-called maxims of equity, in accordance with which the detailed rules have been developed, are as follows: (1) Equity regards that as done which ought to be done. (2) Equity looks to the intent, rather than to the form. (3) He who seeks equity must come with clean hands. (4) He who seeks equity must do equity. (5) Equality is equity. (6) Where there are equal equities, the first in order of time shall prevail. (7) Where there is equal equity, the law must prevail. (8) Equity aids the vigilant, and not those who slumber on their rights. (9) Equity follows the law. (10) Equity will not suffer a wrong without a remedy.

The application of these general principles worked great changes in the law with reference to the consequences of accident, fraud, and mistake. One of the important ends of equitable jurisdiction is to afford relief from effects of accident, fraud, and mistake. Rights with respect to property, particularly real property, very early engaged the attention of the Court of Chancery. New interests in property were recognized and protected. The mortgagor's equity of redemption, the vendee's interests in land before the execution and delivery of the deed, were the creation of courts of equity. Equitable doctrines made it possible for one person, called a trustee, to hold all the incidents of ownership for the benefit of others, called cestuis que trustent. The equitable remedies of specific performance and of injunction, enforceable by fine or imprisonment, added to the common-law remedies of money damages, and the specific restitution of property. The history of the English Court of Chancery is the history of great fundamentals of English and American law.

But the courts of common law were by no means oblivious to the necessity of extending the scope of legal rights. The simple contract, which for the most part is the subject of this book, owes its origin and development to the common-law courts. The field of tort liability has been greatly extended by the evolutionary process of judicial decisions by the rivals of the Court of Chancery. The histories of these two great courts, and of the respective systems of laws recognized and applied by them, down to the time of their consolidation near the middle of the nineteenth century, contain within their pages a substantially complete declaration and exposition of the principles of English and American law as it is known at the present time.

The sources for the study of early English law, which appeared during the period, are the reports of judicial decisions, court records, the great abridgements of the decisions, and text-books. Glanvil's work appeared about 1187; Bracton's great treatise, about 1259; the less valuable statement by Fleta, about 1290; the dec-

laration of the law by Britton, about 1290; the contributions of Littleton on the law of real property, in 1481; the Institutes of Lord Coke, in 1628; and the Commentaries of Blackstone, in 1765. The Year Books, beginning during the reign of Edward I, 1272, and extending into the reign of Henry VIII, 1535, containing the reports of the decisions of the courts, present a substantially complete record of the judicial business of the country during this long period. Beginning with Statham, 1495, followed by Fitzherbert, in 1514, Brooke, 1568, Rolle, 1668, Bacon, 1736, Viner, 1741, Comyns, 1762, there appeared the famous abridgements of the Year Books; the later ones carrying the statement of the law beyond the period of these early reports. With the ending of the series of the Year Books, the system of private reporting of judicial decisions began, which continued until 1865, the date of the commencement of the official reports. Researches by eminent scholars of the nineteenth century and of the present time have added a wealth of knowledge of the origin and development of Anglo-American legal institutions.

American law, therefore, has its origin in English law. The common law is the law in the United States. There is divergence here and there, of course. Even as between the several states, there is not entire harmony in the application of the principles of the common law to varied states of facts. But in their broader aspects the systems of law in the two countries are the same. Even to-day, the current decisions of the English courts are sometimes relied upon by the courts in the United States, and, conversely, decisions of American courts are occasionally cited by English judges. The development which is going on to-day is by the slow process of judicial decision and by legislative enactment; statutes being a much more prominent factor than they were in earlier days.

PART I

CONTRACTS

Chapter
I. Offer and Acceptance.
II. Consideration.
III. Performance of Contracts.
IV. Rights of Third Parties in Contracts.
V. Discharge of Contracts.
VI. Effect of Mistake, Fraud, Duress, and Undue Influence.
VII. Illegality.
VIII. Capacity.
IX. Contracts Required to be in Writing.
X. Remedies.
XI. Special Types of Contracts.

CHAPTER I

OFFER AND ACCEPTANCE

Section
1. Introduction.
2. What Constitutes an Offer.
3. Duration of Offers.
4. Acceptance—Time of Taking Effect.
5. Nature of Acts or Language Essential to Constitute an Acceptance.
6. Offer and Acceptance Implied in Fact or in Law.

SECTION 1.—INTRODUCTION

Anson has defined a contract as "an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others."[1] It is to be noticed that this definition deals with two ideas. In the first place, a contract is said to be a particular kind of an agreement. Attention is here focused upon certain physical facts. The definition then proceeds to direct attention to the legal effect of these facts. The facts constitute one idea; their legal effects, another. The former may be seen or heard. The latter are wholly intangible. An agreement made in New York might bring about a certain legal result, while the same agreement entered into in France might produce quite different legal effects. The same conversation had on some portions of the earth's surface not claimed by any organized state would have no legal effect there. A definition of a contract therefore, must deal with the facts and with their result. Professor Corbin's very carefully constructed definition of a contract throws the emphasis in the first instance upon the legal effect of the facts. Accordingly Professor

[1] Anson on Contract (Corbin's Ed.) § 9.

Corbin defines a contract as "the legal relations between persons arising from voluntary expression of intention, and including at least one right in personam, actual or potential, with its corresponding duty." [2]

In the cases following, we shall be concerned both with the facts and their legal effect, but primarily our inquiry will be: What combinations of facts will bring contractual legal relations into existence? We leave for later chapters the consideration of the questions as to the nature of the legal relations created by these facts. Professor Anson employs the word "agreement" to refer to these operative facts. Professor Corbin refers to these facts by the phrase "voluntary expression of intention." The word "agreement" obviously has a broader meaning than the phrase "voluntary expression of intention," for the former does not necessarily connote action, while the latter does. What is a voluntary expression of intention? What is an agreement? How may we identify that kind of an agreement by which rights are acquired by one or more to acts or forbearances on the part of the others enforceable at law? When will "a voluntary expression of intention" produce "at least one primary right in personam, actual or potential, with its corresponding duty"?

Persons may agree as to the existence or non-existence of a past fact or a present fact, or they may agree that a specified fact or some phenomenon will occur in the future. Suppose the parties agree that a specified phenomenon shall occur in the future as the result of the acts of one of the parties, or that some specified situation will not occur as the result of a conscious limitation upon the freedom of action of one of the parties, as for example, that B. shall bring his horse to A.'s stable on Tuesday next, or that B. shall thereafter refrain from keeping his store open on Sunday. This kind of an agreement comes near to that kind of an agreement which we shall call a simple contract, but for reasons which will later appear, it is not such. Notice in these cases that the only act to be done or refrained from being done concerns but one of the parties alone. The agreement contains no suggestion that the other will perform any act or refrain from acting. Suppose, again, that A. and B., actuated by mutual impulses of generosity, while walking along the street together, should simultaneously shout, A. announcing "I will give you $100 next Tuesday," and B. declaring, "I will give you my horse next Tuesday and bring him to your stable." Does this kind of agreement create a contract? This case differs from the preceding in that, here, the agreement does contemplate action by each party, but even this agreement falls short of being a contract. Suppose, finally, that A. says, "B., I will give you $100 for your horse if you will bring him to my stable next Tuesday." B. replies, "All right, I will do that." This agreement is a contractual agreement. It differs from the preceding agreement in

[2] Professor Arthur L. Corbin, "Offer and Acceptance, and Some of the Resulting Legal Relations," 26 Yale Law Journal, 169.

that, in this last case, the agreement that on next Tuesday two facts will come into existence—i. e., the bringing of the horse to A.'s stable and the handing over by A. of $100 to B.—possess a relationship not found in the other case. There is a sort of connective tissue of causal relationship between the two acts. We could substitute negative acts, i. e., restraint or limitation upon freedom of action, and our result would be the same. A. could say, "I will not attend the sessions of the Board of Trade next Tuesday, if you will not," B. saying, "All right, I will stay away on that day." Or the agreement might forecast an affirmative act by one of the parties and a negative act by the other. If it is clear in these last-mentioned cases that the parties have done something which justifies organized society in saying to A. and B., through the medium which we call law, "You have now gone so far that society thinks that these two acts should be performed, and, moreover, in the event that one of the parties refuses to bring into existence the fact which he said he would bring into existence, and the other party performs his act, or tenders performance, that society, through its judicial organization, will send a person, called the sheriff, to the assistance of the party who has been disappointed."

The kind of agreement in which we are interested here, therefore, is that kind of agreement which suggests future human action or which foreshadows limitation upon human action. The parties to the agreement have each manifested their determination so to order their future conduct that their present intentions pertaining to these future acts will be realized objectively, so that society, through the law, will say that these facts must be brought into existence, or that the unjustifiable failure of one of the parties to perform his act shall result in the imposition of some kind of penalty upon him, provided that there exists between these two future acts a kind and degree of interrelationship, which, as a matter of broad public policy, justifies society in taking cognizance of them.

The question of practical importance then arises: Under what circumstances will some party other than those to the supposed or actual agreement be justified in concluding that these parties have actually entered into an agreement? It is altogether possible for two minds to be in agreement as to future acts, it is possible that these two persons definitely understand that each is to do something in the future, and yet the external evidence of their subjective convictions is insufficient to convey to the mind of another person the consciousness that these two parties have "agreed," and the evidence may be insufficient to transfer to such other party the intelligence, or the comprehension of the nature of these future acts. Why is this aspect of contract important? Subjective truth and objective evidence of that truth are quite distinct. The parties to the agreement are not to be judges in their own cause. Some other person is to be judge as to whether they entered into an agreement. This third party, the judge or jury, or whoever it may be, must have before them some evidence, consisting of language, of

conduct, or of attendant circumstances, which will enable them to arrive at a conclusion that the parties did or did not enter into an agreement. The things which actually took place in the minds of the parties constitute, in a sense, the object of the search. But it is impossible to find out what actually occurred there. External evidence must be relied upon as the best means of discovering these things. We shall find, in fact, that the law realizing the impossibility of obtaining an external reproduction of a mental state, virtually makes no effort to find out what the parties to the agreement actually thought. Instead the law substitutes, for their actual thought, some thought which, in the light of external evidence, the parties most likely did entertain.

So our inquiry into the circumstances under which a third person will be justified in assuming that two or more other persons have entered into an agreement is not a journey into the hidden recesses of the human mind but is an observation directed at external phenomena, spoken words, acts, and circumstances, from which we obtain a conclusion as to what the parties did have in mind. It is this conclusion which governs—the conclusion of a third party—hence the emphasis, in Professor Corbin's definition of a contract, is laid, not upon "intention," but upon the expression of intention. A recognition of this truth will explain many things in the law. It is very easy to employ the expression, "What did the parties intend?" and we shall, for convenience, use this expression; but we should realize that it does not mean exactly what it says.

We are looking at the acts of persons; that is, muscular activity generated by the exercise of volition—conduct, their spoken and written words, and figures, to ascertain therefrom whether they have entered into an agreement. What brings these external things into existence? In the first instance, it is the desire of one of the parties, and later on the desire of the other party. A. desires to possess B.'s horse. He could go and get it, without asking for it; but this he knows is wrong. In the nature of things, if A. is to gain possession, control, over the horse, which is B.'s, he must obtain B.'s consent to the taking. The origin of agreement, therefore, is to be found in transferring to the mind of B. the knowledge of A.'s desire to have B.'s horse. What shall we call the act of A. in communicating to B. the knowledge of A.'s desire for B.'s horse? There is no single word that adequately describes what has just occurred, but it is safe to call this act or series of acts "preliminary negotiations." Suppose, however, that in addition to the act of communicating A.'s desire for B.'s horse, A. promises to do some act, such as handing to B. $100, if B. will consent to take his horse to A. Two future acts are now the subject of discussion, and they are closely related to each other. The probabilities are that, if one of them comes into existence, the other will also, and, if one fails, so will the other. What shall we call this act of A. in making known to B. (1) A.'s desire to have B.'s horse and (2)

A.'s willingness or intention to give to B. $100? In the law, the expressions used by A. in communicating to B. his desire to have B. act, and his own willingness to act, is called an offer. If B. manifests his willingness to do the suggested act, and his own desire to have A. perform the act, which A. said he would perform, the law calls B.'s expression an acceptance. Contractual agreement is, therefore, a compound composed of two elements: Offer and acceptance.

Our future inquiry, therefore, is to be directed to the ascertainment of the circumstances under which it is fair to assume that a person has made an offer, and a person to whom it was made has accepted this offer. We live in a busy world. We do not always have time to express our minds as accurately as we should like to, and, even if we did, it is not certain that another person would always understand precisely what we meant. Contractual agreements spring out of circumstances, as well as out of spoken and written words. A great deal of the time of the courts is taken up in trying to find out what the parties intended—using that word as we have heretofore explained its use, the external evidence of a mental state which foreshadows the future exercise of the human will in such a way as to bring into existence some external reality. When A. leaves his home in the morning and boards a street car, a contractual agreement is formed. What were its terms? Not a word was spoken. Arriving down town, A., proceeds to the bank and pushes some bills, checks, and coin over the counter to the cashier. A contractual agreement was formed. What was it? A moment before the money belonged to A. Does it belong to A. after the cashier picked it up? Suppose a bank robber took this money at that moment, whose money was lost? It depends upon what the parties agreed to. A. goes across the street and enters the floor of the Stock Exchange. He makes signs. B. is attracted, and B. makes signs. They make a little memorandum, which many would not understand, but they may have entered into a contractual agreement. A. spends the rest of the morning in conference with C., and at the end of the conference they draw up a lengthy document and sign. It may have been a contractual agreement. Enough has been said to show that the questions: (1) Did the parties enter into any agreement at all? was there an offer? was there an acceptance? and (2) if we find that there was an agreement, what were its terms? are questions which may be very difficult, indeed, to answer. Yet we do these things every day. We cannot always take time to explain carefully what we should like to have done and what we are willing to do in return. One who sat down at a table in a public restaurant, and while looking over the menu heard the waiter announce in solemn tones, "Sir, we offer to provide for you the food which you see listed here at the prices marked opposite each item," might entertain some fleeting notion that the waiter's mental faculties were not functioning normally. We are forced to take some things for granted. While certain phases of this

restaurant transaction are so obvious that no language is necessary to express the meaning, who can say whether the food brought has been sold to the patron or merely placed there for him to eat until his hunger has been appeased. If some one stole it while the customer was preparing to dine, whose food was stolen, the restaurant keeper's or the patron's? Courts have taken contrary views on this question, and have written elaborate opinions in support of their respective contentions.

In some cases parties are willing to enter into contractual agreements without reducing the agreement to language. In other cases the parties deem it advisable to spend time in fixing upon the terms of a contract. Sound judgment will indicate when it is safe to trust to circumstances and to implications, and will also indicate when it is advisable to exercise a rather high degree of care in entering into an agreement and in prescribing its terms. The study of this collection of cases will contribute to the formation of a judgment as to when special care should be exercised in the making of contracts, and will also contribute to an understanding of the methods and procedure for exercising this care, and to indicate the circumstances under which it will be advisable to seek the advice of competent counsel. With this preliminary statement we may now take up the study of the two problems presented in this chapter: (1) What constitutes an offer? (2) What constitutes an acceptance?

In going into these questions, and into others into which the first leads us, we shall, of course, focus attention upon the rules of law as such, to understand them; but beyond that, and from a practical business standpoint, one should obtain an appreciation of the nature and of the causes of misunderstanding and of litigation which arise out of the formation of contracts. The exercise of care beforehand will often prevent such unfortunate results, but care cannot effectively be exercised without an intelligent understanding of the origin and nature of legal controversy.

SECTION 2.—WHAT CONSTITUTES AN OFFER

Viewing an offer as an operative fact, as distinguished from its legal effect, an offer is a communication to the offeree of the intention of the offeror to do an act, or to refrain from acting in the future, provided that the offeree will likewise in the future perform some act or refrain from acting. However phrased, the offer will make reference to two future acts, one usually to be done by the offeror, the other usually by the offeree. But it is convenient, and sometimes necessary, to distinguish between the various ways in which it is possible to refer to these two future acts. (1) The offeror may say, "I will give you $500 if you will arrest and obtain the conviction of the persons who burglarized my store last night." This is an offer of a promise for an act other than a promise. The language employed by the offeror is called an offer, but in the event of its acceptance this language is then converted into a prom-

ise. While still an offer, it is not certain that the act which the offeror proclaims his willingness to perform will ever be performed. But, after acceptance, his language is then an unqualified assertion that he will perform. The "if" has disappeared. For this reason we speak of the offer after its acceptance as a promise. In the above case, the offeree cannot accept by promising to arrest and obtain the conviction of the burglar. He may accept only by doing these acts. (2) Or an offeror may say, "I will arrest and obtain the conviction of the person who burglarized your store last night, if you will pay me $500." The offeree replies, "All right." This is an offer of a series of acts for a promise. In each of these cases, the contract will not come into existence until the act is done. It is also true that, at the moment when the contract does come into existence, one of the parties has fully performed. It is for this reason that these contracts are called unilateral; that is, that just as soon as there is a contract at all there is but one side to it which is unperformed. (3) The offeror may say, "I will pay you $10,000 if you will agree to erect this building in accordance with these specifications." The offeree promises to construct the building. Here we have an offer of a promise for a promise. This type of contract is called bilateral, meaning that, as soon as the contract comes into existence, neither of the parties has performed his promise. The contract imposes obligations upon each.

To return to our general question: What constitutes an offer? People may do a great deal of talking without making offers. They may even refer, rather definitely, to their future conduct and still no offer may result. What test may be applied to language and conduct by means of which offers may be identified? How are we to draw the line between words and conduct referring to future acts amounting to offers from words and conduct likewise referring to future acts which fail to be offers?

Words and conduct will fail to produce an offer for any one of four reasons—reasons which are not wholly mutually exclusive: (1) The language or conduct may fail to refer to any act to be done by the offeree, as, for example, "I will give you $100, if you will take it." It is possible, of course, to say that this is an offer, but that a contract fails to result for other reasons. (2) The language or conduct may make such an indefinite reference to the nature of the acts to be done by the parties, as to the time when they should be done, that we are not justified in concluding that a true offer was made. (3) The language or conduct may or may not refer to future acts with sufficient definiteness, but there may also be apparent from attendant circumstances unmistakable evidence that the parties intended that such language should not be regarded as an offer. (4) The offer, while it may conform to all formal requisites, may fail to be such because it was not communicated to the offeree.

Having ascertained what words or conduct amount to offers, we next meet the question: What is its legal effect? While an offer

is but one of the essential steps in the formation of a contract, and accordingly does not create any rights or duties, the offer does create a legal relation between the offeror and offeree which has not theretofore existed; for, by making and communicating the offer, the offeror has made it possible for the offeree to create a contract between them. Hence it is proper to say that the legal effect of the words or conduct which are generalized by the word "offer" is to create in the offeree a legal power.

HOTCHKISS v. NATIONAL CITY BANK OF NEW YORK.

(District Court of the United States, S. D. New York, 1911. 200 Fed. 287.)

HAND, District Judge. * * * A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent. * * *

NEBRASKA SEED CO. v. HARSH.

(Supreme Court of Nebraska, 1915. 98 Neb. 89, 152 N. W. 310, L. R. A. 1915F, 824.)

MORRISSEY, C. J. Plaintiff, a corporation, engaged in buying and selling seed in the city of Omaha, Neb., brought this action against the defendant, a farmer residing at Lowell, Kearney County, Neb. The petition alleges:

"That on the 26th day of April, 1912, the plaintiff purchased of and from the defendant 1,800 bushels of millet seed at the agreed price of $2.25 per hundredweight, F. O. B. Lowell, Neb., which said purchase and contract was evidenced by writing and correspondence passing between the respective parties of which the following is a copy:

" 'Neb. Seed Co., Omaha, Neb.—Gentlemen: I have about 1800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want $2.25 per cwt. for this seed f. o. b. Lowell.

" 'Yours truly, H. F. Harsh.'

"Said letter was received by the plaintiff at its place of business in Omaha, Neb., on the 26th day of April, 1912, and immediately thereafter the plaintiff telegraphed to the defendant at Lowell, Neb., a copy of which is as follows:

" 'H. F. Harsh, Lowell, Nebr. Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load. The Nebraska Seed Co.' "

It alleges that defendant refused to deliver the seed, after due demand and tender of the purchase price, and prays judgment in the sum of $900. Defendant filed a demurrer, which was overruled. He saved an exception to the ruling and answered, denying that the petition stated a cause of action; that the correspondence set out constituted a contract, etc. There was a trial to a jury with verdict and judgment for plaintiff, and defendant appeals.

In our opinion the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff. After describing the seed, the writer says, "I want $2.25 per cwt. for this seed f. o. b. Lowell." He does not say, "I offer to sell to you." The language used is general, and such as may be used in an advertisement, or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted, by any or all of the persons addressed.

"If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases." 9 Cyc. 278e.

The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. It did not fix a time for delivery, and this seems to have been regarded as one of the essentials by plaintiff, for in his telegram he requests defendant to "wire how soon can load."

"The mere statement of the price at which property is held cannot be understood as an offer to sell." Knight v. Cooley, 34 Iowa, 218.

We do not think the correspondence made a complete contract. To so hold where a party sends out letters to a number of dealers would subject him to a suit by each one receiving a letter, or invitations to bid, even though his supply of seed were exhausted. In Lyman v. Robinson, 14 Allen (Mass.) 242, 254, the Supreme Court of Massachusetts has sounded the warning:

"Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation."

Holding, as we do, that there was no binding contract between the parties, it is unnecessary to discuss the other questions presented.

The judgment of the district court is reversed.

ANDERSON et al. v. BOARD, ETC., OF PUBLIC SCHOOLS.

(Supreme Court of Missouri, 1894. 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707.)

Action by Anderson and others against the Board of President and Directors of Public Schools. From a judgment sustaining a demurrer to the petition, plaintiffs appeal.

BARCLAY, J. Plaintiffs appealed from a judgment based on a ruling sustaining a demurrer to their petition. The substance of their allegations is as follows: Plaintiffs are copartners in the business of building, and defendant is a corporation having charge and control of the public schools and school property in the city of St. Louis. The

defendant had a well-known rule in regard to buildings, by which it was provided that all new buildings, etc., should be "let by contract to the lowest and best bidder." Defendant being desirous of erecting a large school building to be known as the "New High School," duly advertised for bids for the erection thereof. The advertisement was this: "Proposals for the Erection of the New High School Building on Grand Avenue. Office of Board of President and Directors of the St. Louis Public Schools. St. Louis, August 28, 1891. Sealed proposals will be received at the office of the secretary on or before Monday, September 7, 1891, at 4 p. m., for the erection of the new high school on Grand avenue. All bids are to be addressed to John W. O'Connell, Esq., chairman building committee, and must be accompanied by a certified check, payable to the order of the 'Board of President and Directors of the St. Louis Public Schools,' or cash, amounting to $2,500, which is to be forfeited by the successful bidder if he fails or refuses within five days after the award of contract by this board to enter into written contract, and furnish good and sufficient security, for the faithful performance of the work." Plaintiffs submitted a bid (in accordance with the above advertisement) to build the proposed high school for $196,965; but defendant refused to accept the bid of plaintiffs, but "without cause, arbitrarily and capriciously, through favoritism and bias," rejected it, and then accepted the bid of another for $197,000. Plaintiffs alleged a loss of profits in the sum of $15,000, and prayed judgment, etc. The above is a sufficient outline of the facts on which plaintiffs rely.

It is claimed by defendant that, as the plaintiff's bid for the erection of the high school building related to public work, no action can be maintained for the refusal to allow plaintiffs to execute such work. The contention is that bids for public work are not governed by the general principles of the law of contracts. We do not consider it necessary to examine into the soundness of that contention, as we think the ruling of the trial judge was obviously correct, even conceding to plaintiffs that the transaction should be treated as an ordinary one between individuals, irrespective of the supposed public nature of its subject-matter. That binding obligations can originate in advertisements addressed to the general public may be assumed as settled law to-day. But the effect to be given to such an advertisement as the basis of a contract depends entirely on the intent manifested by its terms. A public proposal of that nature may be so expressed as to need but an acceptance, or the performance of some act by a person otherwise undesignated, to constitute an enforceable legal agreement; while, on the other hand, the proposal may amount to nothing more than a suggestion to induce offers of a contract by others. Proposals of contract by advertisement have a place in the modern common law of England and of this country, though they have not been so definitely classified in our jurisprudence as in that of some continental nations. Mr. Pollock, in his valuable treatise on the Principles of Contract, remarks on this point: "We have no special term of art for a proposal thus made by way of general request or invitation to all men to whose knowledge it comes." 4th Ed. *p. 13. Still less have we any scientific nomenclature for that sub-division of the class of public proposals with which we have now to deal, namely, that class in which is disclosed the intent to invite mere offers of a contract, as distinguished from an intent to propose a contract for a direct acceptance by whom it may concern.

But the principles to be applied by our law to such proposals are not, on that account, uncertain or obscure. When the intent expressed in the advertised proposal is reduced to certainty by interpretation, our system of administration of law is fully capable of giving effect to that intent.

In the case in hand the advertisement has the following caption: "Proposals for the erection of the new high school building on Grand avenue." But the opening lines of the official statement, which follows, show that the caption refers to the proposals to be received, and is not intended to describe the effect of the advertisement as a whole. If there was otherwise any doubt on this point, it is set at rest by the last sentence, viz.: "The board reserves the right to reject any or all bids." That language demonstrates the nature of the advertisement as a mere invitation for offers for a contract. As such it did not lay the foundation of a completed contract. It was merely the opening of negotiations for a contract. The plaintiffs' bid was a proposal to build, which the defendant, by the terms of its statement, had the right to reject. The facts in judgment are wholly unlike those considered in McNeil v. Boston Chamber of Commerce (1891) 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559, cited on behalf of the plaintiffs. In that case it was found as a fact that the defendant had agreed with the bidders to accept the lowest bid, and accordingly was held liable for a breach of that agreement. But in the present appeal that essential fact is wanting. The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. The judgment is affirmed.

UNIFORM SALES ACT, SECTION 21. SALE BY AUCTION

Subsection (2). A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

FAIRMOUNT GLASS WORKS v. GRUNDEN-MARTIN WOODENWARE CO.

(Court of Appeals of Kentucky, 1899. 106 Ky. 659, 51 S. W. 196.)

Action by the Grunden-Martin Woodenware Company against the Fairmount Glass Works to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals.

HOBSON, J. On April 20, 1895, appellee wrote appellant the following letter:

"St. Louis, Mo., April 20, 1895. Gentlemen: Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars, complete, with caps, packed one dozen in a case, either delivered here, or f. o. b. cars your place, as you prefer. State terms and cash discount. Very truly, Grunden-Martin W. W. Co."

To this letter appellant answered as follows:

"Fairmount, Ind., April 23, 1895. Grunden-Martin Wooden Ware

Co., St. Louis, Mo.—Gentlemen: Replying to your favor of April 20, we quote you Mason fruit jars complete, in one-dozen boxes, delivered in East St. Louis, Ill.: Pints $4.50, quarts $5.00, half gallons $6.50, per gross, for immediate acceptance, and shipment not later than May 15, 1895; sixty days' acceptance, or 2 off, cash in ten days. Yours truly,

"Fairmount Glass Works."

"Please note that we make all quotations and contracts subject to the contingencies of agencies or transportation, delays or accidents beyond our control."

For reply thereto, appellee sent the following telegram on April 24, 1895:

"Fairmount Glass Works, Fairmount, Ind.: Your letter twenty-third received. Enter order ten car loads as per your quotation. Specifications mailed. Grunden-Martin W. W. Co."

In response to this telegram, appellant sent the following:

"Fairmount, Ind., April 24, 1895. Grunden-Martin W. W. Co., St. Louis, Mo.: Impossible to book your order. Output all sold. See letter. Fairmount Glass Works."

Appellee insists that, by its telegram sent in answer to the letter of April 23d, the contract was closed for the purchase of 10 car loads of Mason fruit jars. Appellant insists that the contract was not closed by this telegram, and that it had the right to decline to fill the order at the time it sent its telegram of April 24. This is the chief question in the case. The court below gave judgment in favor of appellee, and appellant has appealed, earnestly insisting that the judgment is erroneous.

We are referred to a number of authorities holding that a quotation of prices is not an offer to sell, in the sense that a completed contract will arise out of the giving of an order for merchandise in accordance with the proposed terms. There are a number of cases holding that the transaction is not completed until the order so made is accepted. But each case must turn largely upon the language there used. In this case we think there was more than a quotation of prices, although appellant's letter uses the word "quote" in stating the prices given. The true meaning of the correspondence must be determined by reading it as a whole. Appellee's letter of April 20th, which began the transaction, did not ask for a quotation of prices. It reads: "Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars. * * * State terms and cash discount." From this appellant could not fail to understand that appellee wanted to know at what price it would sell it ten car loads of these jars; so when, in answer, it wrote: "We quote you Mason fruit jars * * * pints $4.50, quarts $5.00, half gallons $6.50, per gross, for immediate acceptance; * * * 2 off, cash in ten days,"—it must be deemed as intending to give appellee the information it had asked for.

We can hardly understand what was meant by the words "for immediate acceptance," unless the latter was intended as a proposition to sell at these prices if accepted immediately. In construing every contract, the aim of the court is to arrive at the intention of the parties. In none of the cases to which we have been referred on behalf of appellant was there on the face of the correspondence any such expression of intention to make an offer to sell on the terms indicated. In Fitzhugh v. Jones, 6 Munf. (Va.) 83, the use of the expression that the buyer should reply as soon as possible, in case he was

disposed to accede to the terms offered, was held sufficient to show that there was a definite proposition, which was closed by the buyer's acceptance. The expression in appellant's letter, "for immediate acceptance," taken in connection with appellee's letter, in effect, at what price it would sell it the goods, is, it seems to us, much stronger evidence of a present offer, which, when accepted immediately, closed the contract. Appellee's letter was plainly an inquiry for the price and terms on which appellant would sell it the goods, and appellant's answer to it was not a quotation of prices, but a definite offer to sell on the terms indicated, and could not be withdrawn after the terms had been accepted.

Appellant also insists that the contract was indefinite, because the quantity of each size of the jars was not fixed, that 10 car loads is too indefinite a specification of the quantity sold, and that appellee had no right to accept the goods to be delivered on different days. The proof shows that "10 car loads" is an expression used in the trade as equivalent to 1,000 gross, 100 gross being regarded a car load. The offer to sell the different sizes at different prices gave the purchaser the right to name the quantity of each size, and, the offer being to ship not later than May 15th, the buyer had the right to fix the time of delivery at any time before that. The petition, if defective, was cured by the judgment, which is fully sustained by the evidence.

Judgment affirmed.

OLCOTT v. McCLURE.

(Appellate Court of Indiana, 1912. 50 Ind. App. 79, 98 N. E. 82.)

Appellant, plaintiff in court below, brought action for a commission on a sale of realty. Plaintiff alleged that defendant, appellee, made him an offer of such a commission in a letter reading in part as follows: "Inclosed you will find description of a Texas farm, offered for sale at a very attractive price. To the agent with whose buyer I consummate a sale, at the price and terms mentioned, I will pay a commission of $1.00 an acre so soon as the terms of the sale are complied with, but I am in no event to be held liable for more than one commission." Judgment below for defendant.

HOTTEL, J. * * * If a writing contains matter sufficient to enable the court to ascertain the subject-matter and the terms and conditions of the obligation or contract to which the parties intended to bind themselves, it is sufficient. The effect of such written contract is to be collected from "all within the four corners" of the several letters or writings which go to make up the same, and, if it can be so collected, such writings will be held sufficient to constitute a contract.

Under the averments of this paragraph of complaint, the subject-matter of the contract, namely, the farm offered for sale, its description, the terms upon which it was offered, the amount which the appellee agreed to pay to the agent with whose buyer he might consummate a sale, can all be definitely and certainly ascertained. Appellee in his brief says: "The primary question is whether the correspondence shows an agreement upon which the minds of the parties met, as to description, terms, price, and commission, or whether the negotiations are inchoate and unperfected until something should intervene and be determined in order to give it full effect." J. A. Everett, Seedsman v. Bassler, 25 Ind. App. 303–308, 57 N. E. 560. We think the test here

furnished a proper one, and that the contents of letter No. 1, supplemented by the averments of the complaint as to the contents of appellant's letter of acceptance and the lost paper and letter, meet every requirement of the rule announced.

It is insisted by appellee that his first letter or proposition was nothing more than an invitation to the person to whom it was made to make an offer to the proposer. This contention is clearly against the import and meaning of the language of the proposition, especially that part of the same which is in the following words: "To the agent with whose buyer I consummate a sale at the price and terms named, I will pay a commission of $1.00 per acre, so soon as the terms of the sale are complied with." These words import more than an invitation for an offer. They are a definite, certain proposition, the acceptance of which should bind the proposer. Of course, standing alone, Exhibit A is nothing more than a proposition which is unilateral; but it is such a proposition as may become binding by acceptance.

Judgment reversed.

KELLER v. HOLDERMAN.

(Supreme Court of Michigan, 1863. 11 Mich. 248, 83 Am. Dec. 737.)

Action by Holderman against Keller upon a check for $300, drawn by Keller, and not honored. The check was given for an old silver watch worth about $15. Keller took the watch and kept it till the day of the trial, when he tendered it back to the plaintiff, who refused to receive it. The whole transaction was a frolic and banter, neither party intending to enter a contractual relation. The defendant, when he drew the check, had no money in the bank. Judgment below for plaintiff.

MARTIN, C. J. When the court below found as a fact that "the whole transaction between the parties was a frolic and a banter, the plaintiff not expecting to sell, nor the defendant intending to buy, the watch at the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

The judgment is reversed, with costs of this court and of the court below. The other justices concurred.

PLATE v. DURST.

(Supreme Court of Appeals of West Virginia. 1896. 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404.)

Assumpsit by Amelia C. Plate against George L. Durst. There was a judgment for plaintiff, and defendant brings error.

DENT, J. * * * The material facts in the case are as follows, to-wit: When the plaintiff was about twelve years of age, in the absence of other home, she went to live with the defendant, her brother-in-law. This was in the year 1885. For the first three or four years she was sent to school, and during the whole period she lived in the family as the defendant's own daughter might have done. On her part, the plaintiff rendered services such as might have been required and expected from a daughter; attending to the marketing, and assisting in the care

of the young children. In addition to these services the plaintiff assisted the defendant in his store, attending to customers, looking after entertainments the defendant had in charge, and doing whatever else the exigencies of the business, and her own capacities, from time to time suggested. According to the plaintiff's testimony, a conversation took place four years before August, 1894, late one evening, in the store of the defendant. This conversation was repeated several times in the plaintiff's testimony, and was given by her as follows: "Mr. Durst asked me if I was tired. I said, 'Yes, sir;' and he said, 'How long have you been with me now'? and I told him, 'Five years;' and he said, 'Well, when you are with me ten years, I will give you one thousand dollars.'" On another occasion, defendant remarked that when she (the plaintiff) should get married he would give her $1,000, and a $500 diamond ring. Defendant does not positively deny either of these conversations, except as to the time of the first, but intimates that he was not in earnest, but jesting.

It must be admitted, in any view of the matter, that this was jesting on a very serious subject to this unfortunate and parentless young girl—still, in the eyes of the law, an infant—engaged early and late, week days and Sunday, at home and abroad, actively, earnestly, and faithfully endeavoring to promote the worldly interests of the defendant. Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile. The law discountenances deceit, even practiced under the form of a jest, if the weak, immature, or confiding are thereby imposed on to their injury. Where the law raises a presumption of gratuitous service, because of the relationship of the parties, the person rendering such service must rebut such presumption by either showing an express contract, "or such facts and circumstances as will authorize the jury to find the services were rendered in expectation by one of receiving, and by the other of making, compensation."

And now it devolves upon us to say whether she is entitled to pay for what her services were actually worth, or does the law, from the fact that he was only misleading her, and never intended to pay her, excuse him from doing so? A person is estopped from denying the sincerity of his conduct, to the injury of a person misled thereby. We therefore must conclude that these promises, in spite of the declaration of the defendant to the contrary, were made in sincerity, as an inducement to her future service. As these promises are not here sued on, the question of the statute of frauds does not arise; but, the plaintiff having been prevented by the defendant from performing her part of the undertaking, she is entitled to recover for the services already rendered, in view of the compensation promised. The judgment is therefore affirmed.

SECTION 3.—DURATION OF OFFERS

It will usually happen that an offer will not be accepted at the moment it is made. How long will the offer survive as such? The making of the offer alone has conferred upon the offeree a power

to create contractual relations between the parties. Under what circumstances may it be said that this power continues in existence? Obviously the power will not exist indefinitely. Moreover, the offer having been made by one of the parties alone, it would seem that he should have power to destroy that which he created. The party to whom the offer was made should also have power, not only to convert the offer into a contract but also to destroy it.

Accordingly there are three ways in which an offer may be terminated: (1) By some event subsequent to the offer, not then within the control of either party; (2) by an act of the offeror, called revocation; (3) by an act of the offeree, called rejection.

Under each of these we shall consider two independent problems: What is the nature of the event which may have the effect of destroying the offer; and at what point of time and under what circumstances will it take effect?

(a) TERMINATION OF AN OFFER BY SOME EVENT

(1) If the offeror has specified a definite time within which the offer may be open for acceptance, and this period of time elapses before acceptance, the offer thereafter is non-existent—incapable of acceptance. (2) If no time is specified in the offer, then the offer is deemed to be open for a reasonable time. What constitutes a reasonable time will depend upon the circumstances of the case. (3) If the offeror dies or becomes insane before acceptance, the offer is thereby terminated.

LORING et al. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts, 1844. 7 Metc. 409.)

Assumpsit to recover a reward of $1,000, offered by the defendants for the apprehension and conviction of incendiaries.

In May, 1837, defendant city offered a reward of $1,000, by advertisement in daily papers, the publication of the advertisement continuing about a week, for the conviction of any person setting fire to any building within the city limits. In January, 1841, an extensive fire took place. Plaintiffs, suspecting one Samuel Marriott of having set the fire, pursued Marriott to New York, brought him back to Boston, and secured his conviction of setting said fire. The only question in this case is, whether said offer of reward continued to be in force at the time of this fire. There had been no express revocation of the offer.

SHAW, C. J. There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender the recovery of property, and the like is an offer or proposal, on the part of the person making it, to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance on the other, is a valid contract made on good consideration, which the law will en-

force. That this principle applies to the offer of a reward to the public at large was settled in this Commonwealth in Symmes v. Frazier, 6 Mass. 344, 4 Am. Dec. 142, and it has been frequently acted upon, and was recognized in the late case of Wentworth v. Day, 3 Metc. 352, 37 Am. Dec. 145.

The ground of defense is that the advertisement, offering the reward of $1,000 for the detection and conviction of persons setting fire to buildings in the city, was issued almost four years before the time at which the plaintiff arrested Marriott and prosecuted him to conviction; that this reward was so offered in reference to a special emergency in consequence of several alarming fires; that the advertisement was withdrawn and discontinued; that the recollection of it had passed away; that it was obsolete, and by most persons forgotten; and that it could not be regarded as a perpetually continuing offer on the part of the city.

We are then first to look at the terms of the advertisement, to see what the offer was. It was competent to the party offering such reward to propose his own terms; and no person can entitle himself to the promised reward without a compliance with all its terms. The first advertisement offering the reward demanded in this action was published May 26, 1837, offering a reward of $500; and another on the day following, increasing it to $1,000. No time is inserted in the notice, within which the service is to be done for which the reward is claimed. It is therefore relied on as an unlimited and continuing offer.

In the first place, it is to be considered that this is not an ordinance of the city government, of standing force and effect; it is an act temporary in its nature, emanating from the executive branch of the city government, done under the exigency of a special occasion indicated by its terms, and continued to be published but a short time. Although not limited in its terms, it is manifest, we think, that it could not have been intended to be perpetual, or to last ten or twenty years or more; and therefore must have been understood to have some limit.

Supposing, then, that by fair implication there must be some limit to this offer, and there being no limit in terms, then by a general rule of law it must be limited to a reasonable time; that is, the service must be done within a reasonable time after the offer made.

What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. The principal object obviously must be to awaken the attention of the public, to excite the vigilance and stimulate the exertions of police officers, watchmen, and citizens generally, to the detection and punishment of offenders. Possibly, too, it may operate to prevent offenses, by alarming the fears of those who are under temptation to commit them, by inspiring the belief that the public is awake, that any suspicious movement is watched, and that the crime cannot be committed with impunity. To accomplish either of these objects, such offer of a reward must be notorious, known and kept in mind by the public at large; and for that purpose the publication of the offer, if not actually continued in newspapers, and placarded at conspicuous places, must have been recent. After the lapse of years, and after the publication of the offer has been long discontinued, it must be presumed to be forgotten by the public generally, and if known at all,

known only to a few individuals who may happen to meet with it in an old newspaper. The expectation of benefit then from such a promise of reward must in a great measure have ceased. Indeed, every consideration arising from the nature of the case confirms the belief that such offer of reward, for a special service of this nature, is not unlimited and perpetual in its duration, but must be limited to some reasonable time. The difficulty is in fixing it. One circumstance (perhaps a slight one) is that the act is done by a board of officers, who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of the year, we cannot necessarily limit it to the time for which the same board or mayor and aldermen have to serve; though it tends to make the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement, as one of some weight. It is some notice to the public that the exigency is passed for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterwards.

But it is not necessary, perhaps not proper, to undertake to fix a precise time as reasonable time; it must depend on many circumstances.

Under the circumstances of the present case, the court are of the opinion that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city. We are therefore of opinion that the offer of the city had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon which this action, founded on an alleged express promise, can be maintained.

Plaintiffs nonsuit.

MINNESOTA LINSEED OIL CO. v. COLLIER WHITE LEAD CO.

(United States Circuit Court, D. Minnesota, 1876. 4 Dill. 431, Fed. Cas. No. 9,635.)

This action was removed from the state court and a trial by jury waived. The plaintiff seeks to recover the sum of $2,151.50, with interest from September 20, 1875—a balance claimed to be due for oil sold to the defendant. The defendant, in its answer, alleges that on August 3d, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the said month of August, twelve thousand four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff has neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or counter-claim to plaintiff's cause of action. The reply of the

plaintiff denies that any contract was entered into between it and defendant.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant: "Minneapolis, July 29, 1875. To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri: Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped. Minnesota Linseed Oil Company."

The following answer was received: "St. Louis, Mo., July 30, 1875. To the Minnesota Linseed Oil Company: Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer. Collier Company."

The following reply was returned: "Minneapolis, July 31, 1875. Will accept fifty-eight cents (58c.), on terms named in your telegram. Minnesota Linseed Oil Company."

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 p. m., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between 8 and 9 o'clock.

On Tuesday, August 3, at 8:53 a. m., the following dispatch was deposited for transmission in the telegraph office: "St. Louis, Mo., August 3, 1875. To Minnesota Linseed Oil Company, Minneapolis: Offer accepted—ship three hundred barrels as soon as possible. Collier Company."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis: "Minneapolis, August 3, 1875. To Collier Company, St. Louis: We must withdraw our offer wired July 31st. Minnesota Linseed Oil Company."

Answered: "St. Louis, August 3, 1875. Minnesota Linseed Oil Company: Sale effected before your request to withdraw was received. When will you ship? Collier Company."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon. It is urged by the defendant that the dispatch of Tuesday, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil. The plaintiff, on the contrary, claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

NELSON, District Judge. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission.

The reason for this rule is well stated in Adams v. Lindsell, 1 Barn. & Ald. 681. The negotiation in that case was by post. The court said: "That if a bargain could not be closed by letter before the an-

swer was received, no contract could be completed through the medium of the post office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on ad infinitum." In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject-matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (volume 1, p. 82). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. * * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counterclaim is denied. Judgment accordingly.

BEACH et al. v. FIRST METHODIST EPISCOPAL CHURCH.

(Supreme Court of Illinois, 1880. 96 Ill. 177.)

DICKEY, C. J. The record shows that Lorenzo Beach had presented to him a subscription paper in the following words:

"Fairbury, February 14, 1874.

"We, the undersigned, agree to pay the sum set opposite our respective names, for the purpose of erecting a new M. E. church in this place, said sums to be paid as follows: One-third to be paid when contract is let, one-third when building is enclosed, one-third when building is completed. Probable cost of said church from ten thousand dollars ($10,000) to twelve thousand dollars ($12,000)."

To which he attached and subscribed the following:

"Fairbury, 1874.

"Dr. Beach gives this subscription on the condition that the remainder of eight thousand dollars is subscribed.

"Lorenzo Beach,..... $2,000."

On the 20th day of April, 1875, Lorenzo Beach was adjudged by the county court of Livingston county insane, and Thomas A. Beach and C. C. Bartlett were appointed conservators of his person and property, and they continued to act as such until the death of Dr. Beach, which occurred in August, 1878.

This action was brought shortly before the death of Dr. Beach for the last installment of the subscription, $666. After his death, his heirs were made parties, under a stipulation, and defended the action.

In the circuit court, judgment was rendered for the unpaid one-third of the subscription, and costs. On appeal to the Appellate Court, that judgment was affirmed. The defendants appeal to this court.

The subscription made by Dr. Beach was, in its nature, a mere offer to pay that amount of money to the church upon the condition therein expressed.

There is nothing in the record tending to show that the church, in this case, took any action, upon the faith of this subscription, until after Dr. Beach was adjudged insane, or that the church paid money, or incurred any liability. His insanity, by operation of law, was a revocation of the offer. In Pratt, Administratrix, etc., v. Trustees of the Baptist Society of Elgin, 93 Ill. 475, 34 Am. Rep. 187, this court said, in relation to such a subscription: "The promise, in such case, stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability on the faith of a promise, which gives the right of action, and without which there is no right of action. Until acted upon, there is no mutuality, and, being only an offer, and susceptible of revocation at any time before being acted upon, it follows that the death of the promisor, before the offer is acted upon, is a revocation of the offer. * * * The continuance of an offer is in the nature of its constant repetition, which, of course, necessarily requires some one capable of making a repetition. Obviously, this can be no more be done by a dead man than a contract can, in the first instance, be made by a dead man."

The paper signed by Dr. Beach was of such a nature that no binding contract sprung therefrom until the church had accepted the same by incurring some legal liability, or expending money upon the faith of it. There being no binding contract upon Dr. Beach at the time

his conservators made the payments, they had no lawful authority to make the same, and the estate of Dr. Beach was not bound thereby.

The judgment of the Appellate Court in this case must be reversed and the cause remanded. Judgment reversed.

(b) REVOCATION BY THE OFFEROR

There are four independent questions pertaining to the express revocation of offers: (1) Does the offeror possess the legal power and legal privilege of revoking? (2) What language or conduct will amount to a revocation? (3) Must the intention to revoke be communicated to the offeree, and what amounts to a communication? (4) Must the communication be transmitted by the offeror, or may it come through indirect channels?

(1) In answer to the first question it may be definitely stated that an offeror may revoke his offer. He has the legal power to do so; that is, he may make it impossible for the offeree thereafter to accept. An attempted acceptance would be a nullity, or at most a new offer to the former offeror. The power to revoke may be exercised, even though the offeror has promised to hold the offer open for a specified period of time which has not yet elapsed. It may strike one as somewhat unjust for the law to permit a person who has, for example, offered to sell certain land to the offeree, and has told the offeree that he would give him ten days in which to make up his mind, to revoke his offer before the ten days are up; but the law does permit this to be done. There is an apparent exception, where the offeree has paid the offeror a sum of money for the privilege of accepting or rejecting within a specified time—the case of an option contract. Even in this case the offeror may, in most cases, effectually terminate the offeree's power to accept, remaining liable in damages to the offeree for having done so. Not only does the offeror have the legal power to revoke, but he has the legal privilege of revoking; that is, the offeror will not be compelled to respond in damages to the offeree for having revoked.

Certainly, what is stated above is true with respect to bilateral contracts; that is, that kind of contract where there is a promise for a promise, such as a promise to convey land, given in exchange for a promise to pay the price for the land.

But, should there be the same power to revoke an offer which contemplates the creation of a unilateral contract? The underlying theory which enables an offeror to revoke is that one party cannot, and, in justice, should not, be bound, unless the other is bound, before he accepts, and therefore the offeror is not bound. If he is not bound, it follows that he should be able to destroy his offer. But how does this work in connection with unilateral contracts? A. offers to pay B. $25, if B. will plow his field. Note that B. is not asked to promise to plow the field. B. may accept only by performance, and his acceptance is not complete until the work

is finished. B. walks away, debating the matter in his mind. He is not bound. He decides to plow the field and to that end begins the work. After plowing half an hour he decides to quit and does so. May A. sue B. for breach of contract? Clearly not, because B. has never promised to plow the field. Suppose the situation be reversed, and that B. begins to plow the field, and when B. is half finished A. approaches B. and says: "B., I revoke my offer. Get off the land." May B. sue A. for breach of contract? It would seem not, because at that moment B. could have stopped work, and A. would have had no right of action against him. Since B. was not bound, A. was not bound, and therefore A. could revoke. The injustice to B., many people would say, was apparent; but still a contrary holding would probably get us into greater difficulty. In this particular case, however, B. does obtain a substantial measure of protection. While B. cannot sue A. on A.'s promise, there is another principle of law under which B. could recover from A. the reasonable value to A. of the services rendered by B. The law calls this a quasi contract. It is not a contract, and, for that reason, it is called an obligation "just as if it were a contract."

The law imposes this obligation irrespective of the intention of the parties. Offer and acceptance form no part of it. But this quasi contractual obligation cannot be imposed upon a person unless that person has been enriched by the acts of the plaintiff; that is, obtained some pecuniary or proprietary gain. This obligation is not imposed because the plaintiff has sustained a detriment. In the above case, A. has clearly obtained something of value, and the law will compel him to pay a reasonable sum, not necessarily at the contract rate, for what he has received. There will be many cases of unilateral contracts where the offeree has incurred expense and expended considerable effort with no corresponding gain to the defendant. A revocation in this case leaves the offeree without any remedy. Suppose there be an offer of reward for the apprehension of a criminal, and a detective agency begins work on the case. Agents are sent to various parts of the country. Great expense may be incurred. The offer is revoked. Is there any remedy against the offeror? Most of the cases have held that the offeror may still revoke, even though the offeree has partly performed. It is perhaps possible to say that the offeror makes two offers: (1) To pay for the performance of the specified act; and (2) by implication, an offer to hold the first offer open a reasonable time, which second offer is actually accepted by the offeree's beginning his performance. This result would be more just to the parties. The offeror would not be bound to pay for a partial performance; he would simply be bound not to revoke the main offer after performance started. Professor Corbin suggests that this result could be brought about by the adoption of the following rule: "Where an offer has been made so that it can be accepted only by performing a series of acts requiring an appreciable length of time

and effort or expense, such offer shall be irrevocable after the offeree has begun the performance of the requested acts, unless the offeror expressly reserved the power of revocation." [3]

BUTCHERS' ADVOCATE CO. v. BERKOF et al.

(Supreme Court of New York, Appellate Division, 1916. 94 Misc. Rep. 299, 158 N. Y. Supp. 160.)

Action by the Butchers' Advocate Company against Jacob W. Berkof and another. From a judgment for plaintiff, and an order denying defendants' motion for new trial, defendants appeal.

LEHMAN, J. The defendants, on or about August 1, 1914, signed a paper which reads as follows:

"Brooklyn, N. Y., August 1, 1914.

"Undersigned hereby authorizes the publishers of the Butchers' Advocate to insert our ad. to occupy ¼ page in Butchers' Advocate for one year and thereafter until publishers have order to discontinue the ad., for which we agree to pay $8.00 (eight dollars) per insertion.

"Safety Auto Trolley,

"J. W. Berkof."

The plaintiff proceeded under this authorization to publish advertisements for the defendant. Some time in September the defendants notified the plaintiff to discontinue the advertisement, but the plaintiff nevertheless continued to insert same in each issue, and has recovered a judgment for the sum of $416, the price named for the insertion of the advertisement for one year.

This judgment is in direct conflict with the decision of this court in the case of White v. Allen Kingston Co., 69 Misc. Rep. 627, 126 N. Y. Supp. 150. In that case the defendant on April 6, 1909, signed a paper which is essentially in the same terms and must be given the same force as the paper signed by this defendant. The plaintiff in that case proceeded to publish the advertisement, but was notified, on June 23, 1909, to discontinue the advertisement. Nevertheless the plaintiff continued the publication thereafter. The court there held:

"The club never obligated itself to publish the advertisement; and in the absence of an obligation on its part, there being no other consideration shown, the so-called contract is wanting in mutuality and is not enforceable. To constitute an agreement there must be a proposition by the one party and acceptance by the other; and, when the parties are not together, the acceptance must be manifested by some appropriate act. At most the printed order was a unilateral contract, or a mere offer, which could be withdrawn by the defendant. In so far as the defendant's order had been executed up to June 23, 1909, the defendant was liable; but, in so far as the order was executory and unfulfilled at the time of the notification to suspend the publication of the advertisement, the liability of the defendant to pay for future publications ceased."

If that case was correctly decided, then there can be no doubt but that the trial justice erroneously awarded a judgment for insertions after the time when the defendant notified the plaintiff to discontinue the publication.

[3] "Offer and Acceptance, and Some of the Resulting Legal Relations," Corbin, 26 Yale Law Journal, 169.

The plaintiff does not attempt to distinguish that case in any way, but he relies upon the opinion of the Court of Appeals in the case of Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39, which was decided after the case of White v. Allen Kingston Motor Car Co., supra. The Court of Appeals in that case stated:

"Even when the obligation of a unilateral promise is suspended for want of mutuality at its inception, still, upon performance by the promisee, a consideration arises 'which relates back to the making of the promise, and it becomes obligatory.' * * * A contract includes, not only what the parties said, but also what is necessarily to be implied from what they said. * * * 'What is implied in an express contract is as much a part of it as what is expressed' * * * for 'the law is a silent factor in every contract.'"

These statements in the opinion of the Court of Appeals obviously do not lay down any new rule of law, but are statements of the well-established rules which that court found applicable to the case before them. They are not, however, applicable to the case before us. In this case the defendant in the written agreement merely authorizes the plaintiff to publish his advertisement for one year. The defendant at that time did not expressly nor impliedly in any form agree to do anything. It was evidently a mere offer or unilateral promise on the part of the defendant, which could ripen into a mutual contract only when the offer was accepted and the acceptance evidenced either by an express promise to perform or by performance. Neither of these elements exist in the present case. * * *

In this case, as well as in the case of White v. Allen Kingston Co., supra, the offer was merely to pay a certain sum per insertion, which was authorized for one year, and in such cases the past performance implied only an acceptance of the offer to pay according to the insertions. It follows that the plaintiff is entitled to no recovery for insertions made after the defendants had notified it to cease publication.

Judgment should therefore be reversed. * * *

An apparent exception to the rule that an offer may be revoked arises in the case of options. If (1) A. makes an offer to B., and (2) offers to hold the offer open for a specified time if B. will pay A. a specified sum, in this case offer (1) cannot be revoked, for offer (2) has been accepted, thus creating a contract. If A. attempted to revoke the first offer, A. would break his contract with B. The next case contains a discussion of option contracts, although, in this particular case, there was no attempt even to revoke.

IDE v. LEISER.

(Supreme Court of Montana, 1890. 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.)

The plaintiff pleads the following instrument in writing: "For and in consideration of one dollar ($1.00) to me in hand paid, I hereby agree to give Frank L. Ide the sole right and option to purchase from me at any time within ten days from the date of this instrument the following described property, to-wit (describing the property). I furthermore agree to furnish a good and sufficient deed of conveyance of

said property, and of the whole thereof. The price of said property to be one thousand dollars ($1,000). Helena, Montana, September 24, 1889. J. J. Leiser." "I hereby extend the above option for a period of ten days from this date. Helena, Oct. 3, 1889. J. J. Leiser." The complaint further sets forth that on October 11, 1889, the plaintiff tendered defendant $1,000, and demanded a conveyance of the property. That defendant refused to give the conveyance and still refuses. That plaintiff is still willing to pay said $1,000. Plaintiff demands judgment that defendant make conveyance to him of the real estate described. The defendant demurred to the complaint on the ground that it did not set forth facts sufficient to constitute a cause of action. Demurrer was sustained, and judgment entered for the defendant. Plaintiff appeals from the judgment. The question raised by the record, and discussed by counsel, is whether the instrument in writing pleaded, and the tender of $1,000 by plaintiff to defendant, October 11, 1889, are sufficient to entitle plaintiff to a conveyance as demanded. No tender of money or demand for a deed was made during the 10 days limited in the original instrument; but were made during the period defined in the extension indorsed on the instrument.

DE WITT, J. (after stating the facts as above). For convenience of terms we will designate the original document pleaded as the first instrument, and the option therein as the first option, and the indorsement extending the time as the second instrument and option. We will not discuss the validity of the first instrument as a foundation for an action for specific performance. We will assume, for the purpose of this decison, that it is good. The option assumed to be granted therein was not exercised within the time limited, and expired October 4. The consideration for this option was one dollar, whether paid by Ide to Leiser, or still a debt owing from Ide to Leiser, is immaterial. That consideration was exhausted by the expiration of the option on October 4. Ide paid his money, the one dollar, and received his goods, the option. Leiser took the one dollar, and delivered a consideration therefor, viz., the option. The transaction was complete, and the terms performed by each party to the agreement.

We come to the second instrument and option. No consideration is named therein, specifically or by reference. The consideration for the first option cannot do service for the second. That consideration was functus officio in the first instrument. A consideration determined by the parties to be the consideration for the sale of one article on one day, and so declared in writing, cannot, in the face of such declaration, be construed by the court as a consideration for the sale of another article on another day. The first ten days' option was a thing of value, and paid for as such. The second was another separate valuable article. Was there any consideration for its sale? We believe the same definitions and distinctions will aid this discussion. There may be (1) a sale of lands; (2) an agreement to sell lands; and (3) what is popularly called an "option." The first is the actual transfer of title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur by which the contemplated sale never takes place. The third, an option, originally is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing)

agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, in præsenti, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy. That which the second party receives is of value, and in times of rapid inflations of prices, perhaps of great value.

A contract must be supported by a consideration, whether it be the actual sale of lands, an agreement to sell lands, or the actual sale of the right to demand the conveyance of lands. A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract; that is to say, the lands are not sold; the contract is not executed as to them; but the option is as completely sold and transferred in præsenti as a piece of personal property instantly delivered on payment of the price. Now this option, this article of value and of commerce, must have a consideration to support its sale. As it is distinct from a sale of lands, or an agreement to sell lands, so its consideration must be distinct; although, if a sale of the lands afterwards follows the option, the consideration for the option may be agreed to be applied, and often is, a part payment on the price of the land. But there must be some consideration upon which the finger may be placed, and of which it may be said, "This was given by the proposed vendee to the proposed vendor of the lands as the price for the option, or privilege to purchase."

Examine the two options granted in the cases before us. L. sold I. an option for ten days from September 24th for one dollar. He then gives an option for another ten days from October 3d, for what? For nothing. L. transfers this option, this incorporeal valuable something, for nothing. The transfer of the option was nudum pactum, and void. But, the point just discussed being conceded, appellant still contends that this second instrument or option was a continuing offer to sell, at a given price, and was accepted by respondent before retracted, and that such acceptance, evidenced by, and accompanied with, the tender of the price, and demand for a deed, constitute an agreement to sell land, which may be enforced in equity. We leave behind now our views of options, and consideration therefor, and meet a wholly different proposition.

Reading the two instruments together we find that on October 3d L. extended to I. an offer to sell his lands at the price of $1,000. There was no consideration for the offer, and it could have been nullified by L. at any time by withdrawal. But it was accepted by I., while outstanding, the price tendered, and deed demanded. It must be plain from the previous discussion that we do not hold that the offer, when made, or at any moment before acceptance, was a sale of lands, an agreement to sell lands, or an option. But upon acceptance and tender was not a contract completed? If one person offers to another to sell his property for a named price, and while the offer is unretracted

the other accepts, tenders the money, and demands the property, that is a sale. The proposition is elementary. The property belongs to the vendee, and the money to the vendor. Such is precisely the situation of the parties herein. L. offered to sell for $1,000, I. accepted, tendered the price, and demanded the property. Every element of a contract was present, parties, subject-matter, consideration, meeting of the minds, and mutuality. And as to the matter of mutuality we are now beyond the defective option. We have simply an offer at a price, acceptance, payment or tender, and demand. That this was a valid contract we cannot for a moment doubt.

In discussing a transaction of this nature, in Gordon v. Darnell, 5 Colo. 304, Beck, C. J., in one of his clear opinions, says: "Its legal effect is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase money, or performance of its conditions, whatever they may be, within the time stated, and before the seller withdraws the offer to sell." Lurton, J., in Bradford v. Foster, 87 Tenn. 8, 9 S. W. 195, says: "Before acceptance, such an agreement can be regarded only as an offer in writing to sell upon specified terms the lands referred to. Such an offer, if based upon no consideration, could be withdrawn by the seller at any time before acceptance. It is the acceptance while outstanding which gives an option, not given upon a consideration, vitality." In Railroad Co. v. Bartlett, 3 Cush. (Mass.) 227, we find the following, by Fletcher, J.: "In the present case, though the writing signed by the defendants was but an offer, and an offer that might be revoked, yet while it remained in force and unrevoked it was a continuing offer during the time limited for acceptance, and during the whole of that time it was an offer every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract." This case readily distinguishes Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681, which may seem to hold a contrary doctrine. It also repudiates Cooke v. Oxley, 3 Term R. 653, and claims that the English case is said to be inaccurately reported, and, in any event, entirely disregarded in the later decisions.

We cannot but conclude that the transaction in the case at bar constituted a valid contract, upon which specific performance may be had. * * * The judgment of the district court is reversed, and the cause is remanded, with directions to that court to overrule the demurrer.

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(2) As regards the nature of the language or the conduct of the offeror, the question whether it amounts to an indication of an intention to revoke is the same kind of question raised in determining whether certain words or conduct amount to an offer. Has the offeror clearly manifested his desire to put an end to the outstanding offer?

(3) The intention to revoke must be communicated. It would not be just to permit an offeror to terminate an offer merely by thinking that he had done so. But what is meant by communication? Would the act of mailing a letter be deemed a revocation? If not, would the receipt of the letter by the offeree be deemed a communication, even though the offeree lost the letter before he had learned its contents? Suppose the offeree were away on a

business trip and the letter reached the office of the offeree, would this be a communication? It is not altogether clear just what the law actually means by requiring a communication. Certainly the law cannot require that the offeree be made actually conscious of the intention of the offeror to revoke. After an offeree has received a letter and has it in his possession, a communication has been made, even though the letter subsequently be lost or thrown away before it was read. But where the letter reaches the offeree's place of business, he being away, the case is not so clear. Certainly, from a practical standpoint, an offeror who desires to revoke should use every effort actually to communicate the intelligence to the mind of the offeree, and thus obviate the possibility of a future law suit.

SHERWIN v. NATIONAL CASH REGISTER CO.

(Court of Appeals of Colorado, 1894. 5 Colo. App. 162, 38 Pac. 392.)

Action by the National Cash Register Company against John J. Sherwin for goods sold and delivered. Judgment for plaintiff, and defendant appeals.

THOMSON, J. This is a suit by the appellee against the appellant to recover the value of a cash register alleged to have been sold and delivered by the plaintiff to the defendant, at his instance and request.

The following agreed statement was filed in the cause: "* * * That on the 8th day of January, 1890, one Walter McD. Cool visited the store of defendant, in Idaho Springs, Colo., and defendant signed and gave him an order for a cash register. * * * That on the 9th day of January, 1890, the said defendant wrote and signed a letter countermanding or withdrawing his said order, and said letter was on said day sealed in an envelope having a return card printed on the outside thereof, and directed to the National Cash Register Co., Dayton, Ohio, and the postage thereon duly prepaid, and then deposited in the post office at Idaho Springs, Colorado, in time for the 3:30 p. m. mail of said day. * * * That on the 16th day of January, 1890, the plaintiff shipped by freight to defendant a cash register of the kind, make, and description mentioned in the writing referred to in paragraph three thereof, and the same arrived at Idaho Springs, Colo., on or before two weeks from the date of shipment, and defendant refused to take or receive the same from the railroad company. * * *" No further evidence was offered on either side, and the court rendered judgment against the defendant, upon the agreed statement, for $175. The defendant appealed.

The order given for the register was simply an offer or proposal which required the acceptance of the plaintiff to constitute a contract. Until such acceptance there was no meeting of minds, or mutuality, in respect to the terms proposed or the subject-matter of the contract. A proposal, while it remains unaccepted, is of no binding force, and is completely under the control of the person who makes it. At any time before acceptance, he may withdraw it, and, when so withdrawn, it is a nullity; but, to render the withdrawal effective, it must be brought to the knowledge of the other party before acceptance. * * * We agree with counsel that the notice of the withdrawal of an offer

must be actual, and must be received before the offer is accepted; but we think the admissions concerning the posting of the defendant's letter are at least prima facie evidence of actual notice. The letter was deposited in the post office on January 9th, in time for the out-going mail, and the order was given on the 8th, after the departure of the mail, so that the two probably went out together, and were received at the same time. At all events, the letter was posted in time to have reached the plaintiff one or two days before the date of its letter of acceptance. The presumption is that the letter of withdrawal reached its destination within the time usually required for the transmission of letters from the defendant's to the plaintiff's post office. The presumption that the letter was received in due time is subject to rebuttal by evidence that it was not in fact received. No attempt at rebuttal was made; and, in the absence of rebutting evidence, the presumption became, for the purposes of the case, conclusive. * * *

In this case the presumption of the receipt of the letter is strengthened by the fact that it was never returned to the defendant, either in obedience to the direction of the return card on the envelope, or through the dead-letter office. There was ample time for its return between the date of its posting and the date of the agreed statement, and the presumption also is that it would have been returned if it had not been delivered. Upon the admitted facts, the judgment should have been for the defendant. Having been given otherwise, it must be reversed.

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(4) Suppose A. offers to sell land to B. and to keep the offer open ten days. Two days after the making of the offer, A. deeds the land to C. D., a bystander, knowing of the prior offer to B., goes and tells B_1 of the sale to C. Does the knowledge thus obtained by B. of the sale to C. constitute a communication of the revocation of A.'s offer? Does the knowledge thus obtained by B. from D. amount to a communication? Could B., by manifesting his intention to accept, create a contract between himself and A.? The courts hold that the offer is revoked, although this result is open to criticism. It would be easier to support this result if the law merely required notice to the offeree of the intention to revoke, instead of apparently requiring communication, because the word "notice" does not so clearly connote that the information should be started on its way to the offeree by the offeror, as does the word "communicate."

(c) REJECTION BY THE OFFEREE

(1) What is the nature of the subject-matter of a rejection? (2) When will the intention to reject take effect? The subject-matter of a rejection must reveal an unequivocal intention of the offeree of refusing the offer. Language or conduct which shows that he does not care to enter into that kind of bargain is a rejection. But this does not mean that any further discussion between offeror and offeree concerning the proposed transaction will operate as a rejection. However, an offeree should realize strongly that a mani-

festation of a present unwillingness to close the deal coupled with any discussion looking to a modification of the terms of the offer is very likely to be regarded as a rejection. If an offer has been made, and the offeree is really interested, and if he fears that it is likely to be withdrawn at any instant, further discussion stimulated by him probably will be a rejection. As a matter of practical business, when a proposed transaction is being discussed, the probabilities are that there are numerous offers, numerous rejections, and counter offers. It is very difficult to ascertain, out of a lengthy period of negotiation, which of the parties made the final offer, if one was made, because many of them have been rejected during the course of the discussion. A counter proposal is a rejection; so, also, is an attempted acceptance, varying from the terms of the offer.

When does an intention manifested by the offeree take effect? When the evidence of the intention to reject is sent by mail, is the offer rejected at the time when the letter is deposited in the mails, or at the time when the letter is received? This is a difficult question, and it is not certain what the law is. If the letter of rejection is like an acceptance, the intention to reject would take effect when the letter was mailed. On the contrary, if it is like a revocation from the offeror, then the letter must be received by the offeror before the offer is rejected. The case could arise in the following way: If the offeree deposits in the mails a letter of rejection at 10 o'clock in the morning, and at 11 o'clock telegraphs an acceptance, is there a contract? There would be, if the rejection did not become operative, as such, until received. In this case, justice would seem to call for the holding that there was a contract, for the contrary result would enable the offeree to go back on his bargain, under circumstances where the offeror, who, having actually received the acceptance before he learned of the rejection, would feel justified in assuming that there was a contract.

MINNEAPOLIS & ST. L. RY. v. COLUMBUS ROLLING MILL.

(Supreme Court of the United States. 1886. 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376.)

This was an action by a railroad corporation established at Minneapolis in the state of Minnesota against a manufacturing corporation established at Columbus in the state of Ohio. The petition alleged that on December 19, 1879, the parties made a contract by which the plaintiff agreed to buy of the defendant and the defendant sold to the plaintiff, two thousand tons of iron rails of the weight of fifty pounds per yard, at the price of fifty-four dollars per ton gross, to be delivered free on board cars at the defendant's rolling mill in the month of March, 1880, and to be paid for by the plaintiff in cash when so delivered. The answer denied the making of the contract. It was admitted at the trial that the following letters and telegrams were sent at their dates, and were received in due course, by the parties, through their agents:

December 5, 1879. Letter from plaintiff to defendant: "Please quote me prices for 500 to 3000 tons 50 lb. steel rails, and for 2000 to 5000 tons 50 lb. iron rails, March 1880 delivery."

December 8, 1879. Letter from defendant to plaintiff: "Your favor of the 5th inst. at hand. We do not make steel rails. For iron rails, we will sell 2000 to 5000 tons of 50 lb. rails for fifty-four ($54.00) dollars per gross ton for spot cash, f. o. b. cars at our mill, March delivery. If our offer is accepted, shall expect to be notified of same prior to Dec. 20th, 1879."

December 16, 1879. Telegram from plaintiff to defendant: "Please enter our order for twelve hundred tons rails, March delivery, as per your favor of the eighth. Please reply."

December 16, 1879. Letter from plaintiff to defendant: "Yours of the 8th came duly to hand. I telegraphed you today to enter our order for twelve hundred (1200) tons 50 lb. iron rails for next March delivery, at fifty-four dollars ($54.00) f. o. b. cars at your mill. Please send contract. * * *"

December 18, 1879. Telegram from defendant to plaintiff, received same day: "We cannot book your order at present at that price."

December 19, 1879. Telegram from plaintiff to defendant: "Please enter an order for two thousand tons rails, as per your letter of the eighth. Please forward written contract. Reply."

December 22, 1879. Telegram from plaintiff to defendant: "Did you enter my order for two thousand tons rails, as per my telegram of December nineteenth? Answer."

After repeated similar inquiries by the plaintiff, the defendant, on January 19, 1880, denied the existence of any contract between the parties.

The jury returned a verdict for the defendant, under instructions which need not be particularly stated; and the plaintiff alleged exceptions, and sued out this writ of error.

GRAY, J. The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. * * * If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made. * * *

The defendant, by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his

election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff, on December 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention in both telegram and letter, of the date and the terms of the defendant's original order, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant. * * *

Judgment affirmed.

SECTION 4.—ACCEPTANCE—TIME OF TAKING EFFECT

LUCAS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Iowa, 1906. 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. [N. S.] 1016.)

Action for damages occasioned by delay in transmitting a telegram. Plaintiff sought to recover profits he would have made in an exchange of real estate but for the negligence of the defendant in failing promptly to transmit a telegram. The telegram in question was an attempted acceptance of an offer by mail to make a certain trade in real estate, the offeror saying, "I will have to know at once." The telegram was handed to the telegraph company on the morning following the evening of the receipt of the offer by mail, and, through the negligence of the company's servants, was not delivered to the offeror until about six p. m. of that day. The defendant company asserted that there was no loss to the plaintiff, because plaintiff's acceptance reached the offeror in time to complete the contract, and because, further, contract was complete upon the delivery of the message of acceptance to the telegraph company. Judgment below for plaintiff.

LADD, J. * * * Having sent the proposition by mail he impliedly authorized its acceptance through the same agency. Such implication arises (1) when the post is used to make the offer and no other mode is suggested, and (2) when the circumstances are such that it must have been within the contemplation of the parties that the post would be used in making the answer. * * * The contract is complete in such a case when the letter containing the acceptance is properly addressed and deposited in the United States mails. * * * This is on the ground that the offeror, by depositing his letter in the post office, selects a common agency through which to conduct the negotiations, and the delivery of the letter to it is in effect a delivery to the offeror. Thereafter the acceptor has no right to the letter and cannot withdraw it from the mails. Even if he should succeed in doing so the

withdrawal will not invalidate the contract previously entered into. But plaintiff did not adopt this course. On the contrary he chose to indicate his acceptance by transmitting a telegram to Sas by the defendant company. Sas had done nothing to indicate his willingness to adopt such agency and the defendant in undertaking to transmit the message was acting solely as the agent of plaintiff. The latter might have withdrawn the message or stopped its delivery at any time before it actually reached Sas. It is manifest that handing the message to his own agent was not notice to the sendee of the telegram. The most formal declaration of an intention of acceptance of an offer to a third person will not constitute a contract. A written letter or telegram, like an oral acceptance, must be communicated to the party who has made the offer or to some one expressly or impliedly authorized to receive it, and this rule is not complied with by delivering it to the writer's own agent or messenger even with direction to deliver to the offeror. * * *

The plaintiff then did not accept the offer of Sas until the telegram was received by the latter, a few minutes after 6 o'clock p. m. of the day after the letter had been received and the question arises whether this was "at once" within the meaning of the offer which stated that another deal was pending. Like "forthwith" and "immediately," "at once" does not mean instantaneously but requires action to be taken within a reasonable time. In view of the particular circumstances of the case, or, as said in Warder, Bushnell & Glessner Co. v. Horne, 110 Iowa, 285, 81 N. W. 591, it is synonymous with the words mentioned and "as soon as possible," and is "usually construed to mean within such reasonable time as shall be required under all the circumstances for doing the particular thing." It is doubtful whether the same vigilance should be exacted in the acceptance of an offer to exchange or purchase real estate as in transactions relating to the transfer of chattel property. * * * The circumstances of each case necessarily have an important bearing. There was no evidence of the time a letter, if promptly mailed, might have reached Sas. He has indicated in his letter that he was contemplating another deal, and we think ordinary minds fairly differ as to whether, in these circumstances, an acceptance 23 or 24 hours after the letter had been received was in time to bind the party making the offer, and the issue was for the jury to determine. * * *

Reversed.

FARMERS' PRODUCE CO. v. McALESTER STORAGE & COMMISSION CO.

(Supreme Court of Oklahoma, 1915. 48 Okl. 488, 150 Pac. 483, L. R. A. 1916A, 1297.)

ROBBERTS, C. * * * The law respecting the making of contracts by correspondence is that the contract is completed when the proposal made by one side is communicated by letter or telegram, and the other party wires his acceptance, or deposits in the post office his letter of acceptance. The moment the telegram is delivered, or the letter mailed in the post office, and not until then, is the contract completed and the parties concluded and bound.

But plaintiff in error contends that the letter of acceptance, and instructions to ship, was not binding upon it, nor did it close the contract, for the reason that it was not sent by the same carrier or agent through

which the other correspondence had been conveyed. In support of that contention, counsel call our attention to the case of Lucas v. Western U. Tel. Co., 131 Iowa, 669, 109 N. W. 191, 6 L. R. A. (N. S.) 1016. On examination of that case, we must admit that it seems to uphold the doctrine contended for by counsel; but, on examination of other authorities on the subject, it appears to us that the case cited stands practically alone. After a careful consideration of the few authorities we have been able to find on the subject, we are of the opinion that the reasonable and best rule should be, where there is no direction as to the mode of communicating the acceptance it may be accomplished through the post office, unless it can be fairly and reasonably inferred from the offer, or other prior communications, that some other means is expected, and that would be a question of fact to be determined by the jury or the trial court.

As stated by Lord Herschell, in Henthorn v. Fraser, [1892] 2 Chan. 27: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

And as stated by Justice Kay in the same case, supra: "Posting an acceptance of an offer may be sufficient, where it can be fairly inferred from the circumstances of the case that the acceptance might be sent by post."

In the instant case one party lived and was doing business in Oklahoma, the other in the state of Wisconsin. The only matter to be considered was a question of time to fill contract, when no time was specified in the offer. We are of opinion that both parties contemplated that the letter sent by post was a means by which an acceptance might be communicated, and that was a fact upon which the trial court passed and should not be disturbed by this court. * * *

MACLAY v. HARVEY.

(Supreme Court of Illinois, 1876. 90 Ill. 525, 32 Am. Rep. 35.)

SCHOLFIELD, J. Appellant brought assumpsit against appellee, in the court below, on an alleged contract whereby the latter employed the former to take charge of the millinery department of his store in Monmouth, in this State, for the season commencing in April and ending in July, in the year 1876, and to pay her therefor $15 per week.

The judgment was in favor of appellee, and appellant now assigns numerous errors as grounds for its reversal.

In our opinion, the case may be properly disposed of by the consideration of a single question. Appellant's right of recovery is based entirely upon an alleged special contract, and unless there was such a contract, the judgment below is right, however erroneous may have been the rulings under which it was obtained. * * *

[After some preliminary correspondence] appellee wrote appellant:

"Monmouth, Ill., March 21, 1876.

"Miss L. Maclay, Peoria, Ill.: * * * I will give you $15 per week, and pay your fare from Chicago to Monmouth, and pay you the above wages for your actual time here in the house at that rate per season. * * * You will confer a favor by giving me your answer by return mail. Yours, John Harvey."

Appellant says she received this in the afternoon, and replied the next day by postal card, addressed to appellee at Monmouth, as follows:

"Peoria, March 23.

"Mr. Harvey: Yours was promptly received, and I will go up to Chicago next week, and when my services are required you will let me know.

"Very respectfully, L. Maclay."

Appellant did not place this in the post office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office.

The postmark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until the 25th of March. * * *

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on the 25th of March. * * * It is clear here that the nature of the business demanded a prompt answer, and the words, "You will confer a favor by giving me your answer by return mail," do in effect stipulate for an answer by return mail. * * *

The evidence shows that there were two daily mails between Peoria and Monmouth, * * * and it did not require more than one day's time between the points. Appellee's letter to appellant bears date March 21st. * * * She received appellee's letter on the evening of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or at the farthest, on the morning of the 24th, but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d to have him mail it. * * * The boy was her agent, not that of appellee, and his negligence * * * was her negligence.

Judgment affirmed.

LEWIS v. BROWNING.

(Supreme Judicial Court of Massachusetts, 1881. 130 Mass. 173.)

GRAY, C. J. In M'Culloch v. Eagle Ins. Co., 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in Langdell on Contracts (2d Ed.) 989–996. In England, New York and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post office duly addressed. * * *

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. * * * And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement

for a new lease, he says: "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'yes' or 'no.' If 'no,' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'no.'" Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the 20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a dispatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception to the ruling at the trial.

Exceptions overruled.

FIRST NAT. BANK v. WATKINS.

(Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 385, 28 N. E. 275.)

Action by the First National Bank against Eugene C. Watkins on a promissory note. Direction of verdict for plaintiff. Defendant excepts.

The report was as follows: "This is an action of contract. At the trial the plaintiff proved the execution of the note, and the indorsements thereon, and rested. Thereupon the defendant offered to prove that the note was made to one H. M. Benedict by the defendant, and at the same time a mortgage of personal property was given to secure the note. The note was made payable at the plaintiff bank. Benedict indorsed the note in the bank, and made over his interest in the mortgage to the plaintiff, and thereupon both became the property of the plaintiff. The defendant afterwards sold his equity in the mortgaged property to a third party, and the plaintiff then agreed with him that it would look to the mortgage property alone for payment of the note. The plaintiff afterwards extended the time for the payment of the note, as appears on the back of the same, without the knowledge or request of the defendant. On the 4th day of April, 1890, the sum of $178.15 was paid, and indorsed upon the note. The defendant did not pay this sum of money, but claimed it was the amount realized from a foreclosure and sale of the mortgaged property, which had greatly depreciated in value since the maturity of the note, and which at the time of such maturity was of more than sufficient value to pay the note. Thereupon, at the request of plaintiff's counsel, the court ruled that if the defendant proved what was stated in his opening it would not amount to a defense to the plaintiff's claim, and ordered a verdict for the plaintiff for the full amount, and the case is now reported. If said ruling was right the verdict is to stand; otherwise to be set aside, and a new trial ordered."

KNOWLTON, J. * * * The contention chiefly relied on by the plaintiff is that such an agreement is not available in defense to a suit on the note, although if broken it would furnish a good foundation for an action for damages. We do not assent to this proposition. An agreement "to look to the mortgaged property alone for the payment of the note" would be, in effect, an agreement to discharge the defendant from all liability upon it, which, if made upon a valuable consideration, would be a good defense to a suit for payment of it. Although

a new and independent contract, it would be unreasonable to permit a plaintiff, who had made such an agreement to collect his note of the maker, and to compel the maker to seek his remedy by a suit to recover back from the payee as damages the sum which was paid. The tendency of the modern cases is to allow such an agreement to be shown in defense, to avoid circuity of action. * * * If there was an agreement purporting to be made in reference to the defendant's sale of the equity of redemption in the mortgaged property in the form of an offer that the defendant might, if he chose, refrain from paying the note, and from taking measures to secure payment of it out of the proceeds of the mortgaged property, and that the plaintiff would look to the property alone for the payment of it; and the defendant, relying upon the offer, did refrain from making an effort to have the property applied to the payment of the note when it became due, and thereby suffered detriment—there would be a sufficient consideration for the agreement. It would be an ordinary case of a unilateral contract, growing out of an offer of one party to do something if the other will do or refrain from doing something else. If the party to whom such an offer is made acts upon it in the manner contemplated, to his own disadvantage, such action makes the contract complete, and notice of the acceptance of the offer before the action is unnecessary. * * *

The entry should be, verdict set aside.

BISHOP v. EATON.

(Supreme Judicial Court of Massachusetts, 1894. 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437.)

KNOWLTON, J. The first question in this case is whether the contract proved by the plaintiff is an original and independent contract or a guaranty. The judge found that the plaintiff signed the note relying upon the letter, "and looked to the defendant, solely, for reimbursement, if called upon to pay the note." The promise contained in the letter was in these words: "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid." On a reasonable interpretation of this promise, the plaintiff was authorized to adopt the first alternative, and to let Harry have the money in such a way that a liability of Harry to him would be created, and to look to the defendant for payment if Harry failed to pay the debt at maturity; or he might adopt the second alternative, and assist him to get money from some one else in such a way as to create a debt from Harry to the person furnishing the money, and, if Harry failed to pay, to look to the defendant to relieve him from the liability. The words fairly imply that Harry was to be primarily liable for the debt, either to the plaintiff or such other person as should furnish the money, and that the defendant was to guaranty the payment of it. We are therefore of opinion that, if the plaintiff relied solely upon the defendant, he was authorized by the letter to rely upon him only as a guarantor.

The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guaranty which the plaintiff might or might not accept. Without acceptance of it, there was no contract, because the offer was conditional, and there was no consideration for the promise. But this was not a proposition which

was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer, and furnishes the consideration. Ordinarily, there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But, if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if, within a reasonable time afterwards, he notifies the promisor.

In accordance with these principles, it has been held, in cases like the present, where the guarantor would not know of himself from the nature of the transaction whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. * * * In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done, in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled as a matter of law that, upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it. When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject-matter, and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail, informing him of what had been done. How far such considerations are applicable to

the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider. The plaintiff was not called upon under his contract to attempt to collect the money from the maker of the note, and it is no defense that he did not promptly notify the defendant of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. * * *

We find one error in the rulings which requires us to grant a new trial. It appears from the bill of exceptions that, when the note became due, the time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from his liability, unless he subsequently assented to the extension and ratified it. * * * The court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff as a matter of law on the facts reported. * * *

Exceptions sustained.

SECTION 5.—NATURE OF ACTS OR LANGUAGE ESSENTIAL TO CONSTITUTE AN ACCEPTANCE

ELKINS v. BOARD OF COM'RS OF WYANDOTTE COUNTY (ZIMMER, Intervener).

(Supreme Court of Kansas, 1914. 91 Kan. 518, 138 Pac. 578, 51 L. R. A. [N. S.] 638, Ann. Cas. 1915D, 257.)

Action by J. W. Elkins against the Board of Commissioners of Wyandotte County, in which Henry T. Zimmer intervenes. From judgment for Zimmer, plaintiff appeals.

MASON, J. The board of county commissioners of Wyandotte county offered a reward for the "arrest and conviction" of the person who had committed a murder. J. W. Elkins brought action against the county for the amount, asserting that he had met the conditions. H. T. Zimmer set up a conflicting claim, which he sought to enforce by interpleading. The county admitted its liability to one or the other of the claimants. Upon a trial the court sustained a demurrer to the evidence of Elkins and rendered judgment for Zimmer, which was reversed on appeal. * * * Upon a new trial judgment was again rendered in favor of Zimmer, and Elkins again appeals.

There was evidence tending to establish these facts: Elkins, learning of the offer of the reward, began an investigation of the case. By talking with one James McMahon he induced him to produce and turn over some articles, including a gun, which were hidden in a cornfield. He told the sheriff of this, stating that McMahon was the guilty person. The sheriff directed the undersheriff and Zimmer to send and get him. McMahon was arrested, and on being confronted with the articles found in the field, confessed. Elkins was at the time a "special and non-pay" deputy sheriff. The description of Elkins as a "special and non-pay" deputy seems fairly to imply that, while he held a commission as a deputy sheriff, his activities in that connection were limited to serving such papers as might be delivered to him, or performing such other acts as might be specifically directed. Clearly he was under no obligation to devote time to the investigation of criminal

offenses. This was evidently the view of the trial court, for the mere fact of Elkins' official character was not held to prevent his recovering the reward.

A reversal is asked because of an instruction to the effect that it was the duty of any one seeking to earn the reward to do all he legally had a right to do towards the arrest of the murderer; that, if Elkins was a deputy sheriff, he had a legal right to arrest McMahon upon discovering him to be the murderer; and that if, having the right and the opportunity to make such arrest, he voluntarily chose not to do so, and Zimmer, acting for his own benefit and for himself, arrested McMahon, then Zimmer was entitled to the reward. Public policy forbids an officer to claim a reward for merely doing his duty, but that is the extent to which his official character affects the matter. * * * If Elkins is entitled to the reward, it is because of voluntary investigations, not required by his office, which resulted in discoveries leading to the arrest and conviction of McMahon. His official character can hardly enter into the matter, because as a private citizen he had authority to make the arrest. * * * If in order to gain the reward he was required to do all he legally could toward the arrest, his omission to make the arrest would be equally fatal to his recovery, whether he was an officer or a private citizen.

In some circumstances the person actually making an arrest might obviously be entitled to the reward—for instance, where a known and unconcealed murderer was at large, and the difficulty in enforcing the law lay in taking him into custody. The present case does not appear to be one to which that rule applies. The jury may have found that the only real difficulty in the affair was to ascertain by whom the murder was committed and by what evidence this could be proved, that Elkins by his own efforts discovered the facts that made it known that McMahon was the murderer, that he reported these facts to the sheriff, and that as the natural result of this report the arrest was made by Zimmer. Such findings in the opinion of this court would require a verdict for Elkins. But under the instruction complained of such a verdict was forbidden if the jury also found that Elkins could have himself arrested McMahon, but omitted to do so. We think the instruction put too much stress upon the question as to who made the arrest, and unduly limited the effect of another instruction, in the following words, which correctly stated the principle by which the matter in dispute should be determined: "A literal compliance with the terms of the reward is not required, neither need there be an actual physical arrest by a claimant; but if you find from a preponderance of the evidence that one of the said parties, plaintiff or intervener, acting with a knowledge that said reward had been offered and with a view to obtain it, performed substantially the terms of said offer of reward, and discovered evidence and performed services which were the primary, proximate, procuring, and predominant cause of the arrest and conviction of one James McMahon for the crime in question, you will find for that party." * * *

The judgment is reversed, and a new trial ordered. All the Justices concurring.

ETHEREDGE v. BARKLEY.

(Supreme Court of Florida, 1889. 25 Fla. 814, 6 South. 861.)

MITCHELL, J. The appellant, complainant below, foreclosed a mortgage in the circuit court of Jackson county against the appellee (defendant below). Decree was rendered November 26, 1883, for $267.30. Subsequently the following agreement was entered into:

"January 29, 1886.

"In consideration of an extension granted me until March 1, 1886, I do hereby agree that a certain decree of foreclosure obtained against me in the circuit court of Jackson county, Florida, by James B. Slade and Charles A. Etheredge, copartners under the firm name and style of Slade & Etheredge, bear interest at the rate of twelve per cent. per annum, instead of the legal rate, and I promise hereby, for the consideration aforesaid, to pay said rate of interest on said decree from date of same. It is understood that if I fail to make payment of said decree by March 1, 1886, but shall instead give Slade & Etheredge such further security as they have before this proposed by letter to Liddon & Carter, my attorneys, then payment of said decree is not to be enforced before October 1, 1886. B. B. Barkley.

"Witness: Benj. S. Liddon."

The defendant failed to make payment by the first of March, 1886, and the plaintiff commenced suit upon the said agreement. * * *

The gravamen of the case is whether the defendant, Barkley, was, under the circumstances, liable to the plaintiff upon the agreement to pay him the increased rate of interest therein provided for.

Judge Story (1 Story, Cont. § 490) says: "In order to create a contract, it is essential that there should be a reciprocal assent to a certain and definite proposition. So long as any essential matters are left open for further consideration, the contract is not complete; and the minds of the parties must assent to the same thing, in the same sense. A mere offer not assented to constitutes no contract, for there must be not only a proposal, but an acceptance thereof. So long as a proposal is not acceded to, it is binding upon neither party, and may be retracted."

The intention of the defendant in signing the agreement is patent. It was for the purpose of procuring an extension of time in which to settle his indebtedness to Slade & Etheredge; but what can be gathered from the alleged agreement as to the intention of Slade & Etheredge? They did not sign the agreement, nor did they, by any act of theirs, show that they intended to assent to the terms of it. On the contrary, they plainly indicated that they did not feel bound thereby, and that they would not be controlled by the terms thereof.

Frank Philips was appointed master by the court to sell the mortgaged property, and, notwithstanding the agreement, he advertised the property for sale on the first Monday in February, 1886, just a few days subsequent to the date of the agreement. The defendant went to him and showed him the agreement, but he said that there had been different payments made on the decree directly to Slade & Etheredge; that he wanted his costs, and would sell the land if the defendant did not pay them. Before sale day Philips telegraphed and wrote to Slade & Etheredge (who at the time resided at Columbus, Ga.), asking for instructions, and they instructed him to sell if the costs were not paid by the defendant, and thereupon the defendant

paid the costs, as he says, to prevent the sale of his property, notwithstanding he had not agreed to do so.

And, now, can it be that this agreement was binding upon the defendant? Can it be that he is liable upon the same, and the other parties to the agreement are not bound by it, or only bound by it when they think it is to their interest to be so bound? This is not the law. To make such agreements binding upon one party, it must be binding upon all, and if a party bound violates the agreement it releases the other party. * * *

Judgment [for defendant] affirmed.

STEINBRENNER v. MINOT AUTO CO.

(Supreme Court of Montana, 1919. 56 Mont. 27, 180 Pac. 729.)

Action for damages for breach of contract. Defendant prepared and sent to plaintiff an agreement giving plaintiff the exclusive right to sell Willys-Overland automobiles in certain territory for a certain length of time. The agreement provided that it was to take effect from the date of signature by Stearns, defendant's general manager. Plaintiff signed and returned the agreement. Defendant acted as if the agreement were completed and so indicated by its correspondence, but the formal contract was never completed by the manager's signature. Defendant later broke its contract by giving said exclusive right to another dealer.

BRANTLY, C. J. * * * The contention is that the contract, though executed by both plaintiff and defendant, never became operative for the reason that it amounted to no more than an offer by the plaintiff to enter into a contract until it had been formally accepted by defendant, as therein provided; that is to say, until the acceptance had been evidenced "by the signature of L. C. Stearns." It is true, as counsel say, that in order to form a contract there must be an offer by one party and an unconditional acceptance of it by the other in accordance with its terms. * * * It is also settled law that the party making the offer may prescribe the mode by which acceptance must be made, if at all. * * * The plaintiff, however, did not prescribe any mode by which the defendant should accept. The mode was provided by the defendant itself and for its own benefit. It was at liberty, therefore, to waive acceptance by the mode prescribed and accept by any other mode. "Anything that will amount to a manifestation of a formal determination to accept communicated or put in the proper way to be communicated to the party making the offer will complete the contract. The principle governing the matter of acceptance is that there must be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act." 1 Beach on the Modern Law of Contracts, § 49. Where a contract is signed by one of the parties only, but is accepted or acted upon by the other party, it is just as binding as if signed by both parties. 9 Cyc. 300.

One, reading the portions of the correspondence between the parties quoted above, cannot entertain any doubt that from and after the time defendant received the triplicate copies of the contract for its acceptance, accompanied by the order of May 26th it regarded plaintiff as its authorized sub-dealer at Missoula, bound to it by all the obligations

which he had proposed to assume. By these letters, it communicated its acceptance as fully and conclusively as if Stearns had formally approved the contract and returned one of the triplicate copies of it to the plaintiff. It could not insist thereafter that there was no contract and avoid its obligations thus assumed. The plaintiff had the right to conclude * * * that he had secured the exclusive privilege for the following year of selling cars manufactured by the Willys-Overland Company of the models therein mentioned, in the designated territory and to supply the necessary parts. He could have no other understanding than that he was at liberty to contract for the sale of the cars which defendant had promised expressly to forward as soon as the manufacturer could furnish them. It was then beyond defendant's power to proceed upon the assumption that there was no contract because Stearns had omitted the formality of signing his name as the contract provided.

No question is made as to the authority of Smith to negotiate the contract in the first instance, subject only to approval by Stearns. Nor does counsel suggest that Stearns did not have authority to waive, for the defendant, the requirement of formal approval. The argument is wholly without merit.

The court submitted to the jury the question whether the defendant had accepted the contract. There was no controversy that Stearns wrote the letters quoted, nor that he had authority to do so. The question whether the contract had been accepted was therefore one arising upon uncontroverted evidence, which furnished the basis for but a single inference, viz., that the defendant had accepted the contract and become fully bound by it. The court should have so held and required the jury to find the amount of damages only. The error in this regard, however, was in favor of the defendant, resulting in no prejudice to it. * * *

The judgment [for plaintiff] and order affirmed.

COURTNEY SHOE CO. v. E. W. CURD & SON.

(Court of Appeals of Kentucky, 1911. 142 Ky. 219, 134 S. W. 146, 38 L. R. A. [N. S.] 903.)

Action by the Courtney Shoe Company against E. W. Curd & Son. Judgment on a verdict in favor of defendant on a counterclaim, and plaintiff appeals.

HOBSON, C. J. The Courtney Shoe Company is a wholesale house doing business in St. Louis, Mo. E. W. Curd & Son are merchants doing business at Cave City, Ky. On August 22, 1909, Curd & Son gave W. B. Yater, a traveling salesman of the Courtney Shoe Company, two orders, one for stock shoes amounting to $49.15, the other for sample shoes amounting to $1,772.35; both to be shipped as soon as it could. The order though made on the 22d, was dated the 21st, as the 22d was Sunday. It was mailed to the house by the drummer, reaching the house on August 23d; the house then wrote Curd & Son the following card: "St. Louis, Mo., August 23, 1909. Dear Sirs: Your order of 8/21—09 to our Mr. Yater is at hand and will receive our prompt and careful attention. Thanking you for same, and hoping to merit your future favors, we are Yours truly, The Courtney Shoe Co." On August 31st the Courtney Shoe Company wrote Curd & Son a letter in which they rejected the order for sample shoes amount-

ing to $1,772.35, telling them that the drummer had no authority to sell the samples, and that they could not accept the order. The stock shoes to the amount of $49.15 were shipped, and, Curd & Son refusing to pay for them, the Courtney Shoe Company brought this suit to recover the price. Curd & Son pleaded as a counterclaim the failure of the plaintiff to fill the order for the sample shoes, alleging that the order was accepted by the house, and that it had thereafter refused to fill the order to their damage in the sum of $1,083.20. Issue was joined on the counterclaim, and on a trial of the case before a jury there was a verdict for the defendant on the counterclaim, fixing the damages at $250. The court entered judgment on the verdict, and the plaintiff appeals. * * *

There were no technical words used in the card. There is no proof of any usage of trade by which the words used have acquired a peculiar sense distinct from their popular sense. The words are therefore to be understood in their plain, ordinary, and popular sense, and what they mean is a question for the court. In Manier v. Appling, 112 Ala. 663, 20 South. 978, the Supreme Court of Alabama had before it the question whether a card acknowledging the receipt of an order sent in by a drummer, and stating that "the same shall receive prompt attention," was an acceptance of the order. Holding that it was not, the court said: "The response, and the only response, the defendants made, was an acknowledgment by postal card of the receipt of the order or proposal, accompanied by the expression, 'the same shall have prompt attention'; and it is this response, it is insisted, constituted an acceptance of the proposal, converting the proposal and acceptance into a contract of sale. Unless these words, 'the same shall have prompt attention,' are deflected from their natural, ordinary meaning, they cannot be construed into an acceptance of the proposal of the plaintiff, converting the two into a concluded or completed contract. The operative words are 'attention' and 'prompt.' The latter, when read in connection with the terms of the proposal that the shoes should be shipped on the succeeding 15th of June, signifies, and was intended to signify, no more than that attention would be given in time to meet this term. If given within that time, it was as speedy as the nature or necessities of the transaction required. Promise to give the proposal attention was not a promise of acceptance; it was not an assent to it. It was no more than a courteous promise to give it consideration, and this we do not doubt is the sense in which it is generally, if not universally, employed in transactions of this character." * * *

In the case at bar, if the plaintiff's letter of August 23d, rejecting the order, had been mailed to defendant directly, and not to the drummer, it is hard to believe that this controversy would have arisen. It is true the card uses the words "our prompt and careful attention"; but the addition of the word "careful" adds nothing to the sense, nor do the concluding words of the card thanking Curd & Son for the order and hoping to merit future favors. These are simply the usual expressions of merchants on receiving an order, and throw little light on the question of its acceptance or rejection. The promise to give the order attention was simply a promise to do what the plaintiff did. They did give it attention and rejected it. * * *

In determining what is an acceptance where there is nothing in the conduct of the parties to show an acceptance in fact of the order,

we think it is a safe and sound rule that the words of the writing shall be taken in their plain, ordinary, and popular sense, and that they should not be strained to express a meaning they do not naturally convey.

We therefore conclude that there was no acceptance of the order for the sample shoes, and that the court should have instructed the jury peremptorily to find for the plaintiff the amount of their claims sued for.

Judgment reversed.

PORTER v. GOSSELL.

(Supreme Court of Arkansas, 1914. 112 Ark. 380, 166 S. W. 583.)

Action by F. L. Gossell against J. I. Porter. From a judgment for plaintiff, defendant appeals.

McCULLOCH, C. J. Appellee instituted this action below against appellant to recover damages resulting from appellant's failure or refusal to perform his alleged contract whereby he sold and undertook to deliver to appellee a car load of oats. The case was tried before the court sitting as a jury, and the only question we have to determine is whether the testimony, viewing it in the light most favorable to appellee, is sufficient to sustain the finding of the court. * * *

The first communication on the subject was that of appellee in a letter dated June 23, 1911, concerning the purchase of hay, and adding the following inquiry about purchase of a car load of oats: "Do you know of any one that has any oats which they might offer in car load lots in your section of the country? If so, I would be glad to have you write me what you think they can be bought at, or would like to have you give me their names, and I will write them concerning the same."

Appellant replied by letter on the same day as follows: "Yours of 23d to hand and noted. I have no oats on hand, but can quote you for immediate delivery, car load lots, bulk oats, at 42 cents, or sacked, 45 cents, f. o. b. tracks here. This is a close price, and, if you are in the market for any oats now, would be glad to hear from you right away so that we may be looking out for them."

That letter constituted a proposal to enter into a contract with respect to the sale of a car load of oats at the price and terms therein named. Appellee replied on June 26th as follows: "Your favor of the 23d at hand, and would say, if the oats you quote are No. 3 or better red oats, destination weights and grades guaranteed, I could use a car at 42 cents, f. o. b. your track, immediate shipment. I think the price you name is just a little bit high though, and in fact have been offered No. 2 oats from Oklahoma on the same basis. I wish you would please write or wire me immediately upon receipt of this if you will ship car as above."

It will be observed that this letter did not constitute an unconditional acceptance, and was not so regarded by appellee. He stated the condition that, if the oats quoted were of a certain grade and the weights were guaranteed at destination, he would purchase a car at 42 cents. The letter shows that he did not intend it as an acceptance of appellant's offer, but intended it as a counter proposition, for he requested an immediate response by letter or wire from appellant, indicating whether the latter was willing to accede to those terms. Negotiations

had not then proceeded to a contract, for the minds of the parties had not yet met. * * *

Appellant replied to the last letter above named on June 28th as follows: "I would not want to load and ship the oats without you would take the city scale weights here. Oats are advancing some; but I can get you a car of bulk oats at 42 cents, I think, if you will take the city scale weights." * * *

Appellee, on the next day (June 29th), replied by wire as follows: "Your letter. Rush car oats, your city scale weights, affidavit attached, satisfactory." He followed this up with letter, written on the same day, saying: "However, as advised you, please furnish me with sworn weight certificate at your end, and it will be perfectly satisfactory. I ask this simply because I know party doing the weighing will necessarily be more careful in furnishing sworn certificate."

The case turns on the question whether appellee's letter and telegram constituted an unconditional acceptance of appellant's offer so that the minds of the parties met on the same proposition, or whether they constituted a new offer which required acceptance upon the part of appellant before a contract was established.

We are of the opinion that the letter and telegram were not an acceptance of appellant's offer, but constituted a proposal containing another condition or qualification, namely: That an affidavit of the weigher should be furnished. Now, that was a condition to which appellant was not bound to accede. There having been no unconditional acceptance of his offer, he had the right to recede from the negotiations. The qualification thus imposed by appellee was a material one, for the reason that appellant had no control over the weigher and could not require him to furnish an affidavit. If it had been merely a matter of appellant furnishing his own affidavit as to the weights, the case might be different; but appellee demanded the affidavit of the weigher, a person over whom appellant is not shown to have had any control, and therefore it was an important qualification of the terms originally proposed by appellant. It changed the terms, in other words, to the extent that it prevented the minds of the parties from meeting, and the negotiations, therefore, did not result in a contract. * * *

"It is an undeniable principle of the law of contracts," said the Supreme Court of the United States, "that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either." Eliason v. Henshaw, 4 Wheat. 225, 4 L. Ed. 556. * * *

The judgment is therefore reversed, and the cause dismissed.

MORSE et al. v. TILLOTSON & WOLCOTT CO.

(United States Circuit Court of Appeals, Second Circuit, 1918. 253 Fed. 340, 165 C. C. A. 122, 1 A. L. R. 1485.)

The action is for breach of contract. The complaint alleges that the plaintiff agreed to purchase notes of a corporation to be organized by defendants, which notes were to amount to $555,084, for the price

of $518,000, and it alleges that the defendants undertook that the transaction should be carried out by the corporation, and afterwards repudiated the agreement.

The answer is a general denial, except it states that "there were negotiations between the plaintiff and the defendants, for the purpose of agreeing, if possible, upon a contract under which the plaintiff was to make a loan upon the credit of some or all of the ships named in the complaint; but the plaintiff and the defendants failed to agree upon the terms of such loan, and no contract was entered into between the plaintiff and the defendants with respect thereto."

The case was tried before Judge Grubb and a jury, and a verdict was returned for the plaintiff in the sum of $31,316, with interest at 6 per cent. from March 16, 1916.

ROGERS, Circuit Judge. * * * The defendants assert that the minds of the parties never met, that one of the conditions of the agreement was that the attorneys for the plaintiff were to be furnished with abstracts of title to the ships and that they were to examine them, and that the deal was not to be consummated until the title was approved. In the letter dated February 28, 1916, written by the president of the plaintiff corporation the writer stated that, when the attorneys "advise us that the title is good, we will advance up to $280,000 on bonds at 92 and interest." And there is no evidence in the case that, when defendants on March 16th canceled the agreement, the plaintiff's counsel was satisfied that the titles were good or that he had rendered any opinion on that subject. It will no doubt be conceded that an offer to sell implies that the title is marketable. And if an offer to sell is made by A. and accepted by B., subject to the title being found good upon examination, it hardly seems that the words "subject to the title being found good" import any new term into the acceptance, so as to prevent a meeting of the minds upon the offer as made.

In Hussey v. Horne-Payne, L. R. 8 Ch. Div. 670 (1878), an offer was made to sell land for a specified sum of money, and the offer was accepted "subject to the title being approved by our solicitors." The defendants afterwards declined to complete the sale, the title not yet having been approved, and the plaintiff claimed specific performance. The Vice Chancellor had held that the offer had been unconditionally accepted, and the demurrer was overruled. The case was carried to the Court of Appeal, where it was reversed, and the demurrer was sustained. In his opinion Jessel, M. R., said:

"The expression 'subject to the title being approved by our solicitors' appears to be plainly an additional term. The law does not give a right to the purchaser to say that the title shall be approved by any one either by his solicitor, or his conveyancing counsel, or any one else. All that he is entitled to require is what is called a marketable title, or, as it is sometimes called, a good title. Therefore, when he puts in 'subject to the title being approved by our solicitors,' he must be taken to mean what he says; that is, to make it a condition that solicitors of his own selection shall approve of the title."

The case was carried to the House of Lords (L. R. 4 A. C. 311), where it was affirmed, but upon different ground. The House of Lords did not agree with the Court of Appeal upon the point upon which that court decided the case. Upon that point the Lord Chancellor (Earl Cairns) declared that he was disposed to look upon the words "subject to the title being approved by our solicitors" as meaning

—"nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course, that would be subject to any objection which the solicitor made being submitted to decision by a proper court, if the objection was not agreed to."

The thing sold in that case happened to be land; but the decision would have been the same, had it been bonds or ships. * * *

There is a clear difference between an agreement to sell "subject to the approval" of title by counsel and an agreement which declares that the entire writing is not to be binding unless a certain thing happens which never happens. * * *

Judgment affirmed.

B. F. STURTEVANT CO. v. FIREPROOF FILM CO.

(Court of Appeals of New York, 1915. 216 N. Y. 199, 110 N. E. 440, L. R. A. 1916D, 1069.)

Action by the B. F. Sturtevant Company against the Fireproof Film Company. From a judgment for plaintiff, defendant appeals.

SEABURY, J. This action is brought to recover damages for the breach of an alleged contract. The plaintiff and defendant are foreign corporations. The plaintiff is a designer and builder of heating and ventilating and drying apparatus. The defendant was engaged in building a factory for the manufacture and sale of motion picture films. On December 29, 1911, the plaintiff submitted to the defendant an elaborate "proposal and specifications," which had been prepared after consultation with a representative of the defendant for the performance by the plaintiff of the work therein specified. The "proposal and specifications" was in the form of a letter addressed to the defendant, and stated that:

"Supplementing our quotation of December 6th, we beg to quote you upon the following apparatus," etc.

The letter was typewritten, and describes in detail the apparatus, and specifies the terms, price, and time of delivery. The specifications that are attached to the letter are printed, although the "dimensions and data" relating to the apparatus are supplemented by typewritten statements. The letter is signed "B. F. Sturtevant Company, by J. L. Williamson." Upon the letter is indorsed the following:

"Accepted: The Fireproof Film Company. H. Kuhn, Vice President and Treasurer. Date, December 30th, 1911."

The plaintiff actually commenced work under this alleged contract on January 1, 1912. * * *

Several letters passed between the parties, and on February 10, 1912, the defendant wrote to the plaintiff: "We notify you herewith that we will have to cancel the contract for fans for the Fireproof Film Company." * * *

The principal ground urged for the reversal of the judgment is that there was no contract between the parties, because at the bottom of the first page of the plaintiff's office stationery, upon which the proposal was written, appear the words: "All agreements are contingent upon strikes, fire, accidents or delays beyond our control. All prices are subject to change without notice, and all contracts and orders taken

are subject to the approval of the executive office at Hyde Park, Mass."

These sentences are printed in very small type, and the first typewritten numeral that indicates the page number is typewritten over this printed matter. The appellant claims that the proposal was given "subject to the approval of the executive office at Hyde Park, Mass." and that, as there was no proof that this approval was given and communicated to it, there was no contract. It appears clearly that Williamson had authority to make the contract, and that his action in so doing was ratified by the executive office at Hyde Park, Mass. The plaintiff actually commenced to perform the work, and continued working under the contract until it received the notice of the defendant that it had canceled the contract. * * * The claim that is now urged rests entirely upon the contention that the clause "all contracts or orders taken are subject to the approval of the executive office at Hyde Park, Mass.," is to be deemed a part of the proposal. If this provision was a part of the proposal, there could be no proof of a contract in the absence of evidence that the order was approved, and that the defendant had been notified of that fact.

In view of the manner in which this provision is printed upon the stationery of the plaintiff, it cannot be held, as a matter of law, that it was incorporated in and a part of the proposal. The language of the proposal is clear and explicit, and this provision, which is printed in small type, cannot be allowed to change, alter, or modify it, unless it was a part of the proposal. It was not incorporated in the body of the proposal or referred to in it. No suggestion was made, either in the pleadings or the proof, that it was a part of the proposal. If an issue had been raised upon the trial whether it was a part of the proposal, that issue would have presented a question of fact to be determined by the jury. As no such question was raised upon the trial, and as it does not appear from an inspection of the proposal that this provision was a part of it, the defendant is not now in a position to secure the reversal of this judgment upon this ground.

When an offer, proposal, or contract is expressed in clear and explicit terms, matter printed in small type at the top or bottom of the office stationery of the writer, where it is not easily seen, which is not in the body of the instrument or referred to therein, is not necessarily to be considered as a part of such offer, proposal, or contract. In Sturm v. Boker, 150 U. S. 312, 327, 14 Sup. Ct. 99, 103, 37 L. Ed. 1093, it was said that: "The contract being clearly expressed in writing, the printed billhead of the invoice can, upon no well-settled rule, control, modify, or alter it."

In Summers v. Hibbard & Co., 153 Ill. 102, 109, 38 N. E. 899, 901, 46 Am. St. Rep. 872, the court said: "The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter heads would not have the effect of preventing appellants from entering into an unconditional contract of sale."

In Menz Lumber Company v. McNeeley & Company, 58 Wash. 223, 229, 108 Pac. 621, 624, 28 L. R. A. (N. S.) 1007, it was said that: "The printed matter on the letter heads was not referred to in either the order or the acceptance, and is not a part of the contract. * * * The construction contended for by the respondent would make that which is an absolute, unqualified acceptance upon its face a conditional

one by reference to a letter head which was not referred to by either parties." * * *

Judgment affirmed.

J. L. PRICE BROKERAGE CO. v. CHICAGO, B. & Q. R. CO. et al.

(Kansas City Court of Appeals, Missouri, 1917. 199 S. W. 732.)

Action by the J. L. Price Brokerage Company against the Chicago, Burlington & Quincy Railroad Company and another. Judgment for plaintiff, and defendant Powell National Bank of Powell, Wyoming, appeals.

TRIMBLE, J. This was a replevin suit brought by the plaintiff brokerage company at St. Joseph, Mo., to obtain possession of a carload of potatoes shipped from Wyoming to St. Joseph, Mo., by the defendant National Bank of Powell, Wyo. There was a finding and judgment for plaintiff, from which the defendant bank appealed.

A sale of the potatoes was made by an exchange of telegrams between the Wyoming bank and the plaintiff. The bank first telegraphed an offer to sell on certain terms. As delivered by the bank to the telegraph company, the telegram read: "Can furnish one car clean white potatoes at one thirty-five per hundred f. o. b. Powell."

But, through a mistake in the transmission of the telegram, when delivered to the plaintiff it read: "Can furnish one car clean white potatoes at *once* thirty-five per hundred f. o. b. Powell."

Plaintiff immediately telegraphed: "Wire just received. We accept car. Ship quick as possible." * * *

When it, in the first place, offered by telegram to sell potatoes to the plaintiff, it made the telegraph company its agent to convey that offer, and, for any mistake the agent made in doing so, the appellant must suffer the loss incurred. The contract was made at 35 cents per hundred. It called for delivery on board cars at Powell, Wyo. The seller appropriated the potatoes to the contract, and placing them on board the cars shipped them to St. Joseph. In shipping the potatoes and directing the bill of lading to be turned over upon payment for them, the seller manifestly intended that plaintiffs should have possession of the potatoes, the only thing remaining to be done was the payment of the contract price.

It is true the seller thought the contract price was $1.35, but unfortunately for the seller, that was its mistake so far as the purchaser was concerned. As the real contract stood, there was nothing further to be done except for the purchaser to pay the agreed price, and when said vendee made a tender thereof, it was the same as if the agreed price had been paid. When the tender was made, the title passed then even if, on account of the terms of the bill of lading, the title did not pass when the potatoes were delivered on board the cars at Powell. When the tender of the price according to contract was made, the vendor had no right to withhold possession. The situation was the same as if the vendee, plaintiff, had gone out to Powell, Wyo., and said to the vendor bank: "Here is a contract made with your agent for this car of potatoes at 35 cents per hundred and here is the amount of money due at that price."

The bank would have no right to say: "I have the potatoes here in a car for you, but my agent made a mistake in contracting with you at

35 cents, and therefore I will not turn them over to you until you pay me $1.35."

Under such circumstances, a tender of the contract price on the part of the vendee would make its right of possession complete, and replevin would lie. * * *

The judgment is affirmed. All concur.

PEPPER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Tennessee, 1889. 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 360, 10 Am. St. Rep. 699.)

FOLKES, J. This is a suit by complainants to recover damages for a breach of a contract to deliver correctly a certain telegram intrusted to defendant as the owner and operator of a telegraph line. The facts necessary to a correct understanding of the case are as follows: On October 5, 1886, R. F. Bugg & Co., produce brokers at Birmingham, Ala., sent by defendant company to complainants, who were produce dealers at Memphis, this telegram: "Quote cribs loose, and strips packed." Thereupon complainants wrote out upon the usual printed blanks of the defendant company, and delivered to the proper agent of the defendant for transmission, this reply, addressed to Bugg & Co., at Birmingham: "Car cribs six sixty, c. a. f., prompt." The word "cribs" meant in the meat trade clear ribs, and "c. a. f." meant cost and freight. These terms were well understood in the trade and by the defendant. This telegram, as delivered by the company to Bugg & Co., read "six thirty," instead of "six sixty," being in other respects correct. Thereupon Bugg & Co. ordered a carload of the meat, amounting to 25,000 pounds. Complainants shipped the meat, and drew on Bugg & Co. for $1,650, the price of the meat at "six sixty." Bugg & Co. refused to pay the draft, relying on the telegram as received by them; and complainants accepted of them $1,575, the value of the meat at the price of "six thirty," making a loss to complainants of $75. Complainants at once notified the company of the mistake, and that the same had entailed upon them the loss of $75, and demanded payment of this sum, which the company declined to make. * * *

There was judgment for the complainants for the sum of $75, with interest from the date of the delivery of the meat. Defendant has appealed, assigning errors.

It is unnecessary for us to determine what is the measure of damages for error in the transmission of a telegram written in cipher—a question upon which the authorities are not in harmony, and one where there are very many nice distinctions and refinements. The telegram before us is in no sense a cipher. It is an abbreviation merely, and, from the proof in the cause, an abbreviation known to the company. * * *

This brings us to the consideration of the third and serious ground of defense—the measure of damages in this particular case. The contention of the counsel for complainants is—and such was the view of the learned chancellor—that the company was the agent of the complainants as the sender of the telegram, and that the complainants were therefore bound to let Bugg & Co. have the goods at $6.30, the price erroneously named in the dispatch as delivered; and that the loss must be measured by the difference between the price at which

they were willing and expected to sell and the price which in consequence of the error of such agent they were compelled to sell.

In our opinion this contention cannot be maintained, either upon principle or authority. The minds of the party who sends a message in certain words and the party who receives the message in entirely different words have never met. Neither can therefore be bound the one to the other, unless the mere fact of employment of the telegraph company, as the instrument of communication, makes the latter the agent of the sender. Upon what principle can it be said such an agency arises? The telegraph company is in no sense a private agent. It is clothed by the state with certain privileges; it is allowed to exercise the right of eminent domain. In exchange for such franchises it is onerated with certain duties, one of which is the obligation to accept, and transmit over its wires, all messages delivered to it for that purpose. The parties who resort to this instrumentality have no other means of obtaining the benefits of rapid communication, which is the price of its existence. They have no opportunity and no power to supervise or direct the manner or means which the company use in the discharge of their duties to the public in the transmission of messages for particular individuals. They can only deliver to the company a legible copy of what they wish communicated, with no expectation that such paper is to be carried to the party addressed; and their connection with the company there and then ceases. They have contracted with the company to transmit the words of the message to the party addressed, through its own agents, and with its own means. The party receiving the message knows that he is not obtaining any communication direct from the sender, but that he is receiving what the company has taken, and changed the form of, from the paper on which it was written, transmitted by electricity over the wires of the company, and reduced to writing at its destination by an agent of the company; and that it only represents what is written by the sender, in the event that there has been no imperfection in the mechanism of the company, nor negligence in the servants of the company.

Knowing the scope of the employment and the methods of transmission, the receiver should be held to know that the sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent. He knows, furthermore, that if he acts on the telegram, and it should turn out to have been altered by the negligence or wrongful act of the company, the latter is liable to him for such injury as he may sustain thereby. Ordinarily there is no relation of master and servant between the sender of the telegram and the company. Where this relationship does not exist the principal is not responsible for the torts of the agent, and the negligent delivery of an altered message, when acted on by the receiver to his detriment, is a tort for which the telegraph company alone is responsible. The company retaining exclusive control of the manner of performance, and of its own employees and instrumentalities, the sender of the message being absolutely without voice in the matter, it seems to us that the position of the company to its employer is that of "independent contractor," as defined and understood in the well-settled class of cases where the employer is held to be not responsible for the negligence of the contractor in the performance of his work or undertaking. The many and marked differences between the employment of such companies to transmit a dispatch and the employment of a private person

to deliver a verbal message, are so manifest that we cannot assume the liability of the sender in the first instance, from his conceded liability in the last for the negligence of the instrumentality employed. Such a holding not only does violence to well-settled principles of the law of agency, but may lead to the absolute ruin of the party employing this useful, and now necessary, public medium of rapid transmission of intelligence; so that every consideration of public policy would seem to point to a different result, unless the courts find themselves constrained by the great weight of authority to uphold the contention here made.

How are the authorities? In England and Scotland the idea of agency in the company, so as to bind the sender upon a telegram negligently changed in the transmission, is repudiated. * * * Mr. Gray, in his work on Communication by Telegraphy, while stating the law to be in England and Scotland as above, says that in this country the rule is in general otherwise, citing a number of cases in note 3, section 104. It is to be noticed, however, that this author, after making the statement above given, throws the weight of his learning and research against what he says is the tendency of the American courts, and in an instructive discussion of the question seems to demonstrate that the English rule is the correct one. * * *

Being of opinion, then, that the complainants were not bound to let Bugg & Co. have the goods at the price erroneously communicated by the telegraph company, but that it was their privilege to have reclaimed them when Bugg & Co. refused to pay the price as written by complainants, let us see what were their rights and duties, and what is the criterion of damage in such a case. They were bound to have taken just such steps as a reasonably prudent man would take to save himself had the mistake or error been his own. A man, under such circumstances, is not to be held to have done the wisest and best thing, but to the exercise of reasonable skill and diligence. * * *

Applying these principles to the case at bar, we find no proof in the record that would enable us to ascertain the damages fairly resulting from the negligence of the telegraph company. There is nothing to show what was the market value of the meat at Birmingham, nor at Memphis, unless the telegram as written by the sender is to be considered as fixing it. This is evidence of what the sender was willing to take for it, and, in the absence of proof to the contrary, may be said to furnish evidence of the market value in favor of the party making the offer, as against third parties. There is no proof as to freight either way, so that we cannot say whether the complainants have acted prudently in selling at the price named in the erroneous telegram, or whether they should have sought other purchasers at Birmingham, or recalled the meat to Memphis, or taken some other course. In the absence of some such proof it is impossible for the court to ascertain the extent of the injury inflicted by the company's negligence, so as to fix and determine the compensation therefor with certainty. But, the negligence being established, and the complainants having shown that they disposed of the goods at the price named in the erroneously delivered message, which was one of the means open to the shipper of extricating himself with the smallest loss, and there being no proof whatever tending to show that such disposition of the goods was not the very best thing to be done under the circumstances, we are of opinion that the difference between the price named in the telegram as

sent and as delivered, where sale is actually made at the latter price, may be taken as the correct measure of damages where, as in the case at bar, the difference is not so great as to excite suspicion, and where from the character of the goods it does not appear unreasonable and improper to make such disposition of the goods. * * *

Let the decree be affirmed, with costs.

McKINNEY et al. v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 274, 104 N. E. 446.)

Action by Daniel L. McKinney and others against the Boston & Maine Railroad.

LORING, J. The plaintiffs in this action had a verdict in the sum of $300 for negligence in the transportation of a horse from Newburyport to Boston. The horse was shipped at Newburyport by a servant of a third person (who shipped the horse to the plaintiffs in their behalf), one Herlihy by name. Herlihy testified that he could not read nor "sign his name." The defendant produced a contract or bill of lading signed: "John Herheley, Shipper, by His Mark, Shipper's Agent. F. W. Russell, Witness." The words "Shipper," "by," "Shipper's Agent," and "Witness" were printed words in a blank used by the defendant in case of the shipment here in question. The other words were written. Herlihy further testified that he delivered the horse to "Russell, one of defendant's agents, for shipment." * * * In addition Herlihy testified that at this time he made his mark on two papers, one of which the defendant's agent Russell kept and the other Russell gave to him; that he did not know what he did with the paper which Russell gave him, on which he made his mark; he did not know whether he kept it in his pocket or "put it in the office" of his employer, who was shipping the horse to the plaintiffs. He further testified "that Russell did not read over the live stock contract to him or say anything about it and asked no question as to whether he wanted the high rate or the low rate; that he didn't know whether the rate which he had was the high rate or the low rate." It was the contention of the defendant that by the terms of the contract or bill of lading the consignee in consideration of the rate of freight charged agreed that the valuation of the horse was to be $100, and that beyond that valuation it (the carrier) was not to be liable in any event. * * *

It is plain that the plaintiffs were entitled to the full damage done to the horse unless the shipper in behalf of the plaintiffs had entered into a special contract limiting the defendant's liability.

It is settled: That a special agreement between a shipper and a carrier by which in consideration of the rate charged the value of the property shipped is agreed upon in case of injury or loss, is valid. * * * That one who receives from a common carrier a bill of lading which purports on its face to set forth the terms of carriage, and accepts and acts upon it, without objection, will be ordinarily presumed as in other cases of contract, in the absence of fraud or other sufficient excuse, to have assented to its terms, as far as the provisions therein contained are lawful and not opposed to public policy. * * * That a person who signs a written instrument as the contract between him and another cannot show that he did not know its contents "because of his limited intelligence and inability to read our language." * * *

It was held in Jones v. Cincinnati, Selma & Mobile R. R., 89 Ala. 376, 8 South. 61, that the effect of the acceptance of a bill of lading by a shipper without objection is not affected by the fact that the shipper could not read nor write. * * *

Where the shipper signs the bill of lading the carrier has a right to assume that he can read and that he understands what he has signed and so assents to the terms of the writing as a contract. As matter of business fairness it is not open to the shipper in such a case to show that he did not read the bill of lading or that he could not understand its terms. * * * The carrier has the right to make the same assumption when a shipper who cannot read or write accepts a receipt containing the terms of the contract of carriage without disclosing the fact that he is an illiterate person. * * * But where the shipper tells the carrier that he cannot read or (as in the case at bar) that fact is otherwise brought home to the carrier's knowledge, there is nothing which gives the carrier a right to make any assumption. In such a case, the question whether a contract (limiting the carrier's liability) has or has not been made depends upon the fact of the shipper's having in fact known and agreed to it.

In the case at bar the fact that the shipper's servant was an illiterate person was brought home to the carrier by the fact that the servant executed the bill of lading by making his mark, and the further fact that the agent who acted for the carrier in arranging for the shipment witnessed the mark so made. Further the shipper's servant testified that the carrier's agent "did not read over the live stock contract to him or say anything about it and asked no question as to whether he wanted the high rate or the low rate; that he did not know whether the rate which he had was the high rate or the low rate." And lastly, there was no evidence that the bill of lading ever reached the shipper or the plaintiffs, and so there was no evidence that it was acted upon as the contract under which the horse was accepted by the carrier. It is to be noted that the duplicate original of the bill of lading put in evidence was produced by the defendant.

The presiding judge was right in refusing to rule under these circumstances that as matter of law the shipper in behalf of the plaintiffs had entered into a special contract with the carrier limiting its common-law liability.

In accordance with the terms of the report the verdict is to stand.

ROYAL INS. CO. v. BEATTY.

(Supreme Court of Pennsylvania, 1888. 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622.)

This was an action by William Beatty against the Royal Insurance Company, on a policy of fire insurance, averring a renewal, and that it was in force at the time of the fire. There was a verdict and judgment for plaintiff. Defendant brings error.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character,

and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence which contributed to the establishment of the relation. But, in any point of view, it is difficult to understand how a legal liability can arise out of mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected, to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence.

Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred, and had not been formally renewed. At the time of the fire the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. I went into the office of the Royal Company, and asked them to bind the two policies of Mr. Beatty expiring tomorrow. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed."

It will be perceived that all that the witness says is that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer: nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another, and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly, if not entirely, for the jury. But here the utterance was a question, and not an assertion; and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how, then, can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court, and not for the jury; for, if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding, or doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies, and obtained no answer, what was his duty? Undoubtedly, to repeat his question until he obtained an an-

swer; for his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly, such silence is not an assent in any sense. There should be something done, or else something said, before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him, and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly, it was his duty to speak again, and to take further action, if he really intended to obtain the defendant's assent; for what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

Judgment reversed.

HOBBS v. MASSASOIT WHIP CO.

(Supreme Judicial Court of Massachusetts, 1893. 158 Mass. 194, 33 N. E. 495.)

Action by Charles A. Hobbs against the Massasoit Whip Company to recover for eel skins alleged to have been sold to defendant by plaintiff. Judgment for plaintiff, and defendant excepts.

HOLMES, J. This is an action for the price of eel skins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and bear the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eel skins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it was fair to assume that if it had admitted the eel skins to be over 22 inches in length, and fit for its business, as the plaintiff testified and the jury found that they were, it would have

accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins.

In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. * * * The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. * * *

Exceptions overruled.

SECTION 6.—OFFER AND ACCEPTANCE IMPLIED IN FACT OR IN LAW

COLUMBUS, H. V. & T. RY. CO. v. GAFFNEY.

(Supreme Court of Ohio, 1901. 65 Ohio St. 104, 61 N. E. 152.)

MINSHALL, C. J. * * * There is some confusion in the statement of the law applicable to what are frequently called "implied contracts," arising from the fact that obligations generically different have been classed as such, not because of any real analogy, but because, where the procedure of the common law prevails, by the adoption of a fiction in pleading—that of a promise where none in fact exists, or can in reason be supposed to exist—the favorite remedy of implied assumpsit could be adopted. This was so in that large class of cases where suit is brought to recover money paid by mistake, or which has been obtained by fraud. Here it is said the law implies a promise to repay the money, when it is well understood that the promise was a mere fiction, and in most cases without any foundation whatever in fact. The same practice was adopted where necessaries had been furnished an insane person, or a neglected wife or child. In all these cases no true contract exists. They are, by many authors, termed "quasi-contracts," a term borrowed from the civil law. In all these cases no more is meant than that the law imposes a civil obligation on the defendant to restore money so obtained, or to compensate one who has furnished necessaries to his wife or child, where he has neglected his duty to provide for them, or, by reason of mental infirmity, is unable to obtain them for himself. But contracts that are true contracts are frequently termed implied contracts—as where, from the facts and circumstances, a court or jury may fairly infer as a matter of fact that a contract existed between the parties, explanatory of the relation existing between them. Such implied contracts are not generically different from express contracts. The difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, while in the other case the terms are inferred as a matter of fact from the evidence offered of the cir-

cumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. In such cases no fictions are or can be indulged. The evidence must satisfy the court and jury that the parties understood that each sustained to the other a contractual relation, and that by reason of this relation the defendant is indebted to the plaintiff for services performed or for goods sold and delivered.

In the leading case of Hertzog v. Hertzog, 29 Pa. 465, the distinction is clearly stated by Judge Lowrie. After quoting from Blackstone, and observing that his language is open to criticism, he says: "There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of parties to transactions, and are dictated only by their mutual and accordant wills. When the intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed from circumstances really existing, and then the contract, thus ascertained, is called an implied one. * * * It is quite apparent, therefore, that radically different relations are classified under the same term, and this often gives rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are only implied ones. In one case the contract is a mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one the intention is disregarded; in the other it is ascertained and enforced. In one the duty defines the contract; in the other the contract defines the duty." The subject is instructively treated by Professor Keener in chapter I of his work on Quasi-Contracts. He expresses the difference between an express contract and a true implied contract as follows: In the one case the language of contract is in terms used, and because of the expressions used the contract is called an express contract; whereas in the other case the contract is established by the conduct of the parties, viewed in the light of surrounding circumstances, and is called a contract implied in fact." * * *

AUSTIN v. BURGE.

(Kansas City Court of Appeals, Missouri, 1911. 156 Mo. App. 286, 137 S. W. 618.)

Action by O. D. Austin against Charles Burge. From a judgment for defendant, plaintiff appeals.

ELLISON, J. This action was brought on an account for the subscription price of a newspaper. The judgment in the trial court was for the defendant. It appears that plaintiff was publisher of a newspaper in Butler, Mo., and that defendant's father-in-law subscribed for the paper, to be sent to defendant for two years, and that the father-in-law paid for it for that time. It was then continued to be sent to defendant, through the mail, for several years more. On two occasions defendant paid a bill presented for the subscription price, but each time directed it to be stopped. Plaintiff denies the order to stop, but for the purpose of the case we shall assume that defendant is correct. He testified that, notwithstanding the order to stop it, it

was continued to be sent to him, and he continued to receive and read it, until finally he removed to another state.

We have not been cited to a case in this state involving the liability of a person who, though not having subscribed for a newspaper, continues to accept it by receiving it through the mail. There are, however, certain well-understood principles in the law of contracts that ought to solve the question. It is certain that one cannot be forced into contractual relations with another and that therefore he cannot, against his will, be made the debtor of a newspaper publisher. But it is equally certain that he may cause contractual relations to arise by necessary implication from his conduct. The law in respect to contractual indebtedness for a newspaper is not different from that relating to other things which have not been made the subject of an express agreement. Thus one may not have ordered supplies for his table, or other household necessities, yet if he continue to receive and use them, under circumstances where he had no right to suppose they were a gratuity, he will be held to have agreed, by implication, to pay their value. In this case defendant admits that, notwithstanding he ordered the paper discontinued at the time when he paid a bill for it, yet plaintiff continued to send it, and he continued to take it from the post office to his home. This was an acceptance and use of the property, and, there being no pretense that a gratuity was intended, an obligation arose to pay for it.

A case quite applicable to the facts here involved arose in Fogg v. Atheneum, 44 N. H. 115, 82 Am. Dec. 191. There the Independent Democrat newspaper was forwarded weekly by mail to the defendant from May 1, 1847, to May 1, 1849, when a bill was presented, which defendant objected to paying on the ground of not having subscribed. Payment was, however, finally made, and directions given to discontinue. The paper changed ownership, and the order to stop it was not known to the new proprietors for a year; but, after being notified of the order, they nevertheless continued to send it to defendant until 1860, a period of 11 years, and defendant continued to receive it through the post office. Payment was several times demanded during this time, but refused on the ground that there was no subscription. The court said that: "During this period of time the defendants were occasionally requested, by the plaintiff's agent, to pay their bill. The answer was, by the defendants, 'We are not subscribers to your newspaper.' But the evidence is the defendants used or kept the plaintiff's * * * newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post office." The defendant was held to have accepted the papers, and to have become liable for the subscription price by implication of law.

In Ward v. Powell, 3 Har. (Del.) 379, it was decided that an implied agreement to pay for a newspaper or periodical arose by the continued taking and accepting the paper from the post office, and that "if a party, without subscribing to a paper, declines taking it out of the post office, he cannot become liable to pay for it; and a subscriber may cease to be such at the end of the year by refusing to take the papers from the post office, and returning them to the editor as notice of such determination." In Goodland v. Le Clair, 78 Wis. 176, 47 N. W. 268, it was held that if a person receives a paper from the post office for a

year, without refusing or returning it, he was liable for the year's subscription. And a like obligation was held to arise in the case of Weatherby v. Bonham, 5 C. & P. 228.

The preparation and publication of a newspaper involves much mental and physical labor, as well as an outlay of money. One who accepts the paper, by continuously taking it from the post office, receives a benefit and pleasure arising from such labor and expenditure as fully as if he had appropriated any other product of another's labor, and by such act he must be held liable for the subscription price. On the defendant's own evidence, plaintiff should have recovered.

The judgment will therefore be reversed, and the cause remanded.

SCULLY v. ROCHE.

(Supreme Court of New York, Appellate Division, 1912. 76 Misc. Rep. 458, 135 N. Y. Supp. 633.)

Action by Thomas J. Scully against Margaret Roche. From a judgment for defendant after trial by the court without a jury, plaintiff appeals.

PAGE, J. Plaintiff's assignor entered into a lease with the defendant, dated October 23, 1909, for certain premises therein described, for a period of 11 months from November 1, 1909, at a rental of $462, payable in installments of $42 monthly in advance. In August or September, 1910, prior to the expiration of the lease, a new lease was prepared for one year at a rental of $540, payable $45 monthly. This lease was not signed.

Defendant testifies that she told the agent that she would not sign the lease at that rental [and was] then told by the agent she would hold over. On the 1st of October, however, she paid the increased rent. On the 1st of November she paid the increased rent, and the agent inquired about the lease, and she testifies she said: "I told you distinctly I will never sign a lease here. In the first place, my eyes are in a bad condition, and my aunt is getting weak, and I don't know what time I will have to give the place up," and "after that I said I wouldn't sign, and under no considerations would I stay. He told me at the time it didn't satisfy him. Then I said to him, 'When I move I will always give you notice.'"

She further testified that she paid the $45 each month, and—"nothing was referred to again. I thought my terms had suited him, because, if they didn't, it was his place to tell me then and there to get out."

She continued in possession until June 30th. In the early part of June she notified the landlord that she intended to move on June 30th, to which the landlord replied: "Do you wish me to try and rent the apartment for you? * * * Your lease does not expire until October 1, 1911, and this time of the year is very poor for renting. If you desired moving before October 1st, I would be satisfied if you moved September 1st, but at present time it would be hard to rent."

Defendant, without replying to this letter, moved June 30th. The claim for rent was assigned to plaintiff, and this action brought to recover from the defendant rent for the months of July, August, and September, on the theory that the lease was renewed. The case, however, was tried upon the theory that the defendant was liable for the

rent of July and August as a tenant holding over after the expiration of her term.

The court gave judgment for the defendant. This was erroneous. Where a tenant holds over after the expiration of a lease, without any other or new agreement with his landlord, the law implies a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original lease, and the option was with the landlord to treat him as a trespasser or as a tenant. The tenant has no such option and holds over at his peril. * * * If, however, the tenant has notice from the landlord that if he retains possession he must pay a higher rent, he must be deemed to assent to pay such increased rent. He cannot hold the premises after such notice and fix his own terms for the rent. * * *

In the case at bar, in addition to the new lease which was presented to the defendant, a written notice was delivered to her, notifying her that the rent was to be at the increased rate. On September 30th the tenant had the option to vacate the premises or hold over. She elected to hold over, and on October 1st paid the increased rent. On October 1st the landlord had the option to treat her as a trespasser and remove her from the premises, or as a tenant and accept the rent. They both made their election. The tenant paid the increased rent and the landlord accepted it. Their status became settled and determined. Neither could alter the situation without the consent of the other and making a new agreement. Therefore the statement by the tenant as to the terms upon which she would remain on November 1st in no way altered the situation. The landlord was not required either to accept or reject the proposition; therefore his silence was not an implied assent. The appellant now concedes that the renewed term must be for 11 months, the same period as the old lease. The term, therefore, would expire on September 1st, and the plaintiff could not recover for more than the rent for the months of July and August, 1911.

The judgment will be reversed, and a new trial ordered.

HOPKINS v. RATLIFF.

(Supreme Court of Indiana, 1888. 115 Ind. 213, 17 N. E. 288.)

MITCHELL, J. * * * The question is whether he [the defendant counter-claiming] is entitled to recover as upon an indebitatus assumpsit for the improvements made on his father-in-law's land while in possession under the arrangement disclosed in the foregoing summary of the answer. It seems clear enough to us that the question must receive a negative answer. The occupancy of land under an agreement with the owner to pay rent presumably creates the relation of landlord and tenant. This relation continues as long as the land is occupied under that agreement. It is, of course, true that a person who goes into possession of real estate under a contract to purchase does not thereby become a tenant of the vendor so as to become liable for rent in case the contract is rescinded. * * * A suit for use and occupation, or for rent, can only be maintained when there is a contract, express or implied, which creates the relation of landlord and tenant. * * * The defendant in the present case went into possession under an arrangement whereby he expected ultimately to become possessed of the land as purchaser by device, which could only take effect at

the plaintiff's death. Until the happening of that event, the legal title and ownership was to remain in the plaintiff, and the defendant was to pay rent. This created no other legal relation between the parties except that of landlord and tenant; and so long as the defendant occupied he did so as tenant, yielding, or under contract to yield, rent to the owner of the land. There being no valid contract of purchase, the possession and improvements can only be referred to the agreement to take possession and pay rent.

The landlord agreed to erect a small house with four rooms on the land. This he neglected to do. He prevailed upon the tenant to repair the old house; but it is not alleged that he had agreed to make repairs, nor does it appear that he in any manner promised or agreed to pay for repairs made by the tenant. In respect to the repair of the old house, their duties and obligations were such as the law imposed upon landlord and tenant. There is no implied obligation on the part of the landlord to make repairs, and, in the absence of an express contract, the duty of keeping the premises in repair rests solely upon the tenant. The tenant must determine for himself the fitness of the buildings for use, or whether they are sufficiently commodious for his purposes. If he repairs or enlarges the buildings for his own convenience, even though it is by the persuasion of the landlord, he does not, in the absence of an agreement or promise, thereby acquire a right to charge the landlord with the expense of repairs. * * * Where a landlord covenants to repair, in case of a breach of the covenant the tenant may make the repairs, and charge the expense to the landlord, or he may recover damages for the breach. * * * The failure of the landlord to erect a house with four rooms, in compliance with the agreement, did not, in the absence of a contract to pay, authorize the tenant to charge the cost of repairing another house to the landlord. If the failure or refusal to build the house resulted in damages to the tenant by reducing the value of the leasehold, that became a matter altogether apart from the subject of repairs. * * * The defendant might have built the house and recovered the cost thereof, or, if the plaintiff refused to build, after notice he might have recovered damages. A tenant who makes improvements of a permanent and fixed character, which are annexed so as to become part of the realty, can neither remove them nor recover for their cost without a special contract with the landlord. * * * If it should be considered that the defendant occupied the land and made the improvements, not as tenant, but in part performance of a contract of purchase, still, since after enjoying the possession for about four years, he cannot now place the plaintiff in the same situation he was in before the contract was made, he cannot repudiate the contract in advance of the time for performance on the part of the plaintiff, and maintain indebitatus assumpsit to recover the cost of the improvements.

The defendant has done nothing in part performance of a contract except to take possession and make improvements. These acts, as we have seen, can be much more readily referred to his contract of tenancy than to the contract of purchase, which was not to be performed on either side until after the plaintiff's death, and which is wholly unenforceable until it shall have been so performed as to be taken out of the statute. Where possession has been taken by a purchaser, and lasting and valuable improvements have been made under and in reliance upon an oral contract of purchase, if the circumstances are such

as to show that the vendor repudiated the contract with a fraudulent purpose to obtain the benefit of improvements made by the purchaser, the contract will be held so far valid as to support an action for damages for breach of the contract. In such a case, a purchaser who has made inprovements on land with the knowledge of the vendor, in reliance on a contract; which improvement the latter gets the benefit of by refusing to perform on his part, may recover the value of the improvements so made, deducting the value of the rents and profits of the land. * * * Where money has been paid on a contract that is wholly void, there being no part performance, the party receiving the money having repudiated the contract, a recovery may be had upon the common count. Where, however, the action is to recover for improvements made while in possession, and in part performance of the contract of purchase, the action must be for damages for breach of the contract, even though the contract may be so far invalid as not to be enforceable. * * * The plaintiff, according to the averments in the complaint, is in no default. He agreed to make a will, and the will cannot speak until the testator's death. The defendant avers that he is informed or has learned that the plaintiff's will, as it is now prepared, does not conform to the agreement. This is not sufficient to authorize him to repudiate the contract and maintain an action on account of improvements made. The answer was not sufficient. The demurrer should have been sustained.

Judgment reversed, with costs.

WADLEIGH v. KATAHDIN PULP & PAPER CO.

(Supreme Judicial Court of Maine, 1917. 116 Me. 107, 100 Atl. 150.)

Action by Moses B. Wadleigh against the Katahdin Pulp & Paper Company. Verdict for plaintiff, and defendant excepts and moves for new trial.

KING, J. Action to recover compensation for driving certain of the defendant's pulp wood down the Penobscot river to its destination, which pulp wood had become intermixed with the plaintiff's logs in said river so it could not be conveniently separated, and also to recover wages and expenses of the plaintiff's men furnished the defendant to assist in separating the pulp wood from the logs at the sorting gaps at the defendant's booms. The verdict was for the plaintiff for $912.24, of which sum $408 is the amount found by the jury for the driving of the intermixed pulp wood. The case comes up on defendant's exceptions and motions for a new trial.

R. S. c. 43, § 6, provides: "Any person, whose timber in any waters of the state is so intermixed with the logs, masts or spars of another, that it cannot be conveniently separated for the purpose of being floated to the market or place of manufacture, may drive all timber with which his own is so intermixed, toward such market or place, when no special and different provision is made by law for driving it, and is entitled to a reasonable compensation from the owner, to be recovered after demand therefor on said owner or agent, if known, in an action on the case; he has a prior lien thereon until thirty days after it arrives at its place of destination, to enable him to attach it; and if the owner cannot be ascertained, the property may be libeled

according to law, and enough of it disposed of to defray the expenses thereof; the amount to be determined by the court hearing the libel." * * *

It is a well-settled general principle that where one party renders services beneficial to another, under circumstances that negative the idea that the services were gratuitous, and the party to whom the services are rendered knows it, and permits it, and accepts the benefit of those services, he is bound to pay a reasonable compensation therefor. That is because such facts and circumstances justify a presumption that the party to whom the services are rendered must have requested them, and must intend to pay for them, and therefore the law implies a promise on his part to pay for them.

But we think the case at bar is not quite within the scope of that general principle. The plaintiff had a right by statute to drive the defendant's pulp wood as he did, if it had become so intermixed with his logs that it could not be conveniently separated therefrom. The defendant could not prevent it. No request on the part of the defendant was necessary, and under those circumstances we think it is not to be inferred. "This statute gives to a party a right to enforce a claim for services, supposed to be rendered for the benefit of another, but without his request, and sometimes without his knowledge, and possibly against his wishes. Such a statute is in derogation of the common law." Lord v. Woodward, 42 Me. 497. The common law gives no right to enforce payment for services rendered without a request, express or implied, because in such case no promise to pay can be implied. It is not to be doubted, we think, that the plaintiff drove the defendant's pulp wood because he had a right to do so under the statute provisions, and not because of any request or assent, express or implied, on the part of the defendant. It is plain from the record that the plaintiff's claim at the trial was to recover the reasonable compensation provided for in the statute for driving the pulp wood under the authority of the statute. To sustain that claim it was incumbent upon him to prove the demand provided for by the statute. That he undertook to do. But the jury were instructed that if they did not find that a demand for the services of driving was made, "then the plaintiff is entitled in this action to recover of the defendant what the jury would consider a reasonable compensation for these services under the quantum meruit count in the writ." We think the instructions as to the plaintiff's right to recover under his count upon a quantum meruit must be held to be error prejudicial to the defendant, and that its exceptions thereto must be sustained. Those instructions enabled the jury to give the plaintiff "reasonable compensation" for driving the defendant's pulp wood, under the authority of the statute, but without proof of the demand therefor required by the statute. And the jury may have done so. * * *

Exceptions sustained as stated in the opinion.

SCEVA v. TRUE.

(Supreme Judicial Court of New Hampshire, 1873. 53 N. H. 627.)

Assumpsit for the value of the support furnished by the plaintiff's intestate, Enoch F. Sceva, to Fanny True, his sister-in-law, who was, and for more than a quarter of a century had been, so hopelessly insane as to have no reason or understanding. Prior to his death, August 11, 1822, William True, father of said Fanny and her sister Martha, wife of said intestate, owned a farm in Andover and Hill, with a house, barn, and outbuildings thereon, situate in said Andover. On May 25, 1822, in expectation of death, William True made the following disposition of his property: He gave, by an instrument in writing under seal, all his personal property, upon certain conditions and subject to certain charges, to his widow, Betsey True, who died upon said premises in May, 1844, without remarrying. He also gave her on the same day, in the same way, "the use and occupation of said real estate, both of lands, buildings, and tenements, so long as she, the said Betsey, remains my widow." He also, by deed, conveyed on the same day one undivided half of all said real estate to each of said daughters. Said intestate carried on said premises in 1822, and married said Martha in December, 1823, and lived on said premises till about one month before his death. All the parties, save Fanny, treated said deeds and instruments as valid, and supposed they were valid; and, aside from the time that the said defendant was away in insane asylums and infirmaries for treatment, all lived together on said premises in one family till they died, or until said Enoch F. Sceva refused to support said Fanny longer; and she was taken away about said November 1, and when said Enoch F. Sceva left, the month prior to his death. Said Sceva took the entire charge of the premises, used the crops and the proceeds of the lumber, wood, and bark, sold off the whole farm for the common benefit of the family, and paid the taxes and other bills for the support and maintenance of the family.

No administration was ever had upon any part of the estate of said William True, nor was there any use or trust for the benefit of said Fanny. No attempt was ever made to make any contract with said Fanny about her support or anything else. No application was made for the appointment of a guardian in the interest of said Enoch F. Sceva, because of the opposition of his wife to any step looking to that end. She has been supported during said forty years by said Sceva, his wife, and her mother, out of the avails of said real estate taken as aforesaid, and out of their own funds. Since 1844 her chief support has been from said Sceva. Said intestate was worth nothing when he commenced on said farm, and died worth about $1,600.

The defendant moved to dismiss. For the purpose of raising questions of law, and no other, the parties agreed that the facts are as stated above, and the questions were reserved for the whole court.

LADD, J. * * * We regard it as well settled, by the cases referred to in the briefs of counsel, * * * that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions

which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact—no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances, by the jury,—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

Suppose a man steals my horse and afterwards sells it for cash. The law says I may waive the tort, and recover the money received for the animal of him in an action of assumpsit. Why? Because the law, in order to protect my legal right to have the money, and enforce against the thief his legal duty to hand it over to me, implies a promise—that is, feigns a promise, when there is none—to support the assumpsit. In order to recover, I have only to show that the defendant, without right, sold my horse for cash, which he still retains. Where are the circumstances, the language or conduct of the parties from which a meeting of their minds is to be inferred, or implied, or imagined, or in any way found by the jury: The defendant never had any other purpose but to get the money for the horse and make off with it. The owner of the horse had no intention to sell it, never assented to the sale, and only seeks to recover the money obtained for it to save himself from total loss. The defendant, in such a case, may have the physical capacity to promise to pay over to the owner the money which he means to steal; but the mental and moral capacity is wanting, and to all practical intents the capacity to promise according to his duty may be said to be entirely wanting, as in the case of an idiot or lunatic. At all events, he does not do it. He struggles to get away with the money, and resists with a determination never to pay if he can help it. Yet the law implies, and against his utmost resistance forces into his mouth a promise to pay.

So, where a brutal husband, without cause or provocation, but from wanton cruelty or caprice, drives his wife from his house, with no means of subsistence, and warns the tradesmen not to trust her on his account, thus expressly revoking all authority she may be supposed to have, as his agent, by virtue of the marital relation, courts of high authority have held that a promise to pay for necessaries furnished her while in this situation, in good faith, is implied by law against the husband, resting upon and arising out of his legal obligation to furnish her support. * * *

So, it was held that the law will imply a promise to pay toll for passing upon a turnpike road, notwithstanding the defendant, at the time of passing, denied his liability and refused payment. * * * In the recent English case of Railway Co. v. Swaffield, L. R. 6 Exch. 132, the defendant sent a horse by the plaintiffs' railway, directed to himself at S. station. On the arrival of the horse at S. station, at night, there was no one to meet it, and the plaintiffs, having no ac-

commodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse. He was referred to the livery stable keeper, who refused to deliver the horse, except on payment of charges, which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station master offered to pay the charges and let the defendant take away the horse; but the defendant declined, and went away without the horse, which remained at the livery stable. The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm, and with payment of a sum of money for his expenses and loss of time. Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it; and it was held that the defendant was liable, upon the ground of a contract implied by law, to the plaintiffs for the livery charges thus paid by them. * * *

The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when, in point of fact, there was none. Of course this is not good logic for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the obligationes quasi contractu of the civil law, which seems to lie in the region between contracts on the one hand and torts on the other, and to call for the application of a remedy not strictly furnished either by actions ex contractu, or by actions ex delicto. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it.

All confusion in this matter might be avoided, as it seems to me, by a suitable discrimination in the use of the term "implied contract." In the discussion of any subject there is always danger of spending breath and strength about mere words, as well as of falling into error when the same term is used to designate two different things. If the term "implied contract" be used indifferently to denote (1) the fictitious creation of the law spoken of above; (2) a true or actual, but tacit, contract—that is, one where a meeting of the minds or mutual understanding is inferred as a matter of fact from circumstances, no words, written or verbal, having been used; and (3) that state of things where one is estopped by his conduct to deny a contract, although, in fact, he has not made or intended to make one—it is not strange that confusion should result, and disputes arise, where there is no difference of opinion as to the substance of the matter in controversy; whereas, were a different term applied to each—as, for example, that of legal duty to designate the first; contract, simply, to designate the second; and contract by estoppel, the third—this difficulty would be avoided. It would, of course, come to the same thing, in substance, if the first were always called an implied contract, while

the other two were otherwise designated in such way as to show distinctly what is meant. This is not always done, and an examination of our own cases would perhaps show that more or less confusion has arisen from such indiscriminate use of the term. A better nomenclature is desirable. But whatever terms are employed, it is indispensable that the distinction, which is one of substance, should be kept clearly in mind, in order that the principles governing in one class of cases may not be erroneously applied to another. * * *

It by no means follows that this plaintiff is entitled to recover. In the first place, it must appear that the necessaries furnished to the defendant were furnished in good faith, and with no purpose to take advantage of her unfortunate situation. And upon this question the great length of time which was allowed to pass without procuring the appointment of a guardian for her is a fact to which the jury would undoubtedly attach much weight. Its significance and importance must, of course, depend very much on the circumstances under which the delay and omission occurred, all of which will be for the jury to consider upon the question whether everything was done in good faith towards the defendant, and with an expectation on the part of the plaintiff's intestate that he was to be paid.

Again, the jury are to consider whether the support for which the plaintiff now seeks to recover was not furnished as a gratuity, with no expectation or intention that it should be paid for, except so far as compensation might be derived from the use of the defendant's share of the farm. And upon this point the relationship existing between the parties, the length of time the defendant was there in the family without any move on the part of Enoch F. Sceva to charge her or her estate, the absence (if such is the fact) of an account kept by him wherein she was charged with her support and credited for the use and occupation of the land—in short, all the facts and circumstances of her residence with the family that tend to show the intention or expectation of Enoch F. Sceva with respect to being paid for her support—are for the jury. * * * If these services were rendered, and this support furnished, with no expectation on the part of Enoch F. Sceva that he was to charge or be paid therefor, this suit cannot be maintained; for then it must be regarded substantially in the light of a gift actually accepted and appropriated by the defendant, without reference to her capacity to make a contract, or even to signify her acceptance by any mental assent.

In this view, the facts stated in the case will be evidence for the jury to consider upon the trial; but they do not present any question of law upon which the rights of the parties can be determined by the court. Case discharged.

CHAPTER II

CONSIDERATION

Section
1. Introduction.
2. Consideration in Unilateral Contracts.
3. Performance of, or Promise to Perform, a Pre-existing Legal Duty.
4. Promises in the Nature of Gratuities.
5. Illusory Promises.
6. Promises to Pay for a Benefit Previously Received.
7. Sealed Instruments.

SECTION 1.—INTRODUCTION

We have observed that an offer and an acceptance of that offer, either express or implied, are requisites to the existence of a contract. It is possible, however for the parties to have arrived at an agreement through an offer and its acceptance under circumstances where no contract is created. There is a third requisite to the existence of a contract. That requisite is called consideration. The determination of the nature and characteristics of consideration calls for a re-examination of the offer and the acceptance from a somewhat different point of view. If A. says to B., "I will sell you my bicycle for $25," and B. replies, "I accept your offer," common knowledge tells us that this sort of agreement is a contract. If we assume that consideration is necessary, we must infer that, whatever consideration may be, it must be present in this case. What is it, and how may we express, in general terms, what constitutes consideration? Before stating some of the definitions of consideration, let us inquire into a few other kinds of agreements. A. says to B., "I have made up my mind to give my horse to you, if you are willing to accept the gift." B. replies, "I shall be very glad to accept." A. later changes his mind and decides not to give the horse to B., and B. sues A. Scarcely any one would be surprised to learn that the law would not permit B. to recover. Why? The courts would say, "Because there was no consideration for A.'s promise." Again, suppose A. gives the horse to B. as a gift, and subsequently B. promises to pay A. $100 for the horse, and then repudiates the promise, and is sued by A. Would the courts enforce this promise? No; because there is no consideration for the promise to pay the $100, although A. agrees to accept the money. Suppose a bank held M.'s note, and that, before maturity, the officers of the bank requested A. to indorse the note. Is A. bound? Would it make any difference if, at the time A. indorsed the note, the holder promised not to sue M. until six months after the date of maturity fixed in the note? Again, suppose A. offers to sell his automobile to B. for $1,000, but adds that it is to be understood that, if he changes his mind within the next three days, the sale is not to be made, and B. accepts. Could B. sue A., if A., within the time specified, expressed his intention not to carry out the trans-

action? The answer to these questions depends upon whether or not there is consideration for the promise sought to be enforced.

It should be apparent that, as a matter of public policy, the law should not hold a person liable for refusing to make a gift which he had previously promised to make, or for his failure to keep many kinds of social or business engagements. This does not imply that society should sanction the deliberate refusal to carry out one's promises. In fact, just the contrary is true. Every one instinctively expects a person, who has said that he would do a certain thing, actually to carry out his promise. Not only that, but society goes further, and expects that a person will do a great many things; that he will conduct himself in a certain manner, even though he has not promised to do so, and his failure so to do calls forth social condemnation. Social and business life would be quite different, if established customs were not almost universally complied with. But it is quite a different thing for the law to provide that, unless a person does keep all of his promises, he must pay damages to the individual whose expectations have been disappointed. The law follows custom, but never catches up with all customs. It is well that this is so, because the law should not undertake to do the impossible. The law should and does fix minimum standards of conduct, and, for violations of these standards, persons guilty thereof are subjected to various penalties. And so, with respect to the liability for the failure to perform one's promise, the law allows one to break some promises. It permits a violation of social and business customs and of promises up to a certain point; but, beyond that, promises cannot be broken without liability for the damage caused. Our problem in this chapter is to find out where this point is. This involves the determination of the nature of consideration, because only those promises founded upon consideration are enforceable.

The question what constitutes consideration is not altogether free from difficulty. In the ordinary case, no doubt, the presence, or absence, of consideration is easily discoverable, but in the border line cases there exists greater doubt. A great deal of the difficulty in the subject of consideration arises from the fact that there is no single generalized statement of the doctrine of consideration that has received universal acceptance. Courts and writers differ in their phraseology of the rule. In fact, no definition of consideration could be so framed as to convey an accurate and complete notion of the nature of this requisite to the validity of a contract. That may be obtained only by an examination of the cases where the doctrine of consideration has been discussed and applied. But at this point it will be of some assistance to note a few definitions of this term.

Sir William R. Anson has defined consideration as "something done, forborne, or suffered, or promised to be done, forborne, or suffered, by the promisee, in respect of the promise." [1]

[1] Anson on Contract (3d Am. Ed.) § 118.

Professor Williston has stated that "there may still be found several somewhat distinct and conflicting ideas as to what constitutes a sufficient consideration. * * * The idea that the consideration is the price requested and received by the promisor for the promise, * * * is undoubtedly the fundamental and, as to most cases, the generally accepted idea of consideration at the present time." [2]

Professor Corbin has said: "No single definition that has been given serves to explain all the currently approved decisions. Consideration is a fact other than a seal, which, when it accompanies a promise, operates to create a legal duty in the promisor. Courts may give operation (1) to facts long antecedent to the promise; (2) to contemporaneous facts regarded as the equivalent of and in exchange for the promise; and (3) to subsequent facts consisting of acts in reliance on the promise. In all contract law our problem is to determine what facts will operate to create legal duties and other legal relations. We find at the outset that bare words of promise do not so operate. Our problem then becomes one of determining what facts must accompany words in order to create a legal duty and other legal relations. We must know what these facts are, in order that we can properly predict the enforcement, reparation, either specific or compensatory, in case of non-performance. We are looking for a sufficient cause or reason for the legal enforcement of a promise. This problem was also before the Roman lawyers, and it must exist in all systems of law. With us it is called the problem of consideration." [3]

The cases following present a series of problems with respect to the doctrine of consideration.[4]

SECTION 2.—CONSIDERATION IN UNILATERAL CONTRACTS

HAMER v. SIDWAY.

(Court of Appeals of New York, 1891. 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693.)

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of $5,000. The trial court found as a fact that "on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing,

[2] Williston on Contracts, § 100.

[3] "Does a Pre-existing Duty Defeat Consideration?" by Arthur L. Corbin, 27 Yale Law Journal, 362.

[4] For a bibliography of the leading discussions of the doctrine of consideration, see notes to chapter IV of Anson on Contract, Corbin's Edition.

and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement." The defendant contends that the contract was without consideration to support it and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise—and insists that it follows that, unless the promisor was benefited, the contract was without consideration, a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement.

Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. *444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Comm. (12th Ed.) *465. Pollock in his work on Contracts (page 166), after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken.

[Judgment for plaintiff affirmed.]

WHITE, Executor of Bluett, v. BLUETT.

(Court of Exchequer, 1853. 2 C. L. R. 301.)

Assumpsit by the plaintiff, as surviving executor of John Bluett. The first count was on a promissory note, whereby the defendant promised to pay the said John Bluett, on demand, the sum of £50, with interest. The second count was for money payable by defendant to John Bluett in his lifetime, for money lent by John Bluett to the defendant. Defendant pleaded that the said John Bluett was defendant's father, and that after the accruing of the causes of action, the defendant complained to John Bluett, that he, the defendant, had not received at his hands so much money or so many advantages as the other children of John Bluett, and certain controversies arose between John Bluett and defendant concerning these matters, and that John Bluett admitted that such complaints were well founded; and thereupon afterwards it was agreed between John Bluett and defendant that defendant should forever cease to make such complaints, and that in consideration thereof, and in order to do justice to the defendant, and also out of his natural love and affection towards the defendant, he, John Bluett, would discharge the defendant of his liability on said causes of action.

Clarke, counsel for defendant, argued that a promise is consideration for a promise.

POLLOCK, C. B. I am of opinion that the plaintiff is entitled to judgment. I think the plea is bad, as it sets up an agreement totally without consideration. The principle contended for at the bar on behalf of the defendant is correct; but it has been pushed to the extreme of absurdity. If we attend to mere language—to words simply, and not to reason—it may be that there is a foundation for the argument which has just been addressed to the court. Mr. Clarke says that the son had a right to complain, and to say to his father, "I will cease to complain if you will give up your claim on that note;" and that having ceased to complain on his father's answering "Yes," there was a binding agreement, with a good consideration, between them. If this plea can be supported, there are many cases of a most absurd character which might be suggested as affording equally good ground of consideration with that in the present plea. For instance, suppose a man to be in the habit of walking a great deal on a particular highway, and to have been remonstrated with by the surveyor because he used the road more than his neighbors and gave more trouble—if these two were to agree that the one should pay a sum of money, and the other should abstain from complaining of his walking on the highway more than other people, it might just as well be argued that that would be an agreement on which an action would lie. So, again, if we take the case of a bill with two joint makers, one of whom is surety for the other; suppose the surety to be always complaining to the holder that he is only surety, and not answerable, and that thereon the holder should say to him, "Very well, if you will cease from pouring these complaints into my ears, and say no more to me about the hardship of being sued for the debt of another, I will promise not to sue you," could such an agreement stand? It appears to me that it could not; and when you examine this plea, it is clear that no consideration for any agreement is alleged on the face of it. If, on the part of the

father, there was nothing more than an unequal distribution of his property, he had a perfect right to do that as he pleases; and the son had no right whatever to complain of it. That is the fallacy of Mr. Clarke's argument, which assumed that the son had a right to complain. He had no such right; and when he promised to abstain from that course, he only promised not to do that which he was bound without any such promise, to abstain from doing. As the case was pressed on our attention in the argument at the bar, I have gone thus fully into it, to show that I entered into and appreciated that argument; but I confess that I never met with a clearer case.

KIRKSEY v. KIRKSEY.

(Supreme Court of Alabama, 1845. 8 Ala. 131.)

Assumpsit by the defendant, against the plaintiff in error. The question is presented in this court, upon a case agreed, which shows the following facts:

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega county, some sixty or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

"Dear Sister Antillico: Much to my mortification I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. * * * I do not know whether you have a preference on the place you live on or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for two hundred dollars, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

ORMOND, J. The inclination of my mind is, that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however, think that the promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach. The judgment of the court below must therefore be reversed, pursuant to the agreement of the parties.

SILVER et al. v. GRAVES.

(Supreme Judicial Court of Massachusetts, 1911. 210 Mass. 26, 95 N. E. 948, Ann. Cas. 1912D, 588.)

Action by Lena M. Silver and others against Charles L. Graves. Verdict for plaintiffs, and defendant excepts.

RUGG, J. The father of the three plaintiffs and of the defendant was survived by them and a widow. By his will each of the plaintiffs was given $100, the widow $1,000, and the defendant the residue of the estate, amounting to about $7,500. The plaintiffs appealed from a decree of the probate court allowing the will. There was evidence tending to show that during the pendency of the appeal there were several conferences between the plaintiffs, or some of them, and the defendant, at which the defendant promised the plaintiffs that, if they would withdraw the appeal and let the will be allowed, he would "make it right * * * with a certain sum" and "give a certain sum which would be satisfactory." He declined to name any specific sum of money which he would pay to them. As a consequence of his promise, the plaintiffs withdrew their appeal, and the will was allowed finally. This action is brought to recover [for] the breach of this agreement. * * *

There is no doubt that the forbearance to prosecute a genuine contest in the courts is a sufficient consideration for a promise. In order that it may have this effect, however, the intention must be sincere to carry on a litigation which is believed to be well grounded and not false, frivolous, vexatious or unlawful in its nature. The abandonment of an honest purpose to carry on a litigation, even though its character be not such either in law or fact or both, as ultimately to commend itself to the judgment of the tribunal which finally passes upon the question, is a surrender of something of value, and is a sufficient consideration for a contract. But the giving up of litigation, which is not founded in good faith, and which does violence to an enlightened sense of justice in view of the knowledge of the one making the concession, is not the relinquishment of a thing of value, and does not constitute a sufficient consideration for a contract. * * * As was said by Morton, J., in Mackin v. Dwyer, 205 Mass. 472, at 476, 91 N. E. 893, at 894: "A threat to contest the will, merely for the purpose of compelling the defendant to settle with her and buy his peace, without any intention on her part of actually contesting the will if no such settlement was made, would not be sufficient and would not constitute a valid consideration for the defendant's promise." * * *

Moreover, the jury saw all the parties to the controversy upon the witness stand, and their manner of testifying may have furnished basis for an opinion as to the purpose of the plaintiffs in making the contest. These and all the other circumstances of the case, together with the presumption, which exists commonly that people act in good faith rather than corruptly, * * * rendered improper a ruling that a jury could not find that the contest which the plaintiffs forbore upon the defendant's promise was a real one honestly undertaken. * * *

Exceptions overruled.

SECTION 3.—PERFORMANCE OF, OR PROMISE TO PERFORM, A PRE-EXISTING LEGAL DUTY

JAFFRAY v. DAVIS.

(Court of Appeals of New York, 1891. 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710.)

POTTER, J. The facts found by the trial court in this case were agreed upon. They are simple, and present a familiar question of law. The facts are that defendants were owing plaintiffs, on the 8th day of December, 1886, for goods sold between that date and the May previous, at an agreed price, the sum of $7,714.37, and that, on the 27th of the same December the defendants delivered to the plaintiffs their three promissory notes amounting, in the aggregate, to $3,462.24, secured by a chattel mortgage on the stock, fixtures, and other property of defendant, located in East Saginaw, Mich., which said notes and chattel mortgage were received by plaintiffs, under an agreement to accept same, in full satisfaction and discharge of said indebtedness; that said notes have all been paid, and said mortgage discharged of record. The question of law arising from these facts, and presented to this court for its determination, is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz. whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt, forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved, if not decided, in Pinnel's Case, 5 Coke, 117, "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts, and in the courts of this country, in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed upon any recurrence of the question to criticise and condemn its reasonableness, justice, fairness, or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in Pinnel's Case, supra, and Cumber v. Wane, 1 Strange, 26; Foakes v. Beer, L. R. 9 App. Cas. 605; Goddard v. O'Brien (Q. B. Div.) 21 Amer. Law Reg. 637, and notes. The steadfast adhesion to this doctrine by the courts, in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business, and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of stare decisis. But the doctrine of stare decisis is further illustrated by the course of judicial decisions upon this subject; for, while the courts still hold to the doctrine of the Pinnel and Cumber-Wane Cases, supra, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case, a consideration for

the new agreement, and to substitute the new agreement in place of the old and thus to form a defense to the action brought upon the old agreement.

It will serve the purpose of illustrating the adhesion of the court to settled law, and at the same time enable us, perhaps more satisfactorily, to decide whether there was a good consideration to support the agreement in this case, to refer to (the consideration in) a few of the numerous cases which the courts have held to be sufficient to support the new agreement. Lord Blackburn said, in his opinion in Foakes v. Beer, supra, and while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk, or robe, etc., in satisfaction, is good," quite regardless of the amount of the debt; and it was further said by him, in the same opinion, "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time;" "and so, if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day, at York, and you will accept it in full satisfaction for the whole ten pounds, is it a good satisfaction?" It was held in Goddard v. O'Brien, 9 Q. B. Div. 37: "A., being indebted to B. in £125 7s. and 9d. for goods sold and delivered, gave B. a check (negotiable I suppose) for £100, payable on demand, which B. accepted in satisfaction, was a good satisfaction." Huddleston, B., in Goddard v. O'Brien, supra, approved the language of the opinion in Sibree v. Tripp, 15 Mees. & W. 26: "That a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing, and more advantageous, than the original debt, which was not negotiable." It was held in Bull v. Bull, 43 Conn. 455: "And, although the claim is a money demand, liquidated, and not doubtful, and it cannot be satisfied with a smaller sum of money, yet, if any other personal property is received in satisfaction, it will be good, no matter what the value." And it was held, in Cumber v. Wane, supra, that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being nudum pactum, but, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement. It was held in Le Page v. McCrea, 1 Wend. 164, 19 Am. Dec. 469, and in Boyd v. Hitchcock, 20 Johns. 76, 11 Am. Dec. 247, that, "giving further security for part of a debt, or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction;" that, "if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." Varney v. Conery, 77 Me. 527, 1 Atl. 683. And so it has been held, "where, by mode or time of part payment different than that provided for in the contract, a new benefit is or may be conferred, or a burden imposed, a new consideration arises out of the transaction, and gives validity to the agreement of the creditor." Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402. And so "payment of less than the whole debt, if made before it is due, or at a different place from that stipulated, if received in full, is a good satis-

faction." Jones v. Bullitt, 2 Litt. (Ky.) 49. * * * In Watson v. Elliott, 57 N. H. 511–513, it was held: "It is enough that something substantial which one party is not bound by law to do is done by him, or something which he has a right to do he abstains from doing, at the request of the other party, is held a good satisfaction."

It has been held in a number of cases, that, if a note be surrendered by the payee to the maker, the whole claim is discharged and no action can afterwards be maintained on such instrument for the unpaid balance. * * * It has been held that a partial payment made to another though at the creditor's instance and request, is a good discharge of the whole debt. Harper v. Graham, 20 Ohio, 106. "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do, or, at least, something different. It may be more, or it may be less, as a matter of fact." It was held by the supreme court of Pennsylvania in Bank v. Houston, 11 Wkly. Notes Cas. 389 (February 13, 1882): The decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, as by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable. It has been held that a payment in advance of the time, if agreed to, is a full satisfaction for a larger claim not yet due. Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95. In some states, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have, by statute, changed the law upon that subject, by providing: "No action can be maintained upon a demand which has been canceled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small"—citing Weymouth v. Babcock, 42 Me. 42. And so in Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181, where a debt of $820 upon book account was satisfied by the payment of one dollar by calling the balance a "gift," though the balance was not delivered, except by fiction, and the receipt was in the usual form, and was silent upon the subject of a gift, and this case was followed and referred to in Ferry v. Stephens, 66 N. Y. 321. So it was held in Mitchell v. Wheaton, 46 Conn. 315, 33 Am. Rep. 24, that the debtor's agreement to pay, and the payment of $150, with the costs of this suit, upon a liquidated debt of $299, satisfied the principal debt. These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the 'old law,'" as it is characterized in Johnson v. Brannan, 5 Johns. 268–272; or as it is called in Kellogg v. Richards, 14 Wend. 116, "technical and not very well supported by reason"; or, as may be more practically stated, a rule that "a bar of gold worth $100 will discharge a debt of $500, while 400 gold dollars in current coin will not." See note to Goddard v. O'Brien, supra, in 21 Amer. Law Reg. 640, 641.

The state of the law upon this subject, under the modification of later decisions, both in England and in this country, would seem to be as expressed in Goddard v. O'Brien, supra: "The doctrine in Cumber v. Wane, is no doubt very much qualified by Sibree v. Tripp, and I cannot find it better stated than in 1 Smith, Lead. Cas. (7th Ed.) 595: 'The general doctrine in Cumber v. Wane, and the reason of all the exceptions and distinctions which have been ingrafted on it, may per-

haps be summed up as follows, viz.: That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.'"

In the case at bar, the defendants gave their promissory notes upon time for one-half the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures, and other personal property of the defendants, under an agreement with plaintiff to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was, by the parties, substituted in place of the former. The consideration of the new agreement was that the plaintiff, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security. It was some trouble at least, and perhaps some expense, to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions, or the power of disposing of this property, and gave the plaintiff such ownership, as against the defendants, and the claims thereto of defendants' creditors, if there were any. It seems to me, upon principle, and the decisions of this state, * * * and of quite all of the other states, the transactions between the plaintiff and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement.

The doctrine is fully sustained in the opinion of Judge Andrews, in Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606, from which I quote: "But it is held that, where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled, except for the agreement, then the agreement is not nudum pactum, and the doctrine of the common law, to which we have adverted, has no application." Upon this distinction the cases rest, which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. Curlewis v. Clark, 3 Exch. 375. Following the same principle, it is held that, when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction, if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners, in satisfaction of the joint or copartnership debt, is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency of the par-

ties, or the convenience of the remedy." Thompson v. Percival, 5 Barn. & Adol. 925. The judgment must be reversed.

MELROY v. KEMMERER.

(Supreme Court of Pennsylvania, 1907. 218 Pa. 381, 67 Atl. 699, 11 L. R. A. [N. S.] 1018, 120 Am. St. Rep. 888.)

MITCHELL, C. J. * * * In the present case the debtor, being in failing circumstances and contemplating bankruptcy, offered the plaintiffs 30 per cent. of his debt as a settlement in full. The plaintiffs dissuaded him from going into bankruptcy, accepted his alternative offer, received the money, and closed the account. They have now brought this suit for the balance. In the absence of any express decision in this state on this point, the learned judge below did not feel at liberty to depart from the general rule. We have no such hesitation. The exact point is whether the debtor's relinquishment of his intention to seek a discharge in bankruptcy, and his payment of 30 per cent. instead, constitute a sufficient consideration to bind the creditor to the agreement. On that point we have no doubt. A valuable consideration may consist in some right, interest, or benefit to one party, or some loss, detriment, or responsibility resulting actually or potentially to the other. "If there is any advantage to the creditor, the law will not weigh the adequacy of the consideration." Fowler v. Smith, 153 Pa. 639, 25 Atl. 744. The accord in this case was good on both branches. By it the creditors got a sum certain, instead of the chances of an uncertain dividend in bankruptcy. On the other hand, the debtor accepted the responsibility of paying a sum certain, whether his assets were sufficient or not, and gave up his right to a release of his future assets, and to a discharge from his whole debt, without regard to the sufficiency of his present assets.

The decisions on this exact point in other states are not numerous, but the general trend is uniform to the result we have reached. * * * On principle and on authority, therefore, the agreement in the present case was binding, and, there being no dispute on the material facts, the defendant's sixth point, asking for binding instructions, should have been affirmed. Judgment for plaintiff reversed.

TANNER v. MERRILL.

(Supreme Court of Michigan, 1895. 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687.)

HOOKER, J. The defendants appeal from a judgment recovered against them at circuit. They are lumbermen, and the plaintiff worked for them at Georgian Bay, his transportation from Saginaw to that place having been paid by them. When he quit work, a question arose as to who should pay this, under the contract of employment, and defendants' superintendent declined to pay any transportation. The plaintiff needed the money due him to get home, and showed a telegram announcing the illness or death of his mother, and said that he must go home, to which the superintendent replied that "he did not pay any man's fare" ; whereupon a receipt in full was signed, and the money due, after deducting transportation, was paid. The plaintiff

testified that they had no dispute, only he claimed the fare and the superintendent refused to allow it. * * *

It is urged upon behalf of the plaintiff that receipts are always open to explanation, and that there is no consideration to support the acceptance of a portion of a valid claim as full payment. The cases which counsel cite do not support the broad contention of plaintiff's counsel, which would seriously derange business affairs if it should be sustained. The doctrine that the receipt of part payment must rest upon a valid consideration to be effective in discharge of the entire debt is carefully limited to cases where the debt is liquidated, by agreement of the parties or otherwise, which was not the case here. It was in dispute. * * *. In Marion v. Heimbach, 62 Minn. 215, 64 N. W. 386, the court say: "But where the claim is unliquidated, it would seem to be true that if the creditor is tendered a sum less than his claim, upon the condition that, if it is accepted, it must be in full satisfaction of his whole claim, his acceptance is an accord and satisfaction." * * * The important fact to ascertain is whether the plaintiff's claim was a liquidated claim or not. If it was, there was no consideration for the discharge. If not, the authorities are in substantial accord that part payment of the claim may discharge the debt, if it is so received.

Upon the undisputed facts, the claim of the plaintiff, as made, was not liquidated. It was not even admitted, but, on the contrary, was denied, because the defendants claimed that it had been partially paid by a valid offset. While the controversy was over the offset, it is plain that the amount due the plaintiff was in dispute. If so, it is difficult to understand how it could be treated as a liquidated claim, unless it is to be said that a claim may be liquidated piecemeal, and that, so far as the items are agreed upon, it is liquidated, and to that extent is not subject to adjustment on a basis of part payment. Cases are not numerous in which just this phase of the question appears. This would seem remarkable, unless we are to assume that, in calling a claim unliquidated, the courts have alluded to the whole claim, and have considered that, where the amount is not agreed upon, the claim as a whole is unliquidated, and therefore subject to adjustment. If this is not true, no man can pay an amount that he admits to be due without being subject to action whenever and so often as his creditor may choose to claim that he was not fully paid, no matter how solemn may have been his acknowledgment of satisfaction, so long as it is not a release under seal.

The judgment must be reversed. No new trial should be ordered.

HOGAN v. STOPHLET.

(Supreme Court of Illinois, 1899. 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809.)

Appellant Hogan sued appellee Stophlet to recover a reward of $50 offered by the latter for the apprehension and conviction of an incendiary. Appellant, sheriff of Pulaski county, arrested the incendiary in the county. The incendiary was convicted of arson. Appellant recovered in the justice of the peace court. The circuit court, on appeal, found for the appellant. The Appellate Court, upon appeal to it, found for the appellee, reversing the case without remanding it. Hogan now appeals to the Supreme Court.

MAGRUDER, J. * * * The Appellate Court has found in its finding of facts, as embodied in its judgment, that the Harry Howard who was arrested was so arrested for the offense of setting on fire and burning the store building of appellee, and for the apprehension and conviction of the party committing this offense the reward was offered. * * *

The appellant was the sheriff of Pulaski county. The arrest of Howard was made in Pulaski county, and for a felony committed by Howard in that county; Howard also being a resident of that county. It was, therefore, appellant's duty to make the arrest. * * * It being true that it was the official duty of the appellant, as sheriff, to make the arrest of the guilty party, and that the fees which he is entitled to charge for the performance of his official duties are fixed by law, it follows upon well-established principles, that the appellant was not entitled to the reward sued for in this case. It is against public policy to allow a man to recover a reward for doing his duty as a public officer. It is also against public policy, and illegal, for a sheriff to receive, for services for which fixed compensation is prescribed by law, any other or further fees, although extraordinary diligence may have been exercised by him in the discharge of his duty. * * * A promise to pay an officer a reward for doing what it is his duty to do under the law is a promise without any consideration to support it.

There are some decisions which hold to the contrary of the views herein expressed, but these decisions will be found upon examination to be cases where the officer arrested the offender beyond his territorial jurisdiction, or cases arising under particular statutes which did not make it the duty of the officer to make the arrest. Many of these decisions are reviewed in the very able opinion delivered by the Supreme Court of Connecticut in Re Russell, 51 Conn. 577, 50 Am. Rep. 55, and are there distinguished from such cases as that which is presented by the present record.

For the reasons above stated, the judgment of the appellate court is affirmed.

KING v. DULUTH, M. & N. RY. CO.

(Supreme Court of Minnesota, 1895. 61 Minn. 482, 63 N. W. 1105.)

Action by George R. King, as surviving partner of the late firm of Wolf & King, against the Duluth, Missabe & Northern Railway Company, on contract. From an order overruling a demurrer to the complaint, defendant appeals.

START, C. J. This is an action brought by the plaintiff, as surviving partner of the firm of Wolf & King, to recover a balance claimed to be due for the construction of a portion of the defendant's line of railway. The complaint alleges two supposed causes of action, to each of which the defendant demurred on the ground that neither states facts constituting a cause of action. From an order overruling the demurrer the defendant appealed.

The complaint for a first cause of action alleges, among other things, substantially, that in January, 1893, the firm of Wolf & King entered into three written contracts with the president and representative of the defendant for the grading, clearing, grubbing, and construction of the roadbed of its railway for a certain stipulated price for each of

the general items of work and labor to be performed; that the firm entered upon the performance of such contracts, but in the latter part of February, 1893, in the course of such performance, unforeseen difficulties of construction involving unexpected expenses, and such as were not anticipated by the parties to the contracts, were encountered. That the firm of Wolf & King found that by reason of such difficulties it would be impossible to complete the contracts within the time agreed upon without employing an additional and an unusual force of men and means, and at a loss of not less than $40,000 to them, and consequently they notified the representative of the defendant that they would be unable to go forward with the contracts, and unable to complete or prosecute the work. Thereupon such representative entered into an agreement with them modifying the written contracts, whereby he agreed that if they would "go forward and prosecute the said work of construction, and complete said contract," he would pay or cause to be paid to them an additional consideration therefor, up to the full extent of the cost of the work, so that they should not be compelled to do the work at a loss to themselves; that in consideration of such promise they agreed to forward the work rapidly, and force the same to completion, in the manner provided in the specifications for such work, and referred to in such contracts; that in reliance upon the agreement modifying the former contracts, and in reliance upon such former contracts, they did prosecute and complete the work in accordance with the contracts as so modified by the oral agreement, to the satisfaction of all parties in interest; that such contracts and the oral contract modifying them were duly ratified by the defendant, and that the actual cost of such construction was not less than $30,000 in excess of the stipulated amount provided for in the original written contracts.

It is claimed by appellant that the complainant shows no consideration for the alleged promise to pay extra compensation for the work; that it is at best simply a promise to pay the contractors an additional compensation if they would do that which they were already legally bound to do. The general rule is that a promise of a party to a contract to do, or the doing of, that which he is already under a legal obligation to do by the terms of the contract is not a valid consideration to support the promise of the other party to pay an additional compensation for such performance. * * * In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. * * * If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of experience in the prosecution of the work that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action.

It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several states, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract

provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one. Munroe v. Perkins, 9 Pick. (Mass.) 305, 20 Am. Dec. 475; Bryant v. Lord, 19 Minn. 396 (Gil. 342); Moore v. Locomotive Works, 14 Mich. 266; Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122.

The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby. There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. * * *

It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the pre-

sumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. * * *

What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. * * *

The cases of Meech v. City of Buffalo, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and Michaud v. McGregor (decided at the present term) 61 Minn. 198, 63 N. W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there, by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule. Do the allegations of fact contained in plaintiff's first alleged cause of action bring his case within the exception? Clearly not; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual expense, involving a large use of powder and extra time and labor for the purpose of blasting out the frozen earth and other material which was encountered. What the character of this material was we are not told, or what the other extraordinary conditions of the ground were.

The court will take judicial knowledge of the fact that frozen ground on the Missabe Range, where the work was to be performed, in the month of February, is not unusual or extraordinary. It was a matter which must have been anticipated by the parties, and taken into consideration by them when this contract was made. The most that can be claimed from the allegations of the complaint is that the contractors had made a losing bargain, and refused to complete their contract, and the defendant, by its representative, promised them that if they would go forward and complete their contract it would pay them an additional compensation, so that the total compensation should be equal to the actual cost of the work. * * *

So much of the order appealed from as overruled the defendant's demurrer to the supposed first cause of action in the plaintiff's complaint must be reversed. * * *

MAKER v. TAFT.

(Supreme Court of Oklahoma, 1914. 41 Okl. 663, 139 Pac. 970, 52 L. R. A. [N. S.] 328.)

GALBRAITH, C. This was an action in replevin commenced April 3, 1911, for the purpose of obtaining the possession of certain horses and cattle described in a chattel mortgage given for the purpose of securing a promissory note for $582. The note being past due, the mortgagee sought the possession of the property in order that he might foreclose the same. The order of replevin was issued, and the property seized and sold after posting notice the required time, and the proceeds of the sale applied in payment of the amount of the note and interest and cost, and a small balance of $36 remaining in the hands of the mortgagee was offered to the defendants, and by them refused. The defendants filed a joint answer to the petition in replevin, in which they admitted the execution of the note and mortgage, but denied that they were unlawfully in the possession of the property at the time of the commencement of the suit, for the reason that the maturity of the note and mortgage had been extended for six months a short time prior to filing the suit, and specially pleaded that "on or about the ——— day of April, 1911, and before the beginning of this action, said defendants paid to the plaintiff the sum of $50 on said debt, and, as consideration therefor, the plaintiff has promised and agreed with the defendants that said note and mortgage was extended for a period of six months from said ——— day of April, 1911." To this answer the plaintiff demurred, on the ground that the same did not state facts sufficient to constitute a defense to the action. * * *

It is contended that, in paying the $50 interest already due, the defendant was doing no more than she was already legally bound to do, and that, therefore, there was no consideration for the agreement to extend the payment of the note. * * * The authorities upon this proposition are in irreconcilable conflict, and it is for this court to decide which line of authorities to follow upon this proposition. * * *

In Dare v. Hall, 70 Ind. 545, it was held that, to release a surety on account of the extension of time to the principal, the extension must have been upon a new consideration, and that the payment of interest already due upon the note did not constitute such new consideration. It was also held that an agreement to continue the payment of interest at the same rate as specified in the note, or an agreement to provide paying interest at a reduced rate, created no new consideration for the extension of the note. To the same effect is the case of Wilson v. Powers, 130 Mass. 127; Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685. * * *

There are authorities equally as strong upon the other side of this proposition. * * * In McComb v. Kittridge, 14 Ohio 348, the court in language referred to by Mr. Justice Brewer in Royal v. Lindsay, 15 Kan. 591, said: "It is just as competent for the principals to a note to extend the time of payment for a specified period as it was to fix the time of payment originally. If the lender of money secured by a note, after the same becomes due, contracts with the borrower that the time of paying the same shall be extended for one year, or for any other period, upon consideration that the borrower shall pay the legal or less rate of interest, why is not that a binding contract? The lender, by this contract, secures to himself the interest on his money for the

year; and the borrower precludes himself from getting rid of the payment of the interest by discharging the principal. It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege, at any time, of getting rid of the payment of interest by discharging the principal. By this contract, the right to interest is secured for a given period, and the right to pay off the principal, and get rid of paying the interest, is also relinquished for such period. Here, then, are all the elements of a binding contract. But it is said there is no consideration for the extension of time, because the law gives 6 per cent after the note is due. But the law does not secure the payment of this interest for any given period, or prevent the discharge of the principal at any moment. There is precisely the same consideration for the extension of the time as there was for the original loan The consideration of the loan, on the part of the borrower, is the payment of interest. If there was no law limiting the amount of interest, the parties might contract for any rate they pleased. A contract to forbear the collection of a debt for a specified period, in consideration of the payment of a rate of interest beyond what the law allows, is founded upon a valid consideration. This would never have been doubted at all, if the law had not fixed the rate for which collection could be had. But by limiting the rate of interest the law does not declare that such rate is not a valuable consideration but, on the contrary, declares that such rate is so fully valuable that it will not permit a higher rate for the use of money or forbearance." * * *

We are constrained to follow the line of decisions holding that the promised extension, if made as set out in the defendants' answer, was without consideration and void. The entire debt at the time of this payment being past due, and the interest then accrued amounting to more than the amount paid, and not having paid or agreed to pay any more than she was under obligation to pay at that time, and not having paid any greater rate of interest than was provided by the terms of the note and mortgage, there was not, in any aspect of the case, a consideration passing from the maker of the note to the payee sufficient to support the alleged promised extension, and for that reason the answer did not set out facts sufficient to constitute a defense, and the demurrer thereto should have been sustained. The same objection, as raised at the subsequent stages of the trial, was well taken, and the denial thereof was prejudicial error.

On account of these errors, the judgment appealed from should be reversed, and said cause remanded to the superior court of Custer county for further proceedings not inconsistent with the foregoing opinion.

DE CICCO v. SCHWEIZER et al.

(Court of Appeals of New York, 1917. 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816.)

CARDOZO, J. On January 16, 1902, "articles of agreement" were executed by the defendant Joseph Schweizer, his wife, Ernestine, and Count Oberto Gulinelli. The agreement is in Italian. We quote from a translation the part essential to the decision of this controversy: "Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Gia-

como Giovanni Francesco Maria Gulinelli: Now in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of two thousand five hundred dollars, or the equivalent of said sum in francs, the first payment of said amount to be made on the 20th day of January, 1902." Later articles provided that, "for the same reason heretofore set forth," Mr. Schweizer will not change the provision made in his will for the benefit of his daughter and her issue, if any. The yearly payments in the event of his death are to be continued by his wife.

On January 20, 1902, the marriage occurred. On the same day, the defendant made the first payment to his daughter. He continued the payments annually till 1912. This action is brought to recover the installment of that year. The plaintiff holds an assignment executed by the daughter, in which her husband joined. The question is whether there is any consideration of the promised annuity. That marriage may be a sufficient consideration is not disputed. The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfillment of an existing legal duty. For this reason, it is insisted, consideration was lacking. The argument leads us to the discussion of a vexed problem of the law which has been debated by courts and writers with much subtlety of reasoning and little harmony of results. There is general acceptance of the proposition that where A. is under a contract with B., a promise made by one to the other to induce performance is void. The trouble comes when the promise to induce performance is made by C., a stranger. Distinctions are then drawn between bilateral and unilateral contracts; between a promise by C. in return for a new promise by A., and a promise by C. in return for performance by A. Some jurists hold that there is consideration in both classes of cases. Ames, Two Theories of Consideration, 12 Harvard Law Review, 515, and 13 Harvard Law Review, 29, 35; Langdell, Mutual Promises as a Consideration, 14 Harvard Law Review, 496; Leake, Contracts, p. 622. Others hold that there is consideration where the promise is made for a new promise, but not where it is made for performance. Beale, Notes on Consideration, 17 Harvard Law Review, 71; 2 Street, Foundations of Legal Liabilities, pp. 114, 116; Pollock, Contracts (8th Ed.) 199; Pollock, Afterthoughts on Consideration, 17 Law Quarterly Review, 415; 7 Halsbury, Laws of England, Contracts, p. 385; Abbott v. Doane, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33. 47 Am. St. Rep. 465. Others hold that there is no consideration in either class of cases. Williston, Successive Promises of the Same Performance, 8 Harvard Law Review, 27, 34; Consideration in Bilateral Contracts, 27 Harvard Law Review, 503, 521; Anson on Contracts (11th Ed.) p. 92.

The storm center about which this controversy has raged is the case of Shadwell v. Shadwell, 9 C. B. (N. S.) 159, 99 E. C. L. 158, which arose out of a situation similar in many features to the one before us. Nearly everything that has been written on the subject has been a commentary on that decision. There an uncle promised to pay his nephew after marriage an annuity of £150. At the time of the promise the nephew was already engaged. The case was heard before Erle, C. J., and Keating and Byles, JJ. The first two judges held the promise to

be enforceable. Byles, J., dissented. His view was that the nephew, being already affianced, had incurred no detriment upon the faith of the promise, and hence that consideration was lacking. Neither of the two opinions in Shadwell v. Shadwell can rule the case at bar. There are elements of difference in the two cases which raise new problems. But the earlier case, with the literature which it has engendered, gives us a point of departure and a method of approach.

The courts of this state are committed to the view that a promise by A. to B. to induce him not to break his contract with C. is void. * * * If that is the true nature of this promise, there was no consideration. We have never held, however, that a like infirmity attaches to a promise by A., not merely to B., but to B. and C. jointly, to induce them not to rescind or modify a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.

The defendant's contract, if it be one, is not bilateral. It is unilateral. * * * The consideration exacted is not a promise, but an act. The count did not promise anything. In effect the defendant said to him: If you and my daughter marry, I will pay her an annuity for life. Until marriage occurred, the defendant was not bound. It would not have been enough that the count remained willing to marry. The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to affect the conduct, not of one only, but of both. This becomes the more evident when we recall that though the promise ran to the count, it was intended for the benefit of the daughter. * * * When it came to her knowledge, she had the right to adopt and enforce it. * * * In doing so, she made herself a party to the contract. * * * If the contract had been bilateral, her position might have been different. Since, however, it was unilateral, the consideration being performance, action on the faith of it put her in the same position as if she had been in form the promisee. That she learned of the promise before marriage is a legitimate inference from the relation of the parties and from other attendant circumstances. The writing was signed by her parents; it was delivered to her intended husband; it was made four days before the marriage; it called for a payment on the day of the marriage; and on that day payment was made, and made to her. From all these circumstances, we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it.

The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forbore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. The distinction between a promise by A. to B. to induce him not to break his contract with C., and a like promise to induce him not to join with C. in a voluntary rescission, is not a new one. It has been suggested in cases where the new promise ran to B. solely, and not to B. and C. jointly. Pollock, Contracts (8th Ed.) p. 199; Williston, 8 Harv. L. Rev. 36. The criticism has been made that in such circumstances there ought to be some evidence that C. was ready to withdraw. Will-

iston, supra, pp. 36, 37. Whether that is true of contracts to marry is not certain. Many elements foreign to the ordinary business contract enter into such engagements. It does not seem a far-fetched assumption in such cases that one will release where the other has repented. We shall assume, however, that the criticism is valid where the promise is intended as an inducement to only one of the two parties to the contract. It may then be sheer speculation to say that the other party could have been persuaded to rescind. But where the promise is held out as an inducement to both parties alike, there are new and different implications. One does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waiver; that one equally with the other must be strengthened and persuaded; and that rescission or at least delay is something to be averted, and something, therefore, within the range of not unreasonable expectation. If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result.

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. From that moment, there was no longer a real alternative. There was no longer what philosophers call a "living" option. This in itself permits the inference of detriment. * * * The same inference follows, not so inevitably, but still legitimately, where the statement is made to induce the preservation of a contract. It will not do to divert the minds of others from a given line of conduct, and then to urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.

One other line of argument must be considered. The suggestion is made that the defendant's promise was not made animo contrahendi. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its motive in the engagement of the daughter to the count. Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise "unless the parties have dealt with it on that footing." Holmes, Common Law, p. 292. * * * "Nothing is consideration that is not regarded as such by both parties." Philpot v. Gruninger, 14 Wall. 570, 577, 20 L. Ed. 743. * * * But here the very formality of the agreement suggests a purpose to affect the legal relations of the signers. One does not commonly pledge one's self to generosity in the language of a covenant. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It

states that these are the "consideration" for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law. Both sides moved for the direction of a verdict, and the trial judge became by consent the trier of the facts. If conflicting inferences were possible, he chose those favorable to the plaintiff.

The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements, and seeks to uphold them. It puts them for many purposes in a class by themselves. * * * It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference. * * * It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others.

The judgment should be affirmed with costs.

SECTION 4.—PROMISES IN THE NATURE OF GRATUITIES

MILLER et al. v. WESTERN COLLEGE OF TOLEDO.

(Supreme Court of Illinois, 1898. 177 Ill. 280, 52 N. E. 432. 42 L. R. A. 797. 69 Am. St. Rep. 242.)

In the matter of the estate of Mary Beatty, deceased, the Western College of Toledo obtained a judgment against Jacob Miller and another, executors, and they appealed to the Appellate Court, which affirmed the judgment, and they again appeal. * * *

The note, filed as a claim against the estate of the deceased, is as follows:

"$7,000.00. Dover, Ill., Dec. 9, 1887. In consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition, I promise to pay to the order of the treasurer of Western College, of Toledo, Iowa, for the erection of the Ladies' Boarding Hall of said college, on or before the first day of December, 1910, the sum of seven thousand dollars, without interest: provided, that in the event of my death before the maturity of this note it shall become then due. Mary Beatty. P. O.: Dover. County: Bureau. State: Ill. Witness: H. H. Maynard. W. M. Beardshear." * * *

The appellee is a college located at Toledo, in the state of Iowa, and is under the management of the denomination known as the United Brethren in Christ. Prior to December, 1887, the college had commenced the erection of a building to be known as the "Ladies' Boarding Hall" of the college and had expended upon the stone foundation thereof the sum of $2,000, donated to it by a man in Ohio, named Dodds. In December, 1887, representatives of the college appealed to the deceased, Mary Beatty, at her home in Dover, Ill., for a donation of $10,-

000, to complete the erection of said hall, she being a member of the denomination to which the college belonged. On December 9, 1887, she was visited by H. H. Maynard, a soliciting agent of the college, and W. M. Beardshear, president of the college. On December 3, 1887, she had given to Maynard $500 in cash, a note for $1,500, payable on or before December 3, 1890, and a note for $5,000 of like tenor with the note for $7,000 above set forth. On December 9, 1887, she destroyed the $5,000 note, and gave to Maynard and Beardshear the $7,000 note above described, and also a short-time note for $1,000. * * *

MAGRUDER, J. It is contended, however, that the note for $7,000, filed as a claim in this case was executed and delivered without any valid consideration to support it. The note recites upon its face that the maker thereof promises to pay "in consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition." * * * Whether this note, upon its face, imports a consideration or not, it is well settled that proof may be introduced to show the facts in regard to the consideration of the note. The evidence tends to show that the deceased availed herself of the privilege, specified in the note, of sending one student four years free of tuition. The certificate embodying such privilege was issued to Mrs. Beatty, and was made use of by a female student upon the order of Mrs. Beatty. We do not deem it necessary, however, to decide whether or not the privilege specified upon the face of the note, and the use of it made by the deceased, constituted a valid consideration. The proof tends to show that the note for $7,000 was a gift or donation to the college. Such a note partakes of the nature of a voluntary subscription to raise a fund or promote an object. It is well settled that a promissory note without consideration, and intended as a gift to the payee by the maker thereof, is but a promise to make a gift in the future, and is not enforceable. As a gift it is always revocable until it is executed, and is not executed until it is paid. "The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon." Pratt v. Trustees, 93 Ill. 475, 34 Am. Rep. 187. In Blanchard v. Williamson, 70 Ill. 647, we said (page 652): "If a party delivers his own promissory note as a gift, it is but a promise to pay a sum certain at a future day, and we are not aware such a promise can be enforced, either at law or in equity. It could not be enforced against the maker in his lifetime, and his representatives could defend against it on the ground there was no consideration." * * * But, while such a note, amounting to a mere gift, is open to the defense of a want of consideration, yet that defense cannot be made to it if money has been expended, or liabilities have been incurred, in reliance upon the note. If money has been expended, or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person so expending money or incurring liability, if the note is not paid, the donor or maker thereof is, in good conscience, bound to pay; and the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking. We have said: "It is the expending of money, etc., or incurring a legal liability on the faith of the promise, which gives the right of action; and without this there is no right of action." Pratt v. Trustees, 93 Ill. 475, 34 Am. Rep. 187.

There was evidence in the case at bar tending to show that the ap-

pellee expended money in the construction of the building known as "Ladies' Boarding Hall" upon the faith of the promise made by the deceased as embodied in the note for $7,000. It makes no difference that she did not advance any money upon that note, but preferred to donate $6,700, and take back certificates, which secured to her the payment of annuities thereon during her life. The instructions given by the court to the jury required them to find whether or not the college, during the lifetime of Mary Beatty, entered into a contract to build and erect, and did build and erect, and expend moneys and incur liabilities in building and erecting, the Ladies' Boarding Hall on the faith and strength of the note for $7,000. The question as to the expenditure of such moneys and the incurring of such liabilities upon the faith and strength of the note was a question of fact, which was submitted to the jury by the instructions. In the present state of the record, we are obliged to assume that the jury found in favor of such expenditures of money and the incurring of such liabilities on the part of the appellee. This being so, the appellee is entitled to its right of action, even if the note for $7,000 was without consideration before it was thus acted upon. Upon this branch of the case, therefore, we are of the opinion that the courts below committed no error in holding the claim of appellee to be a valid claim. * * *

Judgment affirmed.

PRESBYTERIAN CHURCH OF ALBANY v. COOPER.

(Court of Appeals of New York, 1889. 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767.

Appeal from order of the General Term of the Supreme Court in the third judicial department, made the first Tuesday of May, 1887, which reversed a judgment in favor of plaintiff, entered upon the report of a referee, and ordered a new trial.

This was a reference under the statute of a disputed claim against the estate of Thomas P. Crook, defendants' intestate. The claim arose under a subscription paper, of which the following is a copy:

"We, the undersigned, hereby severally promise and agree to and with the trustees of the First Presbyterian Church in this city of Albany, in consideration of one dollar to each of us in hand paid and the agreements of each other in this contract contained, to pay on or before three years from the date hereof to said trustees the sum set opposite to our respective names, but upon the express condition, and not otherwise, that the sum of $45,000 in the aggregate shall be subscribed and paid in for the purpose hereinafter stated; and if within one year from this date said sum shall not be subscribed or paid in for such purpose, then this agreement to be null and of no effect. The purpose of this subscription is to pay off the mortgage debt of $45,000, now a lien upon the church edifice of said church, and the subscription or contribution for that purpose must equal that sum in the aggregate to make this agreement binding.

"Dated May 18, 1884."

The defendants' intestate made two subscriptions to this paper—one of $5,000 and the other of $500. He paid upon the subscription $2,000. The claim was for the balance.

ANDREWS, J. It is, we think, an insuperable objection to the maintenance of this action that there was no valid consideration to uphold

the subscription of the defendants' intestate. It is, of course, unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience. By the terms of the subscription paper the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany, to pay to said trustees, within three years from its date, the sums severally subscribed by them, for the purpose of paying off "the mortgage-debt of $45,000 on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration, viz., "in consideration of one dollar to each of us (subscribers) in hand paid and the agreement of each other in this contract contained." It was shown that the one dollar recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration which, on its face, is insufficient to support a promise, give it any validity, although the fact recited may be true.

It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the chancellor as expressed in Stewart v. Hamilton College, when it was tried before the Court of Errors, 2 Denio, 417, and dicta of judges will be found to the same effect in other cases. * * * But the doctrine of the chancellor, as we understand, was overruled when the Hamilton College Case came before this court (1 N. Y. 581), as have been also the dicta in the Massachusetts cases, by the court in that state, in the recent case of Cottage Street Methodist Episcopal Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant. * * *

In the disposition of this case we must, therefore, reject the consideration recited in the subscription paper as ground for supporting the promise of the defendant's intestate, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because, there is no privity of contract between the plaintiff and the promisors. Some consideration must, therefore, be found other than that expressly stated in the subscription paper, in order to sustain the action. It is urged that a consideration may be found in

the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services, rendered by one party at the request of another, constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustee did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals, interested in promoting the general object in view.

Leaving out of the subscription paper the affirmative statement of the consideration (which, for reasons stated, may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in Hamilton College v. Stewart, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on subscriptions, upon the mortgage debt, did not constitute a consideration for the promise of the defendant's intestate. We are unable to distinguish this case in principle from Hamilton College v. Stewart, 1 N. Y. 581. There is nothing that can be urged to sustain this subscription that could not, with equal force, have been urged to sustain the subscription in that case. In both, the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription and resisted the balance. In both, part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College Case (which in that respect is unlike the present one) it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown, also, that professors had been employed upon the strength of the fund subscribed. That case has not been overruled, and has been frequently cited with approval in the courts of this and other states. The cases of Barnes v. Perine, 12 N. Y. 18, and Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500, are not in conflict with that decision. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration, may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit

it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Judge Allen, in his opinion in Barnes v. Perine, said, "the request and promise were, to every legal effect, simultaneous," and he expressly disclaims any intention to interfere with the decision in the Hamilton College Case. In the present case it was shown that individual trustees were active in procuring subscriptions. But, as we have said, they acted as individuals, and not in their individual capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request of Mr. Crook. They were co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is thwarted by the conclusion we have reached. But we think there is no alternative, and that the order should be affirmed. All concur.

Order affirmed and judgment accordingly.

SECTION 5.—ILLUSORY PROMISES

WICKHAM & BURTON COAL CO. v. FARMERS' LUMBER CO.

(Supreme Court of Iowa, 1920. 179 N. W. 417, 14 A. L. R. 1293.)

Counterclaim asserting that damages were due from plaintiff because of a contract made between plaintiff and defendant. A demurrer to the counterclaim was overruled; hence this appeal.

SALINGER, J. The counterclaim alleges that about August 18, 1916, defendant, through an agent, entered into an oral agreement "whereby plaintiff agreed to furnish and to deliver to defendant orders given them" for carload shipments of coal from defendant f. o..b. mines, "to be shipped to defendant at such railroad yard stations as defendant might direct, at the price of $1.50 a ton on all orders up to September 1, 1916, and $1.65 a ton on all orders from then to April 1, 1917." It is further alleged that "said coal ordered would be and consist" of what was known as plaintiff's Paradise 6″ lump, 6x3″ egg, or 3x2″ nut coal. * * * Then comes an allegation that the agent made oral agreement "that plaintiff would furnish unto defendant coal in carload lots, that defendant would want to purchase from plaintiff" on stated terms, with character of the coal described, and that the oral contract was confirmed by the letter Exhibit 1. It is of date August 21, 1916, and recites that plaintiff is in receipt of a letter from their agent—"asking us to name you a price [repeating the price and coal description found in the counterclaim]. Although this is a very low price, our agent, Mr. Spalding, has recommended that we quote you this price, and we hereby confirm it. Any orders received between now and September 1st are to be shipped at $1.50. We would like to

have a letter from you accepting these prices, and if this is satisfactory will consider same as a contract."

On August 26, 1916, the defendant responded: "We have your favor of the 21st accepting our order for coal for shipment to March 31, 1917."

The basis of the counterclaim, so far as damages are concerned, is the allegation that a stated amount of coal had to be purchased by defendant in the open market at a greater than the contract price, and that therefore there is due the defendant from the plaintiff the sum of $3,090.

The demurrer asserts that the alleged contract is "void for failure of mutuality and certainty," is void because there is no consideration between the parties, because it appears affirmatively that the offer was simply an offer on part of plaintiff, which might be accepted by giving an order until such time as it was actually withdrawn or expired by limitation, each order and acceptance of a carload lot constituting a separate and distinct contract, and void because the agreement could not be enforced by the plaintiff on any certain or specified amount of tonnage, or for the payment of any specified tonnage. * * *

The authorities that deal with uncertainty and indefiniteness hold, in effect, that whatsoever is ascertainable with reasonable effort is sufficiently certain to be enforced, if there be no objection to enforcement other than uncertainty. Now, grant that it was not difficult to ascertain how much coal defendant would sell in the time stated in the negotiations, how does that help if there was no obligation on one side to sell, or on part of the other to buy? If the defendant was under no binding obligation to buy of plaintiff, it does not matter how much defendant could sell. In fewer words, though an offer to sell a specified number of tons of coal is not uncertain or lacking in definiteness, such offer is no contract, unless the other party agrees to receive what is offered. In still fewer words, while a writing may be so uncertain as not to be enforceable, a perfectly definite writing may still be unenforceable because there is no mutuality of obligation.

And the asserted lack of consideration is bottomed on the claim that mutuality is lacking. Appellant does not deny that a promise may be a consideration for a promise. Its position is that this is so only of an enforceable promise. That is the law. If, from lack of mutuality, the promise is not binding, it cannot form a consideration. * * * There is no consideration by promises which lack mutuality. * * *

The question of first importance then, is, whether there is a lack of mutuality. In the last analysis the counterclaim is based on the allegation that plaintiff undertook to furnish defendant such described coal "as defendant would want to purchase from plaintiff." The defendant never "accepted." Indeed, it is its position that it gave orders, and that plaintiff did the accepting. But concede, for argument's sake, that defendant did accept. What was the acceptance? At the utmost, it was a consent that plaintiff might ship it such coal as defendant "would want to purchase from plaintiff." What obligation did this fasten upon defendant? It did not bind itself to buy all it could sell. It did not bind itself to buy of plaintiff only. It merely agreed to buy what it pleased. It may have been ascertainable how much it would need to buy of some one. But there was no undertaking to buy that much, or, indeed, any specified amount of coal of plaintiff. * * *

The "contract" on part of appellee is to buy if it pleased, when it pleased, to buy if it thought it advantageous, to buy much, little, or not at all, as it thought best.

A contract of sale is mutual where it contains an agreement to sell on the one side, and an agreement to purchase on the other. But it is not mutual where there is an obligation to sell, but no obligation to purchase, or an obligation to purchase, but no obligation to sell. * * *

Where one party agrees to cut for the other hay "not to exceed 200 tons," there is lack of mutuality, because the offerant was not bound to deliver any particular quantity of hay, and could cut as little as he pleased. * * *

And so of an offer to receive and transport railroad iron, not to exceed a stated number of tons, during specified periods, and at a specified rate per ton. As to this it was held that, though plaintiff answered, assenting to the proposal, there was still no contract, because there was no agreement on his part that he would deliver any iron for transportation. * * * An agreement to purchase all that the manufacturer desires to sell at a specified price is void. * * * A written proposition to buy a stated quantity of coal at a stated price is not enforceable, because there is no corresponding obligation on the other to sell the coal at said price. * * *

No contract is created by a willingness to ship such gauge glasses as the other "might order," * * * nor by an engagement to deliver at a stated price "as many grapes as he (the other party) should wish." * * *

A contract to sell personal property is void for want of mutuality if the quantity to be delivered is conditioned entirely on the will, wish, or want of the buyer. * * * An agreement to receive and pay for such beer as the plaintiff might from time to time want from the defendant lacks binding force for want of mutuality, though plaintiff agreed to sell all the beer of specified brands which plaintiff should order at prices to be agreed on. * * *

If there never was a contract to ship anything, that is still the situation when a contract to ship what has not yet been shipped is asserted as the basis of an action. As said in Cold Blast Co. v. Bolt Co., 114 Fed. 80, 52 C. C. A. 25, 57 L. R. A. 696, even though there had been some shipments, there was still no consideration and no mutuality in the contract as to any articles which defendant had not ordered, or which plaintiff had not delivered, and therefore the refusal of plaintiff to honor the orders of defendants was no breach of any valid contract, and formed no legal cause of action whereon to base a counterclaim. * * *

It is thus stated in 13 Corpus Juris, 341: "Accepted orders for goods under contracts void within these rules constitute sales of the goods thus ordered at the price named in the contracts, but do not validate the agreements as to articles which the one refuses to purchase or the other refuses to deliver, or to deliver under the void contract. This is so because neither party is bound to take or deliver any amount or quantity of these articles thereunder."

Defendant alleges further that, by reason of the conduct of plaintiff in furnishing defendant two carloads at $1.50 per ton under the contract terms, plaintiff is now estopped from claiming there was no binding between the parties for furnishing coal to defendant under the

contract contended for by defendant. But the claimed estoppel is no broader than the claimed breach of a contract which is no contract.

Cases relied on by appellee do not, on careful consideration, militate with what we have declared. All that Keller v. Ybarru, 3 Cal. 147, holds is that, when one party offers to sell as much as the other wishes, there is a contract after the other declares what quantity he will take. * * *

The demurrer should have been sustained.

Reversed.

OSCAR SCHLEGEL MFG. CO. v. PETER COOPER'S GLUE FACTORY.

(Court of Appeals of New York, 1921. 231 N. Y. 459, 132 N. E. 148.)

Action by the Oscar Schlegel Manufacturing Company against Peter Cooper's Glue Factory to recover damages for an alleged breach of contract. A judgment for the plaintiff for a substantial amount was affirmed by the Appellate Division, two Justices dissenting (189 App. Div. 843, 179 N. Y. Supp. 271), and defendant appeals.

McLAUGHLIN, J. Action to recover damages for alleged breach of contract. The complaint alleged that on or about December 9, 1915, the parties entered into a written agreement by which the defendant agreed to sell and deliver to the plaintiff, and the plaintiff agreed to purchase from the defendant, all its "requirements" of special BB glue for the year 1916, at the price of nine cents per pound. It also alleged the terms of payment, the manner in which the glue was to be packed, the place of delivery, the neglect and refusal of defendant to make certain deliveries, and the damages sustained, for which judgment was demanded. The answer put in issue the material allegations of the complaint. At the trial a jury was waived, and the trial proceeded before the trial justice. At its conclusion he rendered a decision awarding the plaintiff a substantial amount. Judgment was entered upon the decision, from which an appeal was taken to the Appellate Division, First Department, where the same was affirmed, two of the justices dissenting. The appeal to this court followed.

I am of the opinion the judgment appealed from should be reversed, upon the ground that the alleged contract, for the breach of which a recovery was had, was invalid since it lacked mutuality. It consisted solely of a letter written by defendant to plaintiff, the material part of which is as follows:

"Gentlemen: We are instructed by our Mr. Von Schuckmann to enter your contract for your requirements of 'special BB' glue for the year 1916, price to be 9c per lb., terms 2% 20th to 30th of month following purchase. Deliveries to be made to you as per your orders during the year and quality same as heretofore. Glue to be packed in 500-lb. or 350-lb. barrels and 100-lb. kegs, and your special label to be carefully pasted on top, bottom and side of each barrel or keg. * * * Peter Cooper's Glue Factory,

"W. D. Donaldson, Sales Manager."

At the bottom of the letter the president of the plaintiff wrote, "Accepted, Oscar Schlegel Manufacturing Company," and returned it to the defendant.

The plaintiff at the time was engaged in no manufacturing business in which glue was used or required, nor was it then under contract to deliver glue to any third parties at a fixed price or otherwise. It was simply a jobber, selling among other things, glue to such custom-

ers as might be obtained by sending out salesmen to solicit orders therefor. The contract was invalid since a consideration was lacking. Mutual promises or obligations of parties to a contract, either express or necessarily implied, may furnish the requisite consideration. The defect in the alleged contract here under consideration is that it contains no express consideration, nor are there any mutual promises of the parties to it from which such consideration can be fairly inferred. The plaintiff, it will be observed, did not agree to do or refrain from doing anything. It was not obligated to sell a pound of defendant's glue or to make any effort in that direction. It did not agree not to sell other glue in competition with defendant's. The only obligation assumed by it was to pay nine cents a pound for such glue as it might order. Whether it should order any at all rested entirely with it. If it did not order any glue, then nothing was to be paid. The agreement was not under seal, and therefore fell within the rule that a promise not under seal made by one party, with none by other, is void. Unless both parties to a contract are bound, so that either can sue the other for a breach, neither is bound. * * * Had the plaintiff neglected or refused to order any glue during the year 1916, defendant could not have maintained an action to recover damages against it, because there would have been no breach of the contract. In order to recover damages, a breach had to be shown, and this could not have been established by a mere failure on the part of the plaintiff to order glue, since it had not promised to give such orders.

There are certain contracts in which mutual promises are implied: Thus where the purchaser, to the knowledge of the seller, has entered into a contract for the resale of the article purchased; * * * where the purchaser contracts for his requirements of an article necessary to be used in the business carried on by him; * * * or for all the cans needed in a canning factory; * * * all the lubricating oil for party's own use; * * * all the coal needed for a foundry during a specified time; * * * all the iron required during a certain period in a furnace; * * * and all the ice required in a hotel during a certain season. * * * In cases of this character, while the quantity of the article contracted to be sold is indefinite, nevertheless there is a certain standard mentioned in the agreement by which such quantity can be determined by an approximately accurate forecast. In the contract here under consideration there is no standard mentioned by which the quantity of glue to be furnished can be determined with any approximate degree of accuracy.

The view above expressed is not in conflict with the authorities cited by the respondent. Thus, in N. Y. C. Iron Works Co. v. U. S. Radiator Co., 174 N. Y. 331, 66 N. E. 967, principally relied upon and cited in the prevailing opinion at the Appellate Division, "the defendant bound the plaintiff to deal exclusively in goods to be ordered from it under the contract and to enlarge and develop the market for the defendant's wares so far as possible."

In Fuller & Co. v. Schrenk, 58 App. Div. 222, 68 N. Y. Supp. 781, affirmed 171 N. Y. 671, 64 N. E. 1126, the contract provided: "It is hereby agreed that, in consideration of W. P. Fuller & Co. buying all their supply of German mirror plates from the United Bavarian Looking Glass Works for a period of six months from this date, the said United Bavarian Looking Glass Works" agrees to sell certain mirrors at specified prices.

In Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214, the plaintiff was to have, for the term of one year, the exclusive right to place defendant's indorsement on certain designs, in return for which she was to have one-half of all the profits and revenue derived from any contracts he might make. The point was there made, as here, that plaintiff did not promise that he would use reasonable efforts to place defendant's indorsement and market her designs, but this court held that such a promise was fairly to be implied; that when defendant gave to the plaintiff an exclusive privilege for a period of one year, during which time she could not place her own indorsements, or market her own designs, except through the agency of the plaintiff, that the acceptance of such an exclusive agency carried with it an assumption of its duties.

In Ehrenworth v. George F. Stuhmer & Co., 229 N. Y. 210, 128 N. E. 108, defendant and its predecessor were desirous of obtaining a market for a particular kind of bread which it manufactured. In order to accomplish this purpose, it was agreed that plaintiff should purchase and defendant sell all the bread of the kind specified which plaintiff required in a certain locality and pay therefor a price specified in the agreement. The plaintiff also agreed he would not sell any other bread of that kind on that route during the life of the contract, which was to continue so long as the parties remained in business. This contract, it will be noticed, specified the articles to be sold, the price to be paid, the quantity to be furnished, and the term of the contract, during which time plaintiff agreed not to sell any other bread of the kind named in that territory.

In the instant case, as we have already seen, there was no obligation on the part of the plaintiff to sell any of the defendant's glue, to make any effort towards bringing about such sale, or not to sell other glues in competition with it. There is not in the letter a single obligation from which it can fairly be inferred that the plaintiff was to do or refrain from doing anything whatever.

The price of glue having risen during the year 1916 from 9 to 24 cents per pound, it is quite obvious why orders for glue increased correspondingly. Had the price dropped below 9 cents, it may fairly be inferred such orders would not have been given. In that case, if the interpretation put upon the agreement be the correct one, plaintiff would not have been liable to the defendant for damages for a breach, since he had not agreed to sell any glue.

The judgments of the Appellate Division and trial court should be reversed, and the complaint dismissed, with costs in all courts. * * *

RAMEY LUMBER CO. v. JOHN SCHROEDER LUMBER CO.

(United States Circuit Court of Appeals, Seventh Circuit, 1916. 237 Fed. 39, 150 C. C. A. 241.)

Plaintiff, the Ramey Lumber Company, Limited, agreed to sell to defendant, the John Schroeder Lumber Company, at stated prices, all the lumber of certain grades that plaintiff should manufacture or own during the year 1911, in consideration of which defendant agreed to buy all such lumber. Plaintiff sues for breach of contract. Defenses: Uncertainty and want of mutuality of consideration. Complaint dismissed below. Plaintiff brings writ of error.

ALSCHULER, J. * * * As to the defenses of uncertainty and want of mutuality, we are unable to concur in the decision of the trial court. The contract did not lack mutuality of obligation. While defendant promised to buy of plaintiff all the lumber of a certain quality that plaintiff might own during the season, plaintiff bound itself, if it did manufacture or acquire any such lumber, to sell all of it to defendant and to no one else. Thus plaintiff deprived itself of the right to sell lumber to whom it pleased. The promise to restrict its freedom by giving up its right to sell to others was real and definite. It was the substantial and contemplated consideration for defendant's promise to buy all that plaintiff might own during the season. There was the mutuality of obligation essential to a bilateral contract; there was the consideration essential to the validity of any contract. * * * That the plaintiff did not bind itself to acquire or manufacture any such lumber is immaterial. Its promise to deal with defendant was the valid consideration for the obligation by defendant, a consideration that made the undertaking of the other party binding and enforceable.

With regard to the question of uncertainty, a contract is void (save for the possibility of reformation in equity) because of uncertainty, only when it is so worded that the intention of the parties cannot be deduced therefrom. If the intention be clear, the mere uncertainty of the amount involved does not invalidate the obligation, however it may affect the possibility of proving damages for a breach. In the present case the preliminary negotiations demonstrate that defendant wanted to secure all such lumber that it could possibly obtain, without limit, and without binding plaintiff absolutely and under all circumstances to deliver any lumber. The parties had a right to make such a contract, even though the amount that would be deliverable thereunder was not specified, and was in a sense optional with the vendor; and this they did, in terms which are clear and certain. * * *

Moreover, there were definite limitations on the amount that could and must be tendered. While plaintiff had the option either to manufacture and to buy from others, or to refrain therefrom, it was absolutely obligated to sell all that it manufactured or owned during the season. When the contract was executed, the maximum amount that would be deliverable thereunder, while unknown to the parties, and in that sense uncertain, was, under the finding of facts, the amount of specified grades of a definite kind of lumber that could be manufactured between March and July of the year 1911 either by plaintiff or others. So much thereof as plaintiff might own within a definitely limited time, the season of 1911, was the amount that it had obligated itself to sell. This would necessarily have become certain during the season, even if the time limit for plaintiff's ownership included, not merely the manufacturing season, but also the short period thereafter within which delivery must be made. * * *

We therefore conclude that the plaintiff is entitled to recover as its damages the loss it incurred from defendant's nonacceptance of the 20 carloads, and on account of the 1,455,919 feet on hand at time of repudiation of the contract. * * *

The judgment is therefore reversed, and the cause remanded, with directions to the District Court to enter a judgment in favor of plaintiff for $4,899.82, together with interest, as above stated, to date of entry of judgment, and costs.

RICH v. DONEGHEY.

(Supreme Court of Oklahoma, 1918. 177 Pac. 86, 3 A. L. R. 352.)

The owners of a tract of 60 acres of land executed an instrument, denominated an oil and gas lease, by the terms of which they granted, demised, leased, and let the same to another, his heirs, executors, administrators, and assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, power stations, and structures thereon, to procure and take care of said products. The grant was for a term of five years from date and as long thereafter as oil or gas, or either of them, was produced by said party. The instrument recited a consideration of $1 paid by the lessee to the lessors. The lessee agreed to deliver to lessors one-eighth of the oil produced and saved from the premises; to pay certain stipulated sum per annum for each gas well, and for gas utilized from each oil well. The lessee further agreed to complete a well on said premises within six months, or pay at the rate of $15 for each additional month such completion was delayed. The instrument contained the further provision that the lessee should have the right at any time, on payment of $1 to the lessors, to surrender the lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms should cease and determine.

The owners of the land bring action to cancel the instrument and remove same as a cloud on their title. It appeared that no well had been commenced, but that the lessee had made timely payments or tender of all sums stipulated to be paid for delay in completing a well.

MILEY, J. * * * Among the considerations expressed in this instrument are the covenants and agreements of the lessee to pay certain stipulated royalties for oil, and for each gas well, and to complete a well within six months, or pay at the rate of $15 for each additional month such completion is delayed. It will be conceded that this agreement to develop, and the prospective royalties, or the monthly payments in lieu of development, standing alone, would constitute a sufficient consideration. But it is contended that under the clause in the instrument conferring on the defendant the option to surrender the lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, the lessee was not bound to perform these promises, or, as it is said, not bound to do anything. This statement would appear to be too sweeping. Instead of not being bound to do anything, the lessee is obligated thereunder to do one of three things: (1) Drill and complete a well in a fixed time, or (2) surrender all his rights and pay in addition the sum of $1, or (3) pay during the term of five years, or until surrender, $15 per month for each additional month the completion of a well is delayed.

The lessee cannot escape from all these obligations. He may escape two of them, but he is absolutely bound to do one of the three. If he does the first, and fails to find oil or gas, he will suffer a detriment, and, if oil or gas is discovered, will confer a benefit on the lessor by way of royalties on the oil and gas produced. If he does the second, he will suffer a detriment and confer a corresponding benefit on the lessor. If he does neither of these, he is absolutely obligated to the other, and the amounts agreed to be paid for the delay may be recovered in an action therefor. * * * If the lessee

should choose to perform what may seem to be the least onerous obligation, and surrender, the lessor will obtain some benefit and the lessee suffer some detriment, at least to the extent of $1. It would seem, therefore, that under these alternative obligations to develop, or surrender, or pay for delay, a consideration is not wanting. The fact that the lessee must pay $1 at the time he exercises the right of surrender should, it would seem, afford ground for distinguishing decisions holding that the lessee was not obligated to anything where, under the leases there under consideration, the lessee was not obligated to pay anything at the time of surrender, or in which it was provided that the lease should terminate and become void as to both parties unless a stipulated sum was paid for delay.

But, putting that aside, if we give the surrender clause the sweeping effect claimed, and assume that by virtue thereof the lessee has given no binding promise to drill or pay, or do anything, and treat the instrument as though it recited no promise whatever, or imposed no obligations to pay royalties, and to develop, or pay a fixed sum at stated times in lieu thereof, it does not follow that the instrument is without sufficient consideration. Grants of this character are not dependent for their validity on an agreement to pay royalties and the consequent expressed or implied covenant to develop. They may be for any other consideration agreeable to the parties and valuable in law. The consideration may be wholly executed. It may be in money only paid at the time of the execution and delivery of the instrument. Such moneyed consideration, in addition to the covenants before referred to, is recited to have been paid and its receipt acknowledged in the face of the instrument. It is true that the amount recited is small, being only $1, but a dollar is the unit of value, and is a thing of value in fact and in the eye of the law; many sales and transactions are had daily in which that sum is the sole consideration. * * *

The $1 is not the sole consideration, however. It may be urged that it is not the real consideration, but that development and prospective royalties, as has been said in some decisions, were the real or moving consideration. That statement would hardly be accurate here, since the parties agreed that development might be deferred throughout the five-year term, and provided stipulated monthly payments in lieu thereof. It would be more accurate to say that one of the considerations, perhaps the principal one, for the grant was the covenant to develop and yield prospective royalties or pay in lieu thereof. In this connection, it is argued that, by virtue of the surrender clause. the lessee has the option of terminating the lease, and thereby to escape the obligation to develop or pay in lieu thereof, and thus defeat the main purpose or object of the lessor in making the grant, and therefore that it is likewise optional with the lessor to refuse payments for delay and to compel a surrender. To support this argument, the somewhat misleading, though euphonious, epigram, "that contracts unperformed, optional as to one of the parties, are optional as to both," is invoked. That rule can have no application here. It applies to contracts consisting entirely of mutual promises wholly executory and unperformed, the promises on one side being the sole consideration for the promises on the other, and in which, if it is optional with one of the parties whether he will perform his promises, it is said that prior to performance of such promises by him it is optional with the other whether he will perform his promises. It is but another way of stating the rule of

mutuality before referred to. * * * So far as the lessors are concerned, the lease was fully executed, and by its terms there was granted to the lessee an interest in the land to explore the same for oil and gas, and to produce such as might be found, which interest vested immediately upon execution and delivery of the instrument. Nor was the lease wholly unperformed on the part of the lessee with respect to the covenant now under consideration. He had made two of the monthly payments for delay, which had been accepted, and had tendered the payment for the third month before demand was made for cancellation, and has since performed the promise to pay for delay by depositing the amounts due in the designated bank, in strict conformity with the terms of the agreement. However, if it be assumed that the agreement, being fully executed on one side and partly performed on the other, does not make the rule inapplicable, yet the fact that the agreement is founded on an independent consideration, namely, the $1 paid by the lessee at the execution and delivery of the instrument, does have that effect.

In 13 C. J. 336, it is said: "When there is an agreement founded on a consideration, it is not invalid for the want of mutuality because one party has an option while the other has not, or, in other words, because it is obligatory on one and optional with the other. * * * And the option to relinquish a right acquired under a contract will not render it unilateral."

In 6 R. C. L. 687, it is said: "An option, supported by a consideration, furnishes another illustration of a contract which is valid notwithstanding the lack of mutuality. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it." * * *

The cases cannot be distinguished in principle on that ground. * * *

The judgment is accordingly reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the Justices concur except TURNER and BRETT, JJ., not participating, and OWEN, J., dissenting.

SECTION 6.—PROMISES TO PAY FOR A BENEFIT PREVIOUSLY RECEIVED

ALLEN v. BRYSON.

(Supreme Court of Iowa, 1885. 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358.)

Both parties are attorneys at law, and this action was brought to recover for professional services performed by the plaintiff for the defendant, and for personal property sold. Several defenses were pleaded, which are sufficiently referred to in the opinion. Trial by jury. Verdict and judgment for the plaintiff, and defendant appeals.

SEEVERS, J. * * * The defendant pleaded that he and the plaintiff were brothers-in-law, and, in substance, that each of them was engaged in the practice of the law, and had been in the habit of assisting each other as a matter of mutual accommodation, and that "all and each of the professional services for which plaintiff seeks to recover in this

action were rendered by him as matters of mutual accommodation and interchange of courtesies, and without charge or expectation of payment or reward by one as against the other." The court instructed the jury: "If, however, such services were rendered by the plaintiff without expectation of reward, or intention on his part to charge therefor, or by any agreement or understanding that the services were to be gratuitous, the plaintiff cannot recover unless, after such services were rendered, and in consideration thereof, defendant agreed with or promised plaintiff to pay for the same. In the latter case the valuable character of the service, and the moral obligation to pay for the same, would be a sufficient consideration to support the promise, and enable the plaintiff to recover the reasonable value of such service."

We understand this instruction to mean that where one person renders services for another gratuitously, and with no expectation of being paid therefor, that a moral obligation is incurred by the latter which will support a subsequent promise to pay. In our opinion, this is not the law. If the services are gratuitous, no obligation, either moral or legal is incurred by the recipient. No one is bound to pay for that which is a gratuity. No moral obligation is assumed by a person who receives a gift. Suppose the plaintiff had given the defendant a horse, was he morally bound to pay what the horse was reasonably worth? We think not. In such case there never was any liability to pay, and therefore a subsequent promise would be without any consideration to support it. That there are cases which hold that where a liability to pay at one time existed, which, because of the lapse of time, or for other reasons, cannot be enforced, the moral obligation is sufficient to support a subsequent promise, will be conceded.

These cases are distinguishable, because the instructions contemplate a case where an obligation to pay never existed until the promise was made. We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise. To our minds, however, it is difficult to find a moral obligation to pay anything, in the case contemplated in the instructions, prior to the promise. * * *

Reversed.

SILVERTHORN v. WYLIE.

(Supreme Court of Wisconsin, 1897. 96 Wis. 69, 71 N. W. 107.)

Action by George Silverthorn against Winfred Wylie, administrator, etc. Judgment for plaintiff, and defendant appeals.

CASSODAY, C. J. It appears from the record and the findings of the trial court, in effect, that during 1888, and a long time prior thereto, one Alexander R. McDonald, of Wausau, was a practical woodsman, and proficient in estimating the quantity and quality of standing timber; that immediately prior to September 10, 1888, he rendered valuable services for Daniel B. Wylie, then living at said city, in selecting certain vacant lands and government lands desirable for private cash entry; that said services consisted in obtaining a correct plat of all vacant state and government lands in a town named, and going out over said vacant lands, and running out the boundary lines of the various subdivisions thereof, and estimating the quantity and quality of standing timber thereon, and making minutes of the same, and thereby selecting four 40-acre tracts, deemed the most valuable and desirable

for cash entry, one being a state 40, and the other three being government 40's; that said services occupied one week, at an expense of $12 for an assistant, besides the ordinary expenses of the trip from Wausau; that, upon McDonald's report and selection so made, the said Daniel B. Wylie, September 10, 1888, entered or purchased the said three government 40's from the United States and the 40 from the state, paying therefor $200.50, and taking the title in his own name; that said services were so rendered with the understanding, which was afterwards reduced to writing, and embodied in the written contract signed and delivered by the said Daniel B. Wylie to said McDonald, November 26, 1888, in consideration of said services, and as compensation therefor, which contract was to the effect that Daniel B. Wylie had purchased or entered the lands which were therein described, and which had been selected by Alexander R. McDonald, and that when said lands should be sold he thereby agreed to pay McDonald, after deducting the amount of the purchase money, with 5 per cent. per annum interest thereon, also any and all taxes that might be levied on said land, with interest at the rate of 10 per cent. per annum, he would divide the balance of said proceeds equally between himself and the said McDonald; that said contract was duly assigned by McDonald to the plaintiff, October 12, 1891.

The assignments of McDonald to the plaintiff are both in writing, and purport to be upon a good and adequate consideration. But, even if the assignments were without such consideration, yet it would be no reason for withholding payment of the share of the proceeds which, by the terms of the contract, were to go to McDonald. The contention that the contract to pay McDonald such share of the proceeds was without consideration is without foundation. "A promise to pay for past services implies that they were rendered upon previous request, and such services are a good consideration for the promise." Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100. * * * The facts found bring the case within the principle of law stated. Certainly we are not to presume that McDonald expended his time and money and made the selections mentioned, and then voluntarily bestowed the entire beneficial results upon Daniel B. Wylie gratuitously, and without any consideration whatever. Daniel B. Wylie was clearly liable for the services which McDonald had rendered for him, and of which he received the benefit. We find no error in the record. The judgment of the circuit court is affirmed.

MOORE v. ELMER.

(Supreme Judicial Court of Massachusetts, 1901. 180 Mass. 15, 61 N. E. 259.)

Bill by Josephine L. Moore against Nelson L. Elmer and others, as administrators, etc.

The following is a copy of the contract sued on: "Springfield, Mass., Jan. 11th, 1898. In Consideration of Business and Test Sittings Reseived from Mme Sesemore, the Clairvoyant, otherwise known as Mrs. Josephene L. Moore on Numerous occasions I the undersighned do hearby agree to give the above named Josephene or her heirs, if she is not alive, the Balance of her Mortgage note whitch is the Herman E. Bogardus Mortgage note of Jan. 5, 1893, and the Interest on sane on or after the last day of Jan. 1900, if my Death occurs before

then whitch she has this day Predicted and Claims to be the truth, and whitch I the undersighned Strongly doubt. Wherein if she is right I am willing to make a Recompense to her as above stated, but not payable unless death Occurs before 1900. Willard Elmer."

HOLMES, C. J. It is hard to take any view of the supposed contract in which, if it were made upon consideration it would not be a wager. But there was no consideration. The bill alleges no debt of Elmer to the plaintiff prior to the making of the writing. It alleges only that the plaintiff gave him sittings at his request. This may or may not have been upon an understanding or implication that he was to pay for them. If there was such an understanding it should have been alleged or the liability of Elmer in some way shown. If, as we must assume and as the writing seems to imply, there was no such understanding, the consideration was executed and would not support a promise made at a later time. The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for. * * *

It may be added that even if Elmer was under a previous liability to the plaintiff it is not alleged that the agreement sued upon was received in satisfaction of it, either absolutely or conditionally, and this again cannot be implied in favor of the plaintiff's bill. * * *

Bill dismissed.

HERRINGTON v. DAVITT.

(Court of Appeals of New York, 1917. 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700.)

Action by Etta F. Herrington against Ida K. Davitt and others. From a judgment for plaintiff at the Trial Term, affirmed by the Appellate Division (165 App. Div. 942, 149 N. Y. Supp. 1087), defendants appeal.

COLLIN, J. The action is upon a promissory note made by the defendants' testator. After the note was delivered the maker was adjudicated a bankrupt, under the federal act of 1898, and thereunder received his discharge. A composition was effected, under the provisions of the act, between the bankrupt and his creditors. The plaintiff duly accepted the offer of the composition and the 20 per centum of the face value of the note payable under it. The defendants' testator thereafter wrote to the plaintiff a letter as follows:

"Troy, N. Y., Dec. 6, 1904.

"My Dear Sister: Your letter received. Was somewhat surprised at its contents. In regard to your claim against me you will be paid every dollar of it with inst as soon as I sell the mill. If anything happens to me the farm is in my name and you will be paid. I have left orders to that effect. Tell Lester to see what balance there is due me on the books for wood and to pay it to you for inst money.

"Yours truly, A. W. Davitt."

The claim mentioned in the letter was the note. The mill referred to in the letter was sold and conveyed by the testator in January, 1907. This action upon the note was commenced June 8, 1912. Upon the trial judgment in favor of the plaintiff for the unpaid balance pay-

able by the terms of the note was ordered. The Appellate Division, unanimously affirmed the consequent judgment.

The appellants assert and argue that the letter of December 6, 1904, does not contain or constitute a promise or agreement to pay the sum unpaid. At its writing, a statute provided:

"Every agreement, promise, or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; * * * 5. Is a subsequent or new promise to pay a debt discharged in bankruptcy. * * *" Personal Property Law (Laws 1897, c. 417) § 21.

The statute has remained in force. * * * The debtor does not promise to pay the debt discharged in bankruptcy, unless there is a distinct and unequivocal expression by him, by a writing of the prescribed form, of a clear intention to bind himself to its payment. The acknowledgment of the existence of the debt by the payment of a part of it or of interest upon it or by express written words is not sufficient. For the purpose of creating anew the liability, the law does not imply a promise. The promise need not be made to the creditor, but it must with certainty refer to the debt. No particular form of words need be used. The promise is constituted by words which, in their natural import, express the present intention to obligate or undertake to pay. The payment may, however, depend upon a contingency or condition. If so dependent, it must be proved that the contingency has happened or the condition has been performed. * * *

The letter of the defendant's testator constituted a distinct and unqualified promise to pay the debt. In effect and in truth it said to the plaintiff, I will pay you every dollar remaining unpaid upon the note, with interest, and will so pay you as soon as I sell the mill. He stated positively that he then undertook and obligated himself to pay. The construction of the words used by the debtors and the conclusions stated in the judicial decisions above cited, adequately support such decision.

The rule of law is well-nigh universal that such a promise made has an obligating and validating consideration in the moral obligation of the debtor to pay. The debt is not paid by the discharge in bankruptcy. It is due in conscience, although discharged in law, and this moral obligation, uniting with the subsequent promise to pay, creates a right of action. * * * The appellant asserts that the rule does not obtain or have applicability where, as in the present case, there was a composition between the bankrupt and his creditors, assented to and accepted by the creditors seeking to enforce the unpaid debt. The clear weight of judicial opinion and correct reasoning declare such assertion erroneous. In Cohen v. Lachenmaier, 147 Wis. 649, 133 N. W. 1099, the facts, in the particular under consideration, were as are the facts here. The trial court awarded judgment for the balance unpaid on the note. The Supreme Court of Wisconsin in affirming the judgment said:

"It is further contended that each promise, if made, is nudum pactum, because the plaintiff, as one of the creditors, joined with the majority of the creditors in number and amount in accepting the defendant's offer of a composition with the creditors in settlement of their claims. This claim is based upon the ground that a discharge in bankruptcy in a composition is not a discharge by operation of law but is

one effected by the voluntary assent of the creditors. The adjudications are to the effect that a debt which has been extinguished by a voluntary agreement of the debtor and creditor will not support a new promise and that one discharged by operation of law will support one. The proceeding resulting in the discharge of a debtor from liability, based on a composition after bankruptcy proceedings are instituted, is not in its nature such a voluntary act of the creditor as is considered in law as being a voluntary assent of the creditor to the satisfaction of the debt.

In Matter of Merrimam's Estate, 44 Conn. 587, Fed. Cas. No. 9,479, the court stated the principal question as being "whether an express promise made by a bankrupt to a creditor to pay the amount of his debt is valid, such creditor having theretofore expressly assented to a composition made and confirmed under the seventeenth section of the amended Bankruptcy Act of June 22, 1874," and carried into effect and held that the promise was valid. It enunciated that an express promise to pay a debt, which had been theretofore discharged by operation of law, was valid. The adequate consideration was the moral obligaton to keep the original promise; this rule does not apply to a composition inter partes which derives its validity merely from the will of the parties; and if a debt is legally discharged by the voluntary act of the party, there remains no obligation which can be deemed a consideration for a promise; a discharge by performance of the terms of a bankruptcy composition is a discharge by operation of law; the composition is as to the assenting creditor both a voluntary act and an act of the law, but its efficiency is derived from the compulsory power of the law. * * *

The case of Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258, conflicts with the decisions cited and others of like import. Therein it is stated: "It is very generally held that, in the case of a discharge of a debt under insolvent or bankrupt laws, a subsequent promise to pay by the insolvent or bankrupt will revive the original debt and make it enforceable at law. But it is otherwise where the creditor comes to terms with his debtor under a valid composition, and agrees to, and does, accept a part of his debt for the whole. When this is done, the debt is extinguished. The parties having met on common ground, and agreed on terms of settlement which have been carried out, there is no longer even a moral obligation resting upon the debtor as to the balance of the original liability. So that a new promise after composition is without consideration, and will not afford a cause of action. * * *"

It is to be noted that the decisions thus cited sustain the proposition that a promise to pay a debt voluntarily discharged is not binding for want of a legal consideration, but do not hold that a discharge in bankruptcy through a composition is a voluntary release or extinguishment of the debt. * * * The judgment should be affirmed.

KEENER v. CRULL.

(Supreme Court of Illinois. 1857. 19 Ill. 189.)

This is an agreed case, taken by appeal from Scott, from a judgment rendered in the circuit court of said county, at the October term, A. D. 1857, which judgment was rendered upon the following state of facts:

Sarah Crull, wife of George Crull, while a feme sole, in the lifetime of said John Peniger, deceased, rendered services for said Peniger, which claim for services became barred by lapse of time, and it was insisted by the appellees in the court below, that the case was taken out of the statute of limitations by a subsequent promise, and they relied upon the testimony of George Longwith, which testimony is as follows: That in the month of November, 1850, he (the witness) had a conversation with the said Peniger; had been old neighbors, and they had a long conversation together, at Peniger's; Peniger then told witness that he had agreed to give his daughter, the said Sarah, two hundred dollars a year for her work, and he had not paid her yet, and that she had gone to Ohio. Appellant insists that said testimony of George Longwith is not sufficient to take the case out of the statute of limitations.

It is stipulated, in this case, that said Sarah Crull commenced services in A. D. 1833, she being then of age, and continued in service until December, A. D. 1838.

SKINNER, J. This was an agreed case. The plaintiffs sue, as husband and wife, for a debt due the wife when sole. The case shows that the wife, while sole and of full age, remained with her father, and worked in the family from 1833 to 1838; that, in 1850, the father, who is the defendant's testator, in a conversation with one Longwith, said "that he had agreed to give his daughter (the now feme covert plaintiff with her husband), two hundred dollars per year for her work, and he had not paid her yet, and she had gone to Ohio." The debt, if one existed, was barred by the statute, and the question is, whether, by reason of the admissions of her father in 1850, the plaintiffs are entitled to recover against his executor?

The great diversity of construction of like statutes, both in the courts of this country and of England, demands in this case the application of such rule as is consistent with our own decisions, and the current of modern adjudications.

The statute bars the action, and all remedy for recovery of the debt; and, when the bar is complete, the statute being interposed in defense, no action for the recovery of the debt can be maintained.

The debt, however, is not annihilated, and remains the same as before, excepting that all remedy for enforcement of the obligation is gone. The debt constituting an unquestioned moral obligation, is, however, a good consideration to support a promise to perform that obligation; and a new promise, based upon this moral obligation, is binding upon the debtor in avoidance of the bar of the statute.

The new promise may arise out of such facts as identify the debt, the subject of the promise, with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it, at the time acted upon and acceded to by the creditor, the promisee. * * *

Like any other promise, having legal force and sanction, it must be made to the party seeking its benefits, or to some one authorized to act for him. A promise to a stranger is insufficient to establish a promise to the plaintiff or the party whom he represents. * * *

Were this a new question, we should hold that the action could alone be brought upon the new promise. But the current of authority and long usage sanction the practice of declaring upon the original cause of action, and of replying the new promise in avoidance of the

statute of limitation; and we do not feel at liberty to disturb a rule so well settled.

Tested by the rules stated, the plaintiffs cannot recover. The language of the defendant's testator was used to a stranger having no concern in the matter, or right to act for the party in interest, the amount of the debt was not named or in any manner indicated, nor was there any language unequivocally importing a present intention or undertaking to pay.

Judgment [for plaintiff] reversed.

BANK OF CARROLLTON, MISS., v. LATTING.

(Supreme Court of Oklahoma, 1913. 37 Okl. 8, 130 Pac. 144, 44 L. R. A. [N. S.] 481.)

Action by Bank of Carrollton, Miss., against R. G. Latting, Jr. Judgment for defendant, and plaintiff brings error.

SHARP, C. On May 17, 1906, the Carrollton Cotton Oil Company, a corporation, engaged in the manufacture of cotton seed products at Carrollton, Miss., was overdrawn in its account with the plaintiff, the Bank of Carrollton. On said day said milling company executed to said bank its demand note for $948.86; that being the amount of its overdraft. This note was signed, "The Carrollton Cotton Oil Co., R. G. Latting, Jr., Sec. & Mgr.," by Mr. Latting, and on the day of its execution was delivered to the bank. Latting was at the time a stockholder in the mill company, and was also its secretary and manager. Some 10 days after the note was executed and delivered to the bank's cashier, at the cashier's request, Mr. Latting signed the note individually. At the same time it appears that Latting told the cashier of certain collaterals owned by the mill company that he would put up as collateral security for the company's note. This, however, was not requested by the bank, but was volunteered by Latting acting for the mill company. These collaterals consisted of some accounts, and two bills of lading for two car loads of cotton seed, issued to the mill company by the Southern Railway Company. The giving of the note took up the mill company's overdraft. This, it appears, was all the bank at the time required in the way of a settlement of the mill company's indebtedness. As testified to by Mr. Latting: "The cashier of the bank called my attention to the fact that the mill had overdrawn some $900 or more, and asked me to close it up with a note, which I did."

The transaction between the principal, the mill company, and the creditor, the bank, upon the execution and delivery of the note, thereupon became an executed one, and apparently the bank was satisfied with the manner in which the transaction was closed. It had extended credit to the mill company by permitting it to overdraw its account, and accepted its demand note in settlement of the overdraft. It does not appear that, at the time of the execution and delivery of the note, any request for security in any form was made. The subsequent undertaking of the defendant, Latting, was therefore a collateral one. The indebtedness was that of the mill company. There must, of legal necessity, be a sufficient consideration in order to render valid the contract of suretyship or guaranty. This consideration is usually either of benefit to the principal or surety, or of detriment to the creditor. But where the consideration between the principal and the creditor has

passed and become executed before the contract of the surety or guaranty is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract. The rule is a very general one, and authorities in support thereof are manifold. * * *

It is insisted, however, by counsel that the transaction of May 17th, together with that which subsequently took place when the note was signed by Latting, constituted a single transaction, and was therefore not complete until the date of the latter occurrence. This contention finds no support in the evidence. That the mill company complied fully with the bank's demand on the day that the note was given is unchallenged. There was no request or agreement on that date that Latting should personally indorse the note, or that the mill company should deposit collateral. It is therefore unnecessary for us to give further consideration to this contention. * * *

It not appearing that there was any consideration for the defendant's contract of suretyship or guaranty, the judgment of the trial court should be affirmed. * * *

PER CURIAM. Adopted in whole.

SECTION 7.—SEALED INSTRUMENTS

As we have seen, promises are enforced if they are supported by consideration. It is possible for the law to select some other test for the enforceability of a promise; that is, the requisite of consideration could be entirely dispensed with. But, unless the law adopts the policy of enforcing all promises, which it has never done, something must take its place. An intention to make a gift coupled with delivery will transfer rights in property to the donee. Also a gratuitous declaration of trust, unaccompanied by delivery, imposes obligations upon the trustee and confers rights upon the beneficiary. The law imposes duties even in the absence of a promise to assume them, as in the case where one would be unjustly enriched if he were allowed to keep what he received, without paying for it. Moreover, we are under legal duties, not depending upon a voluntary assumption of them, not to commit a trespass or wrong to another's person, to his property, to his reputation, or to his freedom to engage in all lawful social or business activities. Legal obligations arise in various ways. Moreover, legal obligations may arise out of promises for more than one reason. The law could say that all promises in writing shall be enforceable, merely because they are in writing, but it does not say so. The law could say that all promises, either oral or in writing, made in the presence of two witnesses, shall be enforceable. A rule very similar to this exists in the law of wills. A promise to make a gift, when made in conformity with the statute relating to wills, creates rights in the devisee or legatee upon the death of the testator. The usual requirement is that the will must be in writing and signed by the testator and by two or more witnesses who signed in his pres-

ence. Wills of personal property are, in some states, valid although oral, if made in the presence of the requisite number of witnesses.

The law could provide that promises made in open court, or before some public officer, or filed in some public office should thereby be enforceable, and there are situations where this is so. Suppose that one makes a promise to a judge in the course of a trial, and deliberately breaks it; the breach, under some circumstances, may constitute contempt of court, punishable by fine or imprisonment, although the promise was made without consideration. The sworn statements of witnesses on the witness stand, are not promises, in the generally recognized sense; yet if they are not true, the person making them is guilty of the crime of perjury. Statements sworn to before notaries public and other officers are of like nature. In the case of deeds and mortgages, there must be an act of delivery before the rights and duties therein created become operative. Moreover, the law prescribes, generally, that, unless these instruments are recorded in the office of some public official, third parties have the right to deal with the parties to the deed or mortgage just as if the deed or mortgage had never existed, provided such third parties have no actual knowledge of the existence of such instrument.

The above statement was made largely for the purpose of introducing a comment concerning sealed instruments. The point is, that legal rights and duties may come into existence, either (1) because the lawmaking authority has provided that they should exist, or (2) because the parties have voluntarily created them. But, realizing that people will appear to assume duties and to create rights under many circumstances where, in the long run, it would be more just to condone the non-performance of the promise, the law, of necessity, has had to select some requisite, in addition to the promise, to render it enforceable. Consideration is one test. Mankind, at all times, has attached more importance to an act attended by some formality than to informal acts. The above illustrations show how various these formalities may be, and those stated, by no means, exhaust the possibilities.

At a very early day, it became the law that, if a person made a promise in writing, and in addition affixed his seal, the promise was enforceable, no consideration being necessary. In fact, for a long time, the sealed contract was the only kind of executory contract. The law of simple contracts, based upon consideration had not yet developed. The seal originally was an impression made in wax, adhering to the instrument. Modern statutes have, for the most part, done away with this form of seal. To-day, in most states, a seal may consist of the word "seal" or some scroll or marks which sufficiently indicate that the party signing intended to execute a formal contract. The statutes of most states have changed the legal effect of sealed instruments from what it was at the common law. In some states, it is provided that the presence of a seal on a contract shall have no effect; that is, the rules of law applicable to

simple contracts shall apply to and control instruments which in fact have a seal. In some states, it is provided that the presence of a seal raises a presumption of consideration. At common law, no consideration was necessary. There is a good deal of variation in the phraseology of the various statutes. Sometimes the statutes which change the law with respect to sealed instruments do so only with respect to certain kinds of contracts, leaving the rules of the common law to apply to all other kinds.

Seals are important, not only in the law of contract, but also in the law relating to conveyances of property. It is commonly provided that deeds and mortgages must be sealed, that is, unless they are sealed, they will not operate as deeds. Likewise, in the case of wills, statutes sometimes provide that the instrument must be sealed, as well as signed, by the testator.

CHAPTER III

PERFORMANCE OF CONTRACTS

Section

1. Introduction.
2. Interpretation.
3. Conditions in Contracts—General Statement.
4. Performance on Time as a Condition.
5. Performance to the Satisfaction of Another as a Condition.
6. Procuring Certificate of an Architect as a Condition.
7. Substantial Performance in Various Other Types of Contracts as Conditions.
8. Tender of Performance as a Condition.
9. Divisible Contracts.
10. Conditions Subsequent.
11. Prevention as an Excuse for Non-Performance.
12. Waiver as an Excuse for Non-Performance.
13. Anticipatory Breach of Contract.
14. Right of a Party Materially in Default to Recover for His Incomplete Performance.
15. Impossibility of Performance as a Condition.

SECTION 1.—INTRODUCTION

In this chapter we are concerned with two general questions: (1) The question of interpretation of contracts; and (2) the question of the legal effect of acts which occur after the contract has been entered into.

With respect to the first, it is obvious that in many cases the problem of interpretation is either not raised or, if raised, is easily settled. When there is no misunderstanding as to the meaning of words employed in the contract, there is virtually no occasion for interpreting the words. Where the terms of the contract are to be found in the conduct of the parties, or when their meaning is affected by custom and usage, the question, "What did each party promise to do?" becomes more difficult to answer. Even where the language forming the agreement is definitely fixed, there are many cases where it is not always easy to decide whether a particular act falls within the meaning of the words used. The discussion and cases in Section 2 present some aspects of the problem of interpretation.

The larger portion of the chapter is devoted to various detailed problems which concern the legal effect of acts done or omitted after the contract was entered into. These problems grow out of performance and of failure to perform contracts. Did the parties promise to do certain things, absolutely and at all events, or, did they, or either of them, promise to perform certain acts conditionally upon the happening of some event, or conditionally upon the prior performance of some act by the other party? What is a breach of contract? What is the legal effect of a breach upon the party's own rights and duties, and what is the legal effect of the

breach upon the other party's rights and duties? In the main, these are the broad outlines of the problem. A brief, but somewhat more detailed statement concerning the problems growing out of performance is made in Section 3 following.

SECTION 2.—INTERPRETATION

Before taking up the question of interpretation, it may be well to advert again to the problem which immediately precedes that of interpretation. In the chapter on Offer and Acceptance, we noted that there are many situations where considerable difficulty is met in determining what promises were actually made by the parties. Whether we are dealing with an express or an implied contract, we are required to ascertain what words, or symbols or conduct are to be deemed parts of the contract. This problem is relatively more difficult with respect to contracts which, in whole or in large part, arise by implication from conduct; but in all cases, this aspect of the negotiations—i. e., the fixing of the subject-matter to be interpreted—must be settled before we may concern ourselves with the question of interpretation.

To present the problem involved in the interpretation of languages and conduct, it may be profitable to resort to a more or less extended illustration. If the idea which lies behind the illustration is grasped, it will contribute something toward an appreciation of the nature of one of the problems of the law. Suppose A. enters into a contract to sell to B., at a specified price, all of his ripe tomatoes then growing on vines in A.'s tomato patch. Let us assume, further, that the contract does not define what constitutes a ripe tomato, and does not provide that either A. or B. shall have the power, exclusive of the other, to select the tomatoes, or to determine what shall constitute a ripe tomato. The parties have simply contracted to buy and sell ripe tomatoes, when, at the time, they had no thought that there might be any differences of opinion on this question. Of course, in the great majority of cases, people would agree as to whether a particular tomato was ripe or not ripe. A very small boy, sent into the garden to bring in a half dozen ripe tomatoes for dinner, would know enough to execute the order without running any great risk of incurring maternal censure for bringing in green tomatoes. But we are dealing, supposedly, with a contract for the sale of several hundred bushels of tomatoes, where it may become of great importance to know what constitute ripe tomatoes for the purposes of this contract. If, for example, the price of tomatoes suddenly rose 20 or 30 cents on the market, the probabilities are that the buyer's judgment now as to what constituted ripe tomatoes would include a good many tomatoes which he would call green if the market price of tomatoes, instead of rising, had dropped 20 or 30 cents below the contract price. Obviously there should be some way of determining what constitutes

ripe tomatoes by some standard of interpretation which will be reasonably workable, certain, and fair to both parties. We are more interested here in discovering the various possible standards of interpreting the expression "ripe tomatoes" than we are in determining which standard ought to be adopted. Enough has been said to show that there may be disagreement between the parties on this question. From a business standpoint we are vitally interested in locating the source of controversy, to the end that the possibilities for dispute and litigation over contracts may be reduced as much as possible.

In how many ways, therefore, may we interpret the words "ripe tomatoes"? (1) The words "ripe tomatoes" might mean all those tomatoes which in the buyer's judgment were ripe. (2) These words might mean all those tomatoes which in the seller's judgment were ripe. (3) The words might include only those tomatoes which were regarded as ripe by both buyer and seller. (4) The expression "ripe tomatoes" might include only those tomatoes which would be regarded as ripe by the general consensus of opinion. (5) The words might be given that meaning which they had acquired in that particular community, or which had been given to them by those persons who were engaged in the raising and marketing of tomatoes. (6) The words might be given that meaning which the party using them had reason to believe that the other party would attach to the words. No doubt there are other standards of interpretation.

It is reasonably certain that, if the contract contemplated the sale of several hundred bushels of ripe tomatoes, there would be considerable variation in the quantity of tomatoes delivered, according as one or the other of the above standards for interpreting the expression "ripe tomatoes" was employed. Between some of them there might be great variation; between others, the variation would be less. The problem with which the law has to deal is, therefore, to select the standard of interpretation to which contracts must be subjected. The adoption of a particular standard of interpreting language, does not, of course, solve the problem; it merely turns the investigation in a particular direction. The courts have adopted a great many rules, which aid in arriving at an actual result, but we shall not here undertake to consider them.

The problem of interpretation also has another setting, and, for the sake of completeness, we may turn our attention to this phase of the subject although it does not concern the interpretation of contracts. To continue the illustration, suppose that we have a state statute which imposes a tax upon all sales of fruit. Assuming that we have finally determined the number of bushels of tomatoes to which the buyer is entitled, and the question now is whether or not this particular sale should be taxed under a statute imposing a tax on sales of fruit. The character of the question is substantially the same as that presented above; that is: What kinds of physical objects may properly be regarded under the concept

"fruit"? There is this probable difference: It may be proper to interpret a particular word, when employed in a contract, according to some standard which would not be a fitting standard for the interpretation of the same word when found in a statute. We use the same words ofttimes to express different ideas, and the particular meaning is to be sought in the circumstances surrounding the use of the word. Certainly the circumstances surrounding the use of a word in a statute are different from those surrounding the use of the same word in a contract, although this fact in itself may not necessarily point to a different meaning. On the other hand, it is a circumstance which must be considered, because the fact of its use in a statute may indicate a meaning in some respects different from some other accepted meaning of the word.

Let us explore some of the possibilities in the subject. Where shall we search for the meaning of the word "fruit"? We frequently meet the expression that the interpretation of a statute involves an inquiry as to what the Legislature meant. It is altogether improbable that all of the members of the Legislature who voted for this particular measure had precisely the same meaning attached to the word "fruit." Even if they had, it would be impossible, years after the measure was passed, to find out what that meaning was. It is altogether possible that many of the members did not read the bill. It is just as probable that many of them voted for the bill because they had the assurance of some other members, in whom they had confidence, that the measure ought to be adopted. If we were in search of actual intention, we might accordingly be sent out on a search for the individual who drafted the bill. This individual might or might not be a member of the Legislature. Frequently he is not. If it be said, therefore, that a statute is to be taken as meaning that which the draftsman thought it meant, in many cases we should find that some persons who were not members of the law-making body were actually making laws for the community. Obviously, the proper method of interpreting statutes must be sought elsewhere.

Might it be that we should be justified in ascertaining the meaning of the word "fruit" from the standard treatises on botany? If there should happen to be a conflict of opinion, whose opinion should control? Suppose that, at the time the statute was passed, all the botanists were agreed as to the meaning of the word, but that now there was considerable disagreement, or it might be that they all now agreed, but that the present meaning was different from what it was at the time the statute was enacted. Which meaning is the proper one? Perhaps scientific opinion has nothing to do with the legal meaning of the word, but that, on the contrary, the meaning is that which is commonly accepted by the people. If so, how is that meaning to be found out?

It is hoped that enough has been said to show that it is impossible to be so specific and so definite as to put an end to the possibility of controversy over the meaning of words. For some purposes, at

least, words are poor vehicles for the transference of thought from one mind to another. The problem of interpretation is one of the necessary and continuing problems in all legal systems.

The following cases are not inserted with a view of developing the subject. They are included merely for the purpose of further illustrating the existence of the problem and of showing some of the difficulties attendant upon its solution. It may be said that every decision of a court involves, in one way or another, some aspect of this problem.

DAVISON CHEMICAL CO. OF BALTIMORE COUNTY v. BAUGH CHEMICAL CO. OF BALTIMORE COUNTY.

(Court of Appeals of Maryland, 1918. 133 Md. 203, 104 Atl. 404, 3 A. L. R. 1.)

Suit by the Baugh Chemical Company of Baltimore County against the Davison Chemical Company of Baltimore County. From a decree for plaintiff, defendant appeals.

THOMAS, J. The appellee, the Baugh Chemical Company of Baltimore County, plaintiff below, is a corporation engaged in the manufacture of acid phosphate, and its plant is located in Baltimore county, Md., and the appellant, the Davison Chemical Company of Baltimore County, is a corporation engaged in the manufacture of sulphuric acid, and its plant is also located in Baltimore county. The chief materials used in the manufacture of acid phosphate, the product of plaintiff's plant, are sulphuric acid and phosphate rock, and for a number of years prior to the year 1913, the plaintiff had purchased the sulphuric acid required in the manufacture of its acid phosphate from the defendant. Sulphuric acid is made from sulphur, and originally, or in the early days, the raw material employed in the manufacture of that acid was native sulphur or brimstone. After the discovery of the sulphur bearing ore called pyrites, containing about 50 per cent. of sulphur, it became the raw material generally used in the manufacture of sulphuric acid, particularly the low grade of acid used in the making of acid phosphate. Just when this change from brimstone to pyrites took place is not definitely fixed by the evidence in the case, but the lower court in its opinion stated that it was between 1880 and 1890. The chief supply of pyrites was imported from Spain, the supply from the Canadian mines and mines in this country being very small, and those mines were generally owned or controlled and their product consumed by companies engaged in the manufacture of acid or acid phosphate.

In the early part of 1913, the plaintiff and defendant began negotiations for the purchase and sale of sulphuric acid, which resulted in a contract executed by them the 28th day of April, 1913, by which the plaintiff purchased from the defendant from 30,000 to 50,000 tons, of 2,000 pounds each, of sulphuric acid per year, of the quality designated "chamber acid ranging from 50 degrees to 54 degrees Beaume," to be delivered at the plaintiff's works at Canton, or to Baugh & Sons Company, Norfolk, Va., for a period of five years beginning January 1, 1913, and ending December 31, 1917, for the sum of $5.75 per ton. The contract provided that the plaintiff should declare on the 2d of January of each year what amount in excess of the minimum amount of 30,000 tons it would take that year, and that the deliveries of sul-

phuric acid should be made as nearly as possible in equal weekly installments, and also contained the following provisions:

"Fire, accident or strike, in the work of any of the parties herein mentioned; obstruction to navigation, accident to acid, barges, war, insurrections or other uncontrollable causes rendering buyers unable to receive or sellers unable to deliver, shall be good and sufficient reasons to make this contract inoperative during the period of necessary repairs, reconstructions, or continuance of the difficulties."

Immediately following the execution of the contract, the price fixed thereby was by agreement reduced to $5 per ton. In pursuance of the provisions of the contract, the plaintiff elected to take 50 tons of acid per year, and it appears that the deliveries of the acid were accordingly and regularly made by the defendant during the years 1913 and 1914 and until some time early in the year 1915. During the year 1915, the defendant failed to make full deliveries to the plaintiff, * * * and on the 10th of November, 1916, the plaintiff brought suit at law against the defendant to recover damages for the non-delivery of acid in accordance with its contract up to and including June, 1916.

Interference with the importation of pyrites caused by the war, and which had diminished the normal supply during the year 1915, had largely abated during the fall of 1916 and the early part of 1917, and by reason thereof, and the extra efforts made by the defendant in anticipation of difficulty in obtaining the ore, it had, in March, 1917, accumulated at its plant about forty-eight thousand tons. About that time, however, just preceding the entrance of this country into the war, the interference with navigation occasioned by the German U-boat campaign became very serious. The companies with which the defendant had contracted for delivery of the ore, and whose contracts contained a clause similar to the clause in the contract between the plaintiff and the defendant which we have quoted, notified the defendant that they would be compelled to suspend deliveries. After receiving this notice, and after making efforts to secure further deliveries of ore from the parties with whom it had contracted and from other sources, the defendant notified the plaintiff and all others with whom it had contracts for delivery of sulphuric acid that after the exhaustion of its accumulated stock of pyrites it would not be able to make deliveries of the acid contracted for, and would have to take advantage of the clause in its contract with the plaintiff authorizing a suspension of deliveries. At the same time the defendant stated that it would continue its efforts to secure pyrites, and continue to deliver to them their proportion of acid from any pyrites that it might be able to obtain, and offered to install in its plant brimstone burners, and to furnish the plaintiff and other parties to whom it had contracted to furnish acid, with brimstone acid, provided they would agree to pay the increased cost of the brimstone acid delivered in lieu of acid made from pyrites. All of the parties with whom the defendant contracted accepted the offer of the defendant and entered into agreements accordingly except the plaintiff, and on the 25th of September, 1917, the plaintiff filed in the court below a bill of complaint against the defendant. * * *

On the same day the court passed an order, directing a preliminary injunction to be issued, requiring the defendant to "proceed forthwith to fulfill the contract between the complainant and the defendant. * * *"

The defense relied on by the appellant is that under its contract with the plaintiff of April 28, 1913, it was not required to deliver acid made from brimstone, and that it was unable by reason of the war to obtain the necessary amount of pyrites to fulfill its contract with the plaintiff and other parties with whom it had contracted to deliver acid or acid phosphate, it was entitled, under the provision we have quoted, to suspend the deliveries of acid to the plaintiff to the extent of its inability to secure pyrites. * * * The learned court below took the view that by reason of the conflict in the testimony as to the meaning of the words "chamber acid" the evidence produced by the defendant was not sufficient to establish a usage and to show that the trade meaning of the words "chamber acid" was acid produced from pyrites. * * *

It is apparent that the first and important question in the case involves the construction of the contract between the plaintiff and defendant of April 28, 1913. A large part of the evidence was offered for the purpose of showing the meaning of the words "chamber acid." The witnesses produced by the plaintiff testified that they mean acid manufactured by the chamber process from either pyrites or brimstone, while the evidence offered by the defendant tends to show that at the time the contract of 1913 was executed they were generally understood by those engaged in the manufacture or sale of acid and acid phosphate to mean the low grade of acid manufactured from pyrites by the chamber process. The precise question, however, to be determined is, What is the meaning of the words "chamber acid" as used in the contract between the plaintiff and defendant?

In the case of Saunders Co. v. Ducker, 116 Md. 474, 82 Atl. 154. Ann. Cas. 1913C, 817, this court said: "It is an established canon of construction that: 'In order to arrive at the intention of the parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted as to their meaning and application; and the contract must be so constructed as to give it such effect and none other, as the parties intended at the time it was made.'"

Contracts "must receive a reasonable construction so as to give effect to the intention of the parties thereto, and so as to carry out rather than defeat the purposes for which they were executed. They should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design; nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability fairly within the scope or spirit of their term." And in the case of Schlens v. Poe, 128 Md. 352, 97 Atl. 649, the court said:

"It is therefore the duty of the court to construe them (resolutions) —to ascertain the intention of the parties—and that intention must be gathered from the language of the resolution read in the light of the circumstances existing at the time. The rule of construction, as stated in Nash v. Towne, 5 Wall. 699, 18 L. Ed. 527, is this: 'Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and the correct application of the language to the things described.'"

The evidence in the case shows that in 1913 the defendant had been furnishing the plaintiff the acid used in the manufacture of its acid phosphate for a great many years; that with one or two minor exceptions sulphuric acid of the quality used in the manufacture of acid phosphate, and sold for that purpose, was made from pyrites ore, which contains about 50 per cent. of sulphur, by the process known as the chamber process, and that only about 5 per cent. of the brimstone or sulphur sold in this country was used for acid making, and that that per cent. of brimstone employed in making acid was used in the production of what was known as a high grade acid or brimstone acid, which was used for purposes other than the manufacture of acid phosphate. Dr. Grosvenor, one of the plaintiff's witnesses, testified that in 1913 the amount of brimstone or sulphur used in the manufacture of sulphuric acid was only about 5 per cent. of the raw material used for that purpose. The evidence further shows that the cost of the brimstone or sulphur in 1913 was about $22.50 per ton, while the cost of pyrites containing an equal amount of sulphur was about $11 a ton, and that the cost of the brimstone required to make one ton of acid was $5.15, while the cost of the pyrites necessary to make one ton of acid was $2.60 a ton. The undisputed evidence also shows that the officers of the plaintiff were at the time considering the advisability of manufacturing the sulphuric acid necessary for its own plant, and knew what it would cost to produce it, and that they were familiar with the construction of the defendant's plant, and knew that it was at that time only adapted to the production of sulphuric acid from pyrites.

In view of this evidence it is impossible to escape the conclusion that when the plaintiff and defendant used the words "chamber acid" to describe the subject-matter of their contract, they did not refer to acid made from brimstone, which they both knew the defendant could not produce in its plant as then constructed, and could not furnish at the contract price of $5 per ton. Whether, therefore, strictly and technically speaking, chamber acid may be said to include acid made by the chamber process from either pyrites or brimstone, if we are to give effect to the well-established canon of construction to which we have referred, arriving at the intention of the parties, it would seem reasonably clear that the contract referred to the kind of sulphuric acid that was almost universally employed in the manufacture of acid phosphate, and to the production of which the defendant's plant was adapted, and which alone the defendant could have furnished at the price agreed upon.

It would be giving the contract a strained and unreasonable construction to assume that the defendant obligated itself to deliver 50 tons of brimstone acid per year, through a period of five years and commencing at a date anterior to the date of the contract when it knew and the plaintiff knew it could not do so except at a loss per ton equal to about one-half of the price agreed upon. * * *

It follows from what we have said that the preliminary injunction should have been dissolved, and we must therefore reverse the decree from which this appeal was taken.

If the Legislature had enacted a statute imposing a tax on all sales of sulphuric acid, would acid manufactured from pyrites and from brimstone each be taxed, or would acid manufactured from pyrites alone be taxed?

INGERSOLL-RAND CO. v. UNITED STATES FIDELITY & GUARANTY CO.

(Court of Errors and Appeals of New Jersey, 1918. 92 N. J. Law, 403, 105 Atl. 236.)

Suit by the Ingersoll-Rand Company, a corporation, against the United States Fidelity & Guaranty Company. Judgment for defendant, and plaintiff appeals.

TRENCHARD, J. The Ingersoll-Rand Company, the plaintiff below, sued to recover the value of certain machinery which it claimed was its property and was wrongly converted by the defendant to its use.

The record disclosed the following situation: Prendergast & Clarkson had a contract with the United States government for the building of the Shoshone dam at Cody, Wyo. They needed certain machinery for use in this work. The plaintiff, in writing, proposed to furnish them an Ingersoll-Rand air compressor "of the size and dimensions as set forth in the attached specifications," together with various other machines and appliances in the proposal described, at a price of $13,001, upon "terms one-third cash on shipment, one-third 60 days thereafter, and the balance 120 days after shipment." This proposal was signed by the plaintiff, and following the signature is: "Accepted February 24, 1906. Prendergast & Clarkson, by T. J. Prendergast, President." To this contract was attached certain unsigned specifications which concluded with a statement that the title and right of possession to the compressor "remains in the Rand Drill Company until the compressor has been fully paid for in cash." A part of the machinery thus sold (including the compressor) was delivered to Prendergast & Clarkson at Cody, and was used by them in their work on the dam. Later, by reason of a washout at the dam, they defaulted on their contract, and the United States government, pursuant to its contract rights, took possession of all the machinery and appliances on the ground, among others, those which are the basis of this suit, being a part of that furnished by the plaintiff, and then called on the defendant company (which was surety for the performance of the dam contract) to do the work of construction. At the same time the government, in supposed compliance with the defendant surety company's contract rights, turned over to the defendant the machinery and appliances thus taken into possession. Inasmuch as the plaintiff had not been paid in full for this property, it brought this suit, which is based upon the claim that title to the property did not pass until the whole purchase money was paid.

The trial judge, sitting at the Hudson circuit without a jury, found for the defendant, and the plaintiff appeals.

We are of the opinion that the judgment must be affirmed. Of course, if we look only at the contract for the sale of this machinery (without regard to the specifications), there can be no doubt that the title passed to the purchaser upon delivery. The question which the case presents is, however, whether the unsigned annexed specifications, taken in connection with the contract itself, were operative to retain the title in the plaintiff, for the rule is that unsigned specifications, not contained in the contract nor in terms made a part thereof by the contract itself, but referred to therein and annexed thereto, must be construed therewith. * * *

But it is also the rule that, where the specifications are referred to

for a specific purpose only, they become a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes. * * * Tested by this rule, we think the reservation of title found in the "attached specifications" was no part of the contract.

The word "specifications," when used in such a contract, ordinarily means a specific and detailed description of the thing to be furnished or the work to be done. The specifications in question were of that character. True, they concluded with the statement that the title and right of possession to the compressor "remain in the Rand Drill Company until the compressor has been fully paid for in cash." But that is not a "specification" within the meaning of the term.

It is to be noted that the "attached specifications" were not in terms made a part of the contract, and the only reference therein to them is in the clause describing the compressor as "of the size and dimensions as set forth in the attached specifications." No doubt they were thus referred to for the purpose only of fixing the size and dimensions of the compressor, and not for the purpose of adding new terms to the contract by making it a conditional sale. This view is strengthened by the fact that the specifications used were evidently prepared for use by the Rand Drill Company (plaintiff's predecessor in business), and, while quite appropriate for fixing the size and dimensions of the compressor, were inappropriate to reserve title in the plaintiff. * * *

The judgment below will be affirmed.

PENNSYLVANIA SUGAR CO. v. CZARNIKOW-RIONDA CO.

(United States Circuit Court of Appeals, Third Circuit, 1917. 245 Fed. 913, 158 C. C. A. 201.)

McPHERSON, Circuit Judge. In this action the plaintiff, a purchaser of raw sugar from the defendant, was nonsuited in the effort to recover damages for failure to make a full delivery. The defendant shipped 32,000 bags from Cuba to Philadelphia, and the plaintiff received 25,000 bags; the remaining 7,000 being the quantity in dispute. The plaintiff sets up a right to the whole 32,000, while the defendant contends that 25,000 bags completely fulfilled the contract. The facts are as follows:

The Pennsylvania Company is a Philadelphia refiner, and the Rionda Company is a dealer in Cuban sugar, having an office in New York City, and transacting part of its business through John F. Craig & Co., a firm of brokers in Philadelphia. So far as appears, Craig & Co. were not authorized to make final contracts of sale. Shortly before June 16, 1914, the Pennsylvania Company and Craig & Co. negotiated concerning the sale of sugar, and agreed upon certain terms provisionally. The brokers sent these on to New York for approval, and in due course the following written form of agreement, dated June 16, signed by the Rionda Company, and identified as "Contract V 329," was returned to the brokers to be accepted by the Pennsylvania Company:

"New York, June 16th, 1914.

"To Messrs. Pennsylvania Sugar Company, Philadelphia, Pa.:

"We have this day sold to you for account of Czarnikow-Rionda Company, New York:

"Quantity: Twenty-five thousand to thirty thousand (25/30,000) bags * * * of Cuba centrifugal sugar.

"Shipment or clearance: To be shipped cleared during August, 1914, first half, not before 5th.

"Destination: Per steamer, or steamers, to be named as soon as possible, for Philadelphia. * * *

"Price: At two and seven-sixteenth (2 7/16c) cents per pound. Cost and freight, basis ninety-six (96°), average outturn polarization, net landed weights.

"Payment: To be made to Czarnikow-Rionda Company by cash in New York in six (6) days from date of delivery of shipping documents to buyers, for the net amount of the invoice, or by sellers or Czarnikow-Rionda Company drawing on buyers at six (6) days' sight for the net amount of the invoice with shipping documents attached.

"Delivery: Sugar to be delivered at a customary safe wharf or refinery, as directed by buyers. * * *

"Marine insurance: To be covered by buyers from shore to shore, including risk of lighters at ports of loading and discharge.

"Czarnikow-Rionda Company,

"[Signed] Manuel E. Rionda, Vice President. Brokers."

Craig & Co. presented this writing to the Pennsylvania Company for acceptance, but were informed that it did not contain all the terms that had been agreed upon. Thereupon the brokers communicated with the Rionda Company and were authorized to write the following letter:

"Philadelphia, June 17th, 1914.

Messrs. Pennsylvania Sugar Co., Philadelphia—Dear Sirs: Referring to contract V 329, dated June 16th, 1914, the understanding at the time of sale of this cargo was that the drafts to be drawn against this cargo were to be made payable in Philadelphia; also that, should there be any demurrage, the same was to be settled for on the basis of net registered tonnage. The sellers, Messrs. Czarnikow-Rionda Company, authorize us to herewith confirm these conditions and same become part of contract above named.

"Yours truly, [Signed] Jno. F. Craig & Co.,

"Brokers for Messrs. Czarnikow-Rionda Co., New York."

* * * The two writings of the 16th and 17th are therefore to be taken together as the contract, and upon their construction the decision of the controversy depends. * * *

The question may perhaps be stated thus: Was the express and definite provision of the contract that calls for a specified quantity of sugar within the limits named so modified by the word "cargo" as to lose its apparent meaning, and to take on the new meaning of a whole shipload, a load that exceeds the maximum limit? It is true that a "cargo" is primarily the load of a ship; but the word, like many another, may carry a varying content, and the question of its scope in a given contract under given circumstances cannot be decided by confining the court's inquiry to its abstract meaning. We must determine what scope the parties gave it in this contract, and our opinion is that the meaning here is the same as the meaning of the definite phrase, "25,000 to 30,000 bags of Cuba centrifugal sugar." There can be no doubt that the writing of June 16, unaffected by the letter of June 17, would have been satisfied by the delivery of 25,000 bags, and we find little in the letter that indicates a different conclusion. The letter is dealing directly with two subjects only—payment in Philadelphia, instead of in New York, and the settlement of possible demur-

rage—and the reference to the quantity of sugar is indirect and incidental. No doubt the sugar is spoken of as "this cargo;" but we think this is no more than the writer's allusion to the large quantity (correctly described as a cargo) that had already been distinctly specified, and therefore did not need to be specified again. * * *

And this leads to the question, how much sugar did the Pennsylvania Company buy? If the word "cargo" were not in the contract, the answer would be plain, namely, from 25,000 to 30,000 bags, at the seller's option. But, as the letter of June 17 put "cargo" into the contract, the effect of introducing it must have been one of two things—either to strike out the figures and substitute "cargo," or to let the figures stand and add "cargo." * * * Without prolonging the discussion, we conclude that the word "cargo," as used in this contract, does not mean a whole shipload, but does mean the quantity specified, and for this reason we see no occasion to consider in this opinion the cases where the word in other contracts has been held to bear a different meaning—e. g., Kreuger v. Blanck, 5 L. R. Exch. 179; Borrowmen v. Drayton, 2 L. R. Exch. 15.

The judgment is affirmed.

The case following is inserted by way of a digression from the general subject of contracts, but it does concern the problem of interpretation. The larger question raised may be stated roughly as follows: Are constitutional provisions to be interpreted exclusively in accordance with the meaning which the words possessed at the time of the adoption of the constitution, or, may those same words be given a meaning to-day different from that which they had at the time when they were used in the fundamental law?

There has been much able thought directed toward the solution of this broader problem of the law. It is one which, while involved in innumerable decisions of the courts, is not commonly dealt with as a problem in judicial decisions. This problem is, however, expressly presented in the next case, distinctly so because of the presentation therein of two views with respect to its solution.

The extracts are taken from a decision sustaining the constitutionality of an employers' liability and workmen's compensation law.

BORGNIS et al. v. FALK CO.

(Supreme Court of Wisconsin, 1911. 147 Wis. 327, 133 N. W. 209, 37 L. R. A. [N. S.] 489, 2 N. C. C. A. 834.)

WINSLOW, C. J. * * * For all the essential purposes of this discussion, it may truly be said that this is the law which is before us, and the question is simply whether there is any vital part of it which the Legislature may not enact because the Constitution forbids it. It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers, as well as laymen, that the personal injury action brought by the employé against his employer to recover damages for injuries sustained by reason of the negligence of the employer had

wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop, with few employés, and the stagecoach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones; but they were relatively few, and the employé who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers' common-law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty.

In approaching the consideration of the present law, we must bear in mind the well-established principle that it must be sustained unless it be clear beyond reasonable question that it violates some constitutional limitations or prohibition. That governments founded on written constitutions which are made difficult of amendment or change lose much in flexibility and adaptability to changed conditions there can be no doubt. Indeed that may be said to be one purpose of the written constitution. Doubtless they gain enough in stability and freedom from mere whimsical and sudden changes to more than make up for the loss in flexibility; but the loss still remains, whether for good or ill. A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress.

Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general lan-

guage or general policy to be interpreted and applied to present day people and conditions? When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation. These general propositions are here laid down, not because they are considered either new or in serious controversy, but because they are believed to be peculiarly applicable to a case like the present, where a law which is framed to meet new economic conditions and difficulties resulting therefrom is attacked principally because it is believed to offend against constitutional guaranties or prohibitions couched in general terms, or supposed general policies drawn from the whole body of the instrument. * * *

MARSHALL, J. (concurring). The result, itself, meets with my unqualified approval. Some language in the court's opinion, however, respecting the Constitution, I fear will be construed in a different way than the writer thereof, or any member of the court, intended or would sanction, tending to impair the lofty character of the fundamental law as significantly maintained by this court. * * *

As to the subject of the enactment, advanced thinkers in economics, law and legislation have been at the front and the public has been slow to follow. It took the industrious, able, patient, tactful legislative committee over two years of activity, to educate the people up to willingness to accept on trial the mild law before us. Opposition had to be overcome by education on all sides. The Legislature responded, not so much to a general demand, as to a constitutional command, to conserve, in the light of the present, the public welfare.

The remarks in the court's opinion which may suggest to some that a different meaning is to be read out of the Constitution now than formerly; that it may have meant one thing when framed and later another, and now be held differently, according to judicial interpretation to meet social necessities as recognized by human instrumentalities in the particular environment—probably was not so intended, but I sense danger of a contrary impression going out. Such ability to bend the fundamental law in the name of judicial interpretation—the idea that an eighteenth century construction for an eighteenth century condition may not, and at the hands of the court does not have to, fit a twentieth century condition—has been advanced by some, but not, significantly at least, by any court. On the contrary, it has met with universal condemnation. That it is wrong, every man of eminence that has ever written upon the subject in the past, as well as the very nature of the case and the very logic and limitations of judicial interpretation, bear witness. The fertile method of dealing with the Constitution has been characterized as one which has "furnished a mode of argument which would on the one hand leave the Constitution

crippled and inanimate, or on the other give it an extent of elasticity subversive of all rational boundaries." Story, Constitution, 389.

Manifestly, there can be but one right interpretation or construction of the Constitution. It is said to have been constructed of general declarations, so that, in letter and spirit, it might abide indefinitely and would have to so abide, dealing with all conditions and all ages, except as amended in the manner therein specified. Considerately with that, there can be but one viewpoint for interpretation, and that is the one from which the framers of the system builded. * * *

The foregoing I can but regard out of harmony with this, in its letter: "Changed social, economic and governmental conditions and ideals of the time, as well as the problems the changes have produced, must largely enter into the consideration and become influential factors in the settlement of problems of construction and interpretation" —so far as it is pregnant with the thought that the fundamental law is judicially changeable. The words "problems" of "construction" and "interpretation" I think were unfortunately used, if the thought was merely of problems of whether new enactments to cope with new conditions are within or without the legitimate field of legislative activity, having regard to appropriateness of means to effect a constitutional end. The latter might be, as I have suggested, at one time and not a half century theretofore, because changed conditions may render an end legitimate, within the unchangeable scope of the fundamental law, which earlier was not, or the selected means to effect that end might be reasonably appropriate at one time, though not so a century, more or less, theretofore.

Why treat judicial interpretation of law as a process of following changing ideals, social problems and ideas, since its sole office is to solve uncertainties as to the intent at the time of the enactment? Interpretation commences where begins uncertainty—obscurity as to the meaning the lawgivers purposed putting into the enactment and succeeded, discoverably, in expressing, literally or inferentially. In short, the gist of the matter is the intent when the law was made, not what one can make the language say in a different environment from that of its origin to accomplish a desired purpose. * * *

It is needless to add that I heartily endorse all said in the court's opinion regarding the importance of the legislation which has received approval. May it be the beginning of a well rounded out constitutional system making every one who consumes any product of labor for hire pay his proportionate amount of the cost of the creation representing the personal injury misfortunes of those whose hands have enabled him to secure the objects of human desire, thus minimizing the sufferings which are the natural incidents of industry and should be borne, so far as they represent pecuniary sacrifice, by the mass of mankind whose desires are administered to by such industry.

SECTION 3.—CONDITIONS IN CONTRACTS—GENERAL STATEMENT

In the remaining portion of this chapter we are concerned with the problems which arise after the contract has been entered into. We are assuming the existence of a binding contract between the parties. Questions pertaining to offer, acceptance and considera-

tion have all been settled. The questions which are presented in the following cases grow out of the conduct of the parties to the contract and other events which occur subsequent to its formation.[1]

It is obvious that if each party to a contract performs his promise or promises exactly—that is, if each performs the promised act or acts at the proper time and at the proper place—no controversy will arise. The contract will then be fully performed on both sides and will accordingly be discharged by performance; that is, having lived its allotted life the contract will cease to exist. Perhaps, having regard for the countless number of contracts which are daily entered into, the great majority are fully performed without controversy between the parties. But we are dealing with the legal situations which are presented when contracts are not performed by both parties in accordance with their respective promises. We are to be concerned with the questions which arise when one party to a contract sues the other party to the contract. We want to know whether the plaintiff or the defendant is to win, and we want to discover the reasons which will impel the courts to terminate the litigation in favor of the one or of the other.

It would be possible to discuss these questions by employing the terms "legal rights" and "legal duties," etc., wholly apart from any actual law suit, but it may, perhaps, add to clearness if we have visualized a proceeding in court wherein one of the parties to a contract is suing the other party. The plaintiff is asking for some relief from the defendant, usually money damages. It is perfectly clear of course, that if the defendant has fully performed all the acts which he promised to perform, and that such performance was effected at the proper time and place, the defendant cannot be held liable. In such a case the plaintiff's charge that defendant broke his contract is not made out. The defendant wins because he was not guilty of a breach of contract.

It is apparent, therefore, that in one view of the situation with which we are dealing—a lawsuit between the parties to a contract—the first question to arise is: Did the defendant break his contract; that is, did the defendant fail in any respect to perform the promised act, either with respect to the quality of the act itself, or with respect to the time or place of its performance? If the defendant did so fail to perform, he will be held liable to the plaintiff, irrespective of the extent of such breach. The breach, from a business point of view, may be very trifling. Nevertheless he will be held liable. Perhaps the amount of damages may be but nominal, but he will be liable to this extent. Substantial performance is never a defense. Proof of substantial performance by the plaintiff will often enable him successfully to maintain his suit against the defendant to recover damages for the defendant's breach, but the

[1] Two of the very best treatments of the difficult subject of Conditions are found in the article by Professor Arthur L. Corbin, "Conditions in the Law of Contracts," 28 Yale Law Journal, 739; also chapter XIII of Corbin's Anson on Contract; and "The Summary of Conditions in Contracts and Impossibility of Performance," by Professor George P. Costigan.

defendant cannot defend by proving substantial performance. This point should not be lost sight of, for in the cases following there is a good deal of discussion of the doctrine of substantial performance, but in such cases it will be found that it is the plaintiff who is insisting that all he need prove is substantial performance, in order to hold the defendant. The defendant is not urging that he is not liable because he has substantially performed. This matter will appear more clearly in the light of later discussion.

We are now at the point where the problems with which this chapter is concerned may be indicated. The bulk of the problems arises in cases where the defendant is admitting that he is guilty of a breach of contract, but he is insisting that he cannot be held liable for such breach because of the legal effect of certain conduct of the plaintiff. The defendant, therefore, is urging that his non-performance is excused. Looking at the law suit from the standpoint of the defendant, the question is: **What conduct by the plaintiff or what outside events will operate as an excuse for the defendant's breach?** Looking at the same situation from the standpoint of the plaintiff the question is: **What facts must the plaintiff prove in order to hold the defendant liable for the latter's breach?** This statement of the question at once suggests the possibility of legal rights being conditioned upon the occurrence of certain events or the performance of certain acts by the holder of the right.

The idea of "excuses for non-performance" could be used as a basis for the classification of the cases following, or, the notion of "conditions" could be similarly employed as a basis for classifying the subject-matter. It is the latter idea, that of conditions, which has here been used as a basis for arranging the cases, which, in their broader aspect, concern problems in the performance of contracts.

A condition may be defined as follows: **A condition in a contract is some act or event, either affirmative or negative, expressly or impliedly agreed upon by the parties or interpolated into the contract by the law which creates, qualifies or extinguishes some right or duty or other legal relation arising out of the contract.** The act constituting the condition may be one to be performed by either of the parties to the contract or it may be an act to be performed by a third party or it may be some event of nature. The act may or may not be an act, the performance of which has been promised by either of the parties. The act, thus operating as a creation, qualification, or extinguishment of some legal relation may be so referred to in the contract that it must be performed or occur before the relation which it concerns arises. In such a case we would refer to the act as a condition precedent, to the existence of the right or duty or other relation. If we were thinking of the circumstances under which A.'s duty to perform a certain promise in a contract with B., would arise and we discovered that his duty of performance was not to arise until some act X was to be per-

formed either by A., or by B., or by some third party, we would refer to act X as a condition precedent to A.'s duty to perform his promise. Such a promise by A., namely, one, the duty to perform which is thus qualified, is sometimes referred to as a dependent promise, or dependent covenant, because the duty of performance arising thereunder depends upon, and is conditioned upon the happening of some act. This act may be one of actual performance or of tender of performance. If instead of thinking of A.'s duty to perform a particular promise, we were to inquire into the circumstances under which some right of A. were to arise, such as a right to demand immediate performance of some promise by B., or a right to sue B. for damages because of B.'s failure to perform this particular promise, we might also discover that this right of A. against B. would not arise until some act Y was performed. It might be that act Y was an act, which A. was to perform, or which B. was to perform or which was to be performed by some third party. In this case, we are dealing with the same kind of situation as that wherein act X was involved, except that in this case, since we are looking at the transaction from A.'s standpoint, act Y is a condition precedent, not to a duty but to a right of A. Quite often courts refer to certain acts as conditions precedent without stating whether the particular act so referred to is precedent to a duty or precedent to a right. The context will usually make it clear which is meant. It is obviously quite important to find out whether a particular act is regarded as precedent to a duty or precedent to a right and to determine whose duty or whose right is referred to.

We have thus far, for the most part, apparently assumed that the act which we have here been calling a condition, can be precedent only to duties or to rights. As a matter of fact there are other legal relations to which an act may be precedent. The occurrence of an act or event may be made to operate as a condition precedent to the existence of a legal power or privilege. A power is not the same as a right, though the term "right" is often used to include the concept "power." Usually the term "right" implies a correlative duty in some other person. A power does not imply a duty in some other person, the term power merely means that the person so possessing it, may by some act of his alone, change some person's relations with respect to the subject of the power. Such person is under a liability An agent sometimes has power to bind his principal to a contract which his principal did not authorize him to make but in doing so the agent may break his contract, that is, violate a duty owed to his principal. A thief of a negotiable instrument payable to bearer has power to transfer title to an innocent purchaser. We shall not pursue these distinctions further, but they are mentioned merely for the purpose of showing that acts may operate as conditions precedent to legal relations other than legal rights and legal duties.

There are acts, which affect rights and duties under contracts, properly called conditions which have a different legal effect in

their operation. A right or duty may be presently owed, except in so far as the passage of time is necessary to render them active, which rights or duties may be destroyed or otherwise affected by the happening of the act. In this case the act would not be referred to as a condition precedent to the right or duty, but would be subsequent to the particular right or duty which is being referred to. For example, if A. sells goods to B. and if by the terms of the contract and by the performance thereunder all of the incidents of legal title or of ownership pass to B., but the contract provides that if within a specified time B. chooses to return the goods, this act of B. may be referred to as a condition subsequent to the passing of title to B. Of course this same act will operate as a condition precedent to A.'s regaining title. Whether the act should be referred to as a condition precedent or as a condition subsequent will thus depend upon whether attention is focused upon what happened before the act occurred or upon what is to take place after the act occurred.

There is another class of acts which, while they operate as conditions, have a somewhat different legal effect from conditions precedent to rights or duties or conditions subsequent to rights or duties. It is possible, in fact very common, for a contract to refer, not to one future act alone, but to two future acts, in such a way as to lead to the inference that these two acts are to be performed at the same moment of time. Commonly one of the acts is to be performed by one of the parties to the contract and the other is to be performed by the other party to the contract. These acts may be called concurrent conditions. When we were sketching the nature and effects of conditions precedent to rights or duties, we noted that the act which operated as the condition precedent must have been performed before the particular right or duty which was involved was deemed to have come into existence. The distinction between conditions precedent and conditions concurrent is not so much with respect to the character of the act, nor even with respect to the legal effects which follow a non-performance of the act, but more properly the distinction is with respect to what constitutes a non-performance of the condition. If act X is a condition precedent to the existence of right A or duty A, act X must be performed before right A or duty A comes into existence. But if act X is a condition concurrent with act Y, and if right A or duty A is to follow the performance of act X and act Y, the party who owes the performance of act X, or the party who owes the performance of act Y need not actually perform his act in order to bring, let us say his right A, into existence, he needs merely to tender the performance of his act and if the other party signifies his unwillingness or inability to make a tender of performance of his act, then the right or duty which is to follow a performance of the act is deemed to have arisen. Even here it is possible to regard concurrent conditions as a special class of conditions precedent, by regarding the act of tender as the real condition precedent.

Thus far conditions have been classified as precedent, subsequent and concurrent. Looking at conditions from a different point of view, they may be classified as express, implied in fact and implied in law. A condition is said to be express when it is created by language definitely set out in the oral or written agreement. When a condition is implied in fact it is based upon actual, but unexpressed, intention of the parties. When a condition is implied in law, it is not based upon an actual and unexpressed intention of the parties, but it is based upon a conviction of the court that in order to do justice between the parties the contract must be dealt with just as though it did provide for such a condition. The two kinds of conditions, those implied in fact and those implied in law, shade gradually into one another so that it is difficult to determine in some cases upon which theory the court proceeded in dealing with them. There is a tendency recognizable in the decisions to call a condition one implied in fact when it would be more proper to refer to it as a condition implied in law. Conditions implied in law are sometimes called constructive conditions. The distinctions between the two kinds of implied conditions are not in most cases of great importance, because their legal effects will be substantially the same. There is this difference: where a condition is implied in law, the courts are more likely not to insist upon its literal performance to the same extent as in the case where it is implied in fact. When a condition is implied in fact it is to be given the same legal effect as an express condition, because parties are left free, within very broad limits, to enter into such contracts as they choose, and when they have expressed their intention, whether expressly or impliedly, this intention is to be given effect.

It will be noticed that in the above very brief discussion of conditions we have not attempted to consider what words or conduct descriptive of acts will be regarded as creating conditions. We have but briefly touched upon their legal effect. We have merely attempted to create a few concepts, mental receptacles so to speak, into which we may put these ideas as we find them developed in the cases.

SECTION 4.—PERFORMANCE ON TIME AS A CONDITION

ADAMS et al. v. GUYANDOTTE VALLEY RY. CO. et al.

(Supreme Court of Appeals of West Virginia, 1908. 64 W. Va. 181, 61 S. E. 341.)

Bill to cancel a contract by P. C. Adams and others against the Guyandotte Valley Railway Company and another. Decree for defendants, and complainants appeal.

POFFENBARGER, P. The [plaintiff] landowners agreed to * * * lease * * * for coal mining or coal coking purposes any part of the land that lies upon or is drained by the stream emptying into the Guyandotte river to any party or parties presented by the railway company

or its assigns, with all such privileges as are necessary and proper for the conduct of mining operations. * * * The covenants and conditions imposed upon the railway company were two in number, only the first of which is important, which reads as follows: "It will cause the said railway to be commenced within one year and completed and in operation opposite the said lands of the parties of the first part by the 1st of January, 1903; and it is understood that, if the said railway is not completed and in operation by the said date, this agreement shall no longer be binding upon the parties hereto." * * *

Failure of the railway company to comply with the condition having been shown, the propriety of the remedy invoked by the plaintiffs is dependent upon the character of that condition. If it is a condition subsequent, noncompliance with which works a forfeiture of a vested right or estate a court of equity will not enforce the forfeiture. It will leave the parties to their legal remedies. * * * If it is a condition precedent, one which it was incumbent upon the railway company to perform before any interest, right, title or estate vested or could vest, or, in other words, the performance of which operated to vest the title, or was the means by which the title was to be acquired, not defeated, after acquisition in some other way, equity has jurisdiction to cancel the contract by way of removing a cloud from the title to the land, if it constitutes a cloud thereon, for this can be done without destroying any right under it. * * * That failure to perform a condition precedent prevents the vesting of title or right is elementary law. * * *

No authority need be cited for the proposition that the completion and operation of the railroad opposite the land is a condition precedent. * * * That was the substance of the thing which it was stipulated the railway company should do. It constituted the whole consideration for all the covenants and agreements made by the other parties. This would necessarily be the conclusion if the terms of the contract did not indicate it, but they do. All the stipulations in favor of the railway company are clothed in prospective terms. * * * There is no language in the contract importing a grant of any right in præsenti. * * * The only matter about which there could be a doubt is whether time is made an essential part of the condition. In the construction of contracts this is often a perplexing inquiry, but the doubt generally arises in those instances in which the parties have not, by any express terms of the contract, indicated the essentiality of the time specified. Then resort must be had to the nature of the instrument, its subject-matter, the evident purpose had in view, the prior and subsequent conduct of the parties, and the immediate context of the phrase or clause specifying time. The form and legal effect of the stipulation also have important bearing upon the question. In such cases, the inquiry is for the intention of the parties, and it must be gathered from the whole instrument and the surrounding circumstances. * * *

Under the practically unlimited right and power of parties to make such contracts as they see fit to make, and bind themselves to such extent and in such manner as they please, they may make performance of any covenant or condition, however unimportant or trivial in character, a condition precedent. Though time of performance may be comparatively or really unimportant in a practical sense, they have the power to stipulate with one another that failure to observe it shall be fatal and put an end to the contract. * * *

The stipulation under consideration here relates to a condition, the

nonperformance of which may inflict injury not easily or readily susceptible of ascertainment or compensation. It is not like failure to pay money on a specified day. * * * In the event of failure to perform within the time stipulated, the gravity of the injury would depend upon the period of delay. Delay of one month or six months might not be serious; but, if such delay is permissible, why not a delay of one year, five years, or ten years? How could the court fix a time within which the delay would be deemed innocuous, and beyond, fatal? * * * How can we say that this did not signify intention to make the time specified an essential element of the condition? They have solemnly said in their written agreement, not only that the road should be completed and operated opposite the land, but also that it should be completed and operated by the 1st day of January, 1903, and that failure to comply within that time should put an end to the contract. In this final clause the date of completion is referred to as well as the requirement of completion. * * * Our conclusion is that, by the express terms of the contract, time is made of the essence thereof. As the road was not built within that time, no title vested, nor can it ever vest under this contract. Wherefore the agreement now amounts to nothing more than a cloud upon the title of the plaintiffs, and the court should have canceled it as such. * * *

BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILLING & ELEVATOR CO.

(United States Circuit Court of Appeals, Eighth Circuit, 1892. 52 Fed. 700, 3 C. C. A. 248.)

SANBORN, Circuit Judge. The ground on which it is sought to sustain the instruction of the court below to return a verdict for the defendant in this case is that the plaintiff failed to tender or deliver the articles contracted for to the defendant, at Denver, until six or eight days after the expiration of the year, that the plaintiff did not therefore furnish them "in the course of the year," and that this failure justified the defendant in repudiating the contract, and refusing to pay any part of the contract price.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to time of performance is, or is not, deemed of the essence of the contract, the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale

and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. * * *

This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit $1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. * * * This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. * * * But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. * * *

It only remains to determine whether the contracts in the case at bar are the ordinary contracts of merchants for the manufacture and sale of marketable commodities or contracts for labor, skill, and materials, and this is not a difficult task. A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he requires, and which render them of value to him, but useless and unsalable to others—articles whose chief cost and value are derived from the labor and skill bestowed upon them, and not from the materials of which they are made—is a contract for work and labor, and not a contract of sale. * * * Thus

in Engraving Co. v. Moore, 75 Wis. 170, 172, 43 N. W. 1124, 6 L. R. A. 788, 17 Am. St. Rep. 186, where the lithographing company had contracted to manufacture a large quantity of engravings and lithographs for a theatrical manager, with special features, useful to him only during a certain season, and they were completed and set aside in the rooms of the lithographer, and there burned before delivery to the manager, the court held that the contract was not one for the sale of personal property, but one for work, skill, and materials, because it was not the materials, but the lithographer's work of skill, that gave the value to the finished advertisements, and was the actual subject-matter of the contract, and because that work and skill, while it added the chief value to the finished articles for the especial use of the defendant, made both the articles and the materials worthless for all other purposes.

The contracts in the case we are considering were not for the blank paper on which they were finally impressed; that was of small value in proportion to the value of the finished articles; they were not for the sale of anything then in existence; they were for the artistic skill and labor of the employés of the defendant in preparing the sketches and designs, transferring them upon stone, and finally impressing them upon the paper the defendant was to furnish; and they authorized the plaintiff, without other orders than the contracts themselves, and the approvals of the designs and proofs there called for, to prepare and furnish all the articles named in the contracts and to collect the contract price therefor. These contracts required the names of defendant's mills and its trade-marks to be so impressed upon all these articles that when they were completed they were not only unsalable to all others, but worthless to plaintiff for all purposes but waste paper. The contracts are evidence that on December 31, 1889, the articles contracted for would have been worth about $6,000 to the defendant, and if a few days later, when they were tendered, they were not worth so much, the defendant may recover the damages it suffered from the delay from December 31, 1889, to the date of the tender, in a proper action therefor, or may have the same allowed in this action under proper pleadings and proofs, and no injustice will result; while, if the defendant was permitted on account of this delay to utterly repudiate the contract, the plaintiff must practically lose the entire $6,000.

The contracts contain no stipulation from which it can be fairly inferred that the parties intended the time of performance to be even material; indeed, they strongly indicate the contrary. They provide that a certain portion of the articles shall be furnished in two months, that the remainder of the stationery and 5,000 hangers shall be furnished in the course of the year, and the 5,000 hangers more and the vignette shall be furnished within a reasonable time after the proofs are approved by the defendant; there is no stipulation for the payment of any damages or the avoidance of the contracts on account of a failure to perform within any of the times stipulated in the contracts, and the parties themselves proceeded so leisurely thereunder that the first and only admitted request by the defendant for the delivery of any of the articles not delivered in August was on December 16, 1889. * * * In the absence of any such stipulation, or any clearly expressed intent that time should be material even, it would be clearly unjustified by the law and inequitable to hold that the plaintiff is compelled to forfeit his entire contract price on account of this trifling delay that may

have been immaterial to the defendant, and, if not, may be fully compensated in damages.

The result is that these contracts were not for the sale and delivery, or the manufacture and delivery, of marketable commodities. They were contracts for artistic skill and labor, and the materials on which they were to be bestowed in the manufacture of articles which were not salable to any one but the defendant when completed because impressed with special features useful only to it. There was nothing in the contracts or their subject-matter indicating any intention of the parties that the stipulations as to time should be deemed of their essence; and the defendant was not justified on account of the slight delay disclosed by the record in refusing to accept the goods, or in repudiating the entire contract. This conclusion disposes of the case, and it is unnecessary to notice other errors assigned. The judgment below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SECTION 5.—PERFORMANCE TO THE SATISFACTION OF ANOTHER AS A CONDITION

PENNINGTON v. HOWLAND.

(Supreme Court of Rhode Island. 1898. 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774.)

Action by Harper Pennington against Samuel S. Howland. There was a verdict and judgment for plaintiff.

STINESS, J. The plaintiff was employed to paint a pastel portrait of the defendant's wife for the sum of $500, under a contract by correspondence, which only provided for the price. The plaintiff went to the defendant's house, in Washington, D. C., and began his work. The defendant testified that he at once objected to the proposed portrait, in street dress and hat; but the plaintiff said it was an artistic idea, which he wished to carry out, and that, if it was not satisfactory, he would paint the defendant one "until satisfied." He also testified that the plaintiff undertook the commission with the understanding that he would paint a satisfactory portrait. The plaintiff denies this, and says that, upon the completion of his work, Mrs. Howland said that she wanted another portrait, taken in a different style of dress, to show a pearl necklace which had belonged to her mother. He then painted a second portrait, and went away, leaving his implements, as he says, to be sent to him, or, as the defendant says, because the portrait was not finished, and because he was to return to complete it. The defendant says that he received a letter from the plaintiff stating that the pictures should be framed to keep the pastel from brushing off, and that he would give instructions to a man, whom he usually employed, to do it. The frames came, the pictures were put into them, and, after some correspondence, the defendant paid for them, and the pictures are still in his possession.

Upon this general statement of testimony, the plaintiff's claim was that he painted one portrait at an agreed price, and then another upon request, for which he had charged the same price, and that both were not only without conditions, but were said to be satisfactory. The de-

fendant claims that the plaintiff agreed upon starting his work that, if the picture was not satisfactory, he would paint another; that, after expressing his dissatisfaction, the plaintiff immediately started another, which he did not finish; that the pictures were framed simply to preserve them until the last one should be finished; and that they have since remained with him in that way. These conflicting claims present obvious questions of fact for a jury. Numerous exceptions were taken at the trial, which can be better considered generally than in detail.

According to the defendant's statement that the work was to be satisfactory to him, he asked the court to instruct the jury that he had the right to reject the first portrait, if he was not satisfied with it. The judge instructed the jury that "satisfactory" means "reasonably satisfactory," but, in response to another request, he also instructed the jury that "an artist, if he agreed to paint a picture to one's satisfaction, has no cause of action for the price unless the buyer is satisfied, however good the picture is"—adding: "But, unless the man returns the picture, he is conclusively held to be satisfied." This last instruction, without the added sentence, states the law correctly, according to the current of authority; and, in giving the preceding instruction that a portrait must be "reasonably satisfactory," the judge doubtless had in mind another class of cases to which that limitation may apply. When the subject of the contract is one which involves personal taste or feeling, an agreement that it shall be satisfactory to the buyer necessarily makes him the sole judge whether it answers that condition. He cannot be required to take it because other people might be satisfied with it, for that is not what he agreed to do. Personal tastes differ widely, and, if one has agreed to submit his work to such a test, he must abide by the result. A large number of witnesses might be brought to testify that the work was satisfactory to them, that they considered it perfect, and that they could see no reasonable ground for objecting to it. But that would not be the test of the contract, nor should a jury be allowed to say in such a case that a defendant must pay because, by the preponderance of evidence, he ought to have been satisfied with the work, or, in other words, that it was "reasonably satisfactory."

Upon this principle numerous cases have been decided. In McCarren v. McNulty, 7 Gray (Mass.) 139 (an action to recover the price of a bookcase), the court said: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish material for a compensation the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain, the law can afford him no relief. Having voluntarily assumed the obligations and risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions." Gibson v. Cranage, 39 Mich. 49, 33 Am. Rep. 351, was to the same effect, where the subject of the action was a portrait. In Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446, the plaintiff was to make a bust of the defendant's deceased husband satisfactory to her. The court held that it was for her alone to determine whether it was so, and that it was not enough to show that her dissatisfaction was unreasonable. Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463, was for a suit of clothes. Devens,

J., said: "It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction." The doctrine was carried to very great length in Singerly v. Thayer, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207, where an elevator had been erected in a building, and "warranted satisfactory in every respect." It was held that, if it had been substantially completed so that the owner of the building could understand how it would operate, it could be rejected if it was not satisfactory.

In Boiler Co. v. Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709, the opinion sets out the two classes of cases with reference to which a distinction has been made. One class is that which involves personal taste and judgment, examples of which we have shown; and the other class is that where the subject-matter of the contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship, salability, and other like considerations, rather than to personal satisfaction. For example, if one agrees to sell land with a satisfactory title, and shows a title valid and complete, the parties must have intended such a title to be satisfactory, rather than to leave an absolute right in the purchaser to say "I am not satisfied," when no reason could be shown why he should not be satisfied. So, if one agrees to do work in a satisfactory manner, it must mean a workmanlike manner—as well as it would be expected to be done—rather than a merely personal or whimsical rejection. It is this class of cases to which the term "reasonably satisfactory" applies. Hence in the boiler case, last cited, it was held that a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and would not be regarded.

In Machine Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57, the court says: "In the one class the right of decision is completely reserved to the promisor, without being liable to disclose reasons or account for his course; and a right to inquire into the grounds of his action and overhaul his determination is absolutely excluded from the promisee and from all other tribunals. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination upon grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness and the adequacy of the grounds of it, is open to consideration, and subject to the judgment of judicial triors." * * * Even in cases of the latter class, where a rejection is made in good faith, the dissatisfaction of the purchaser is held in many decisions to be sufficient.

The instruction to the jury in the present case that "satisfactory" means "reasonably satisfactory" was erroneous as applied to the subject-matter of the alleged contract. * * * New trial granted.

SECTION 6.—PROCURING CERTIFICATE OF AN ARCHITECT AS A CONDITION

NOLAN et al. v. WHITNEY.

(Court of Appeals of New York, 1882. 88 N. Y. 648.)

One Michael Nolan, entered into an agreement with the defendant to do some mason work in the erection of two buildings for the sum of $11,700 to be paid in installments as the work progressed. The last installment of $2,700 was to be paid thirty days after completion of the work which was to be performed to the satisfaction and under the direction of the architect, to be attested by his certificate, before any payment could be required to be made. All the installments were paid except the last, and Nolan, claiming that he had fully performed his agreement, commenced this action to recover that installment. The defendant alleged that Nolan had not fully performed his agreement according to its terms and requirements, and also that he had not obtained the architect's certificate, as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully performed on the part of Nolan; the latter gave evidence tending to show that the work was properly done, that he had fairly and substantially performed his agreement, and that the architect had refused to give him the certificate which would entitle him to the final payment. The referee found that Nolan completed the mason work required by the agreement according to its terms; that he substantially complied with and performed the requirements of his agreement; but that there were trivial defects in the plastering for which a deduction of $200 should be made and he ordered judgment in favor of Nolan for the last installment, less $200.

THE COURT in their opinion say: "It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. * * * According to the authorities cited under an allegation of substantial performance upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable, and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity."

HEBERT v. DEWEY.

(Supreme Judicial Court of Massachusetts, 1906. 191 Mass. 403, 77 N. E. 822.)

KNOWLTON, C. J. The first of these actions was brought by the plaintiff's intestate to recover upon a contract in writing for building a house for the defendant. * * *

The defendant contended that the plaintiff could not recover under the contract, because her intestate failed to obtain from the architect a certificate that the final payment was due. The question is whether a sufficient justification was shown for this failure. The instruction to the jury on this point was as follows: "If the defendant's architect capriciously withheld the final certificate, and capriciously allowed the contractor to believe that nothing more remained to be done to entitle him to such certificate, the contractor is thereby relieved from his obligation to secure the certificate." This was in accordance with the plaintiff's request, except that the judge left out the word "fraudulently" which was used in the request with "capriciously." The law bearing upon this part of the case has not been definitely settled in this commonwealth. There is a class of cases arising under policies of insurance and other similar contracts, in which it is held that the procurement of the certificate, called for by the contract, is a condition precedent to the plaintiff's recovery. * * * The reason why it is not open to the plaintiff in these cases to show that he could not obtain the certificate, is because the nature of the contract and the purpose of the requirement of a certificate are such as to make the recovery conditional upon the presentation of the paper. * * * In such contracts the plaintiff takes upon himself the obligation to furnish the required proof, and assumes the risk of whatever difficulty there may be in procuring it.

Whether a contract is of this kind is a question of construction, dependent upon the meaning of the parties, as ascertained from the writing. A provision for a certificate by an architect, in a building contract, stands differently. The architect is the agent of the owner, to perform an act for the convenience of both parties, in regard to a matter with which he is directly connected as an employé. It is assumed by the contracting parties and implied in the contract that he will do his duty, and will act in good faith in determining whether a certificate should be granted. In cases under provisions like the one before us, it is everywhere held that the contractor may recover without a certificate, if the circumstances relieve him from the obligation to obtain one. What circumstances are sufficient for this purpose is the only question. If the owner wrongfully interferes to prevent the giving of a certificate, it is universally held that this will entitle the contractor to recover without it. * * * Many of the authorities are to the effect that any wrongful refusal of the architect to give a certificate will entitle the contractor to proceed without one. In some of the cases it is said that if the architect unreasonably refuses to give a certificate it is enough. * * * In others it appeared that he refused "dishonestly and arbitrarily," or "willfully and fraudulently," or "capriciously." * * *

In the present case there was evidence from which the jury might have found that after a complete performance of the contract the plaintiff's intestate applied to the architect for the final certificate, and he willfully and fraudulently refused to give it. It is plain that in

making the contract it was understood between the parties that the architect would act in good faith in the performance of this part of his duty. In legal effect, the contract is as if their understanding in this particular had been written into it, as one of its terms. If, under such an agreement, after the full performance of the contract, the architect willfully and fraudulently refuses to act, or dies, or becomes disqualified, and there is no provision for such a case, the question arises whether the contractor is entitled to receive the contract price, the fact of performance being shown in some other way, or whether the entire contract falls to the ground, and the parties are left to enforce their rights under a quantum meruit. It is a general rule that if an implied condition that fails is of the essence of the contract, and enters largely into the consideration, in such a way that there can be no substantial performance under the changed conditions, the whole contract will fail, and the parties may have reasonable compensation for what they have done in reliance upon it. * * * But the provision in this case for the ascertainment of their rights, in reference to the construction of the building called for by the contract is of a different kind. It is a part of the machinery provided for the ascertainment and adjustment of their rights in reference to the matters to which the contract relates. It is provided to be used only upon an implied condition that it will be available for use. If, through the death or incapacity of the architect, or his willful refusal to act, it becomes impossible to adopt this method of determining the rights of the parties, other means may be adopted, on the ground that this no longer remains as an essential term of the agreement. In all substantial particulars the contract is complete without the provision for obtaining a final certificate, and, in the case supposed, it should be treated as if the provision were stricken from the contract. * * *

In all the cases that we have cited under building contracts, it is held that there may be a recovery upon the contract, where the contractor's failure to obtain the architect's certificate showing performance of it is caused by the fraud or intentional misconduct of the architect. * * * We have found no case of this kind in which it is held, on a failure to obtain an architect's certificate after performance of a contract, that the contract lost its force, and that the parties were left to their rights upon a quantum meruit. In a case like the present, we are of opinion that if an architect after the completion of a contract willfully, and without excuse, refuses to act at all, or if he acts dishonestly and in bad faith, and the contractor is thereby prevented from obtaining a certificate, the contractor may proceed with his suit without it. * * *

After telling the jury that certain conduct of Dewey would not be fraudulent in reference to the certificate, he added: "It would still have to be shown by the plaintiff that the certificate ought to have been given, and if it was shown that the work was done and the contract substantially performed, then the fact that the certificate was not given was not of any account." This last proposition was not correct in law. If the architect, acting in good faith, thought that the work was not properly done and the contract was not substantially performed, and refused the certificate for that reason, the mere fact that the certificate ought to have been given, and that the work was done, and the contract was performed, would not entitle the plaintiff to re-

cover without the certificate. The parties were bound by the decision of the architect made in good faith. * * *

Because the instructions give too little effect to the requirement that the contractor shall procure a certificate from the architect before he is entitled to payment, there must be a new trial.

SECTION 7.—SUBSTANTIAL PERFORMANCE IN VARIOUS OTHER TYPES OF CONTRACTS AS CONDITIONS

BUFFALO & L. LAND CO. v. BELLEVUE LAND & IMPROVEMENT CO.

(Court of Appeals of New York, 1901. 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951.)

A vendor in selling land contracted to construct a street car line over such land, and operate cars thereon at certain specified hours "as such street railroads are usually run," until the land was sold by the vendee, and agreed, in case of default, to release its mortgage on the land, and repay the purchase money and certain liquidated damages. The road was constructed by the vendor, and operated according to contract, except during a certain winter, when its service was interrupted by heavy snow blockades, but it used all the usual means to keep its tracks clear, and operated its road as well as similar roads in the vicinity.

O'BRIEN, J. This is an action to rescind a contract for a breach by the defendant, and to compel the latter to specifically perform certain alternative provisions thereof. * * * The trial court rendered judgment for the plaintiff for the relief demanded, which was the restoration of the purchase money of the land, so far as paid, and all money paid on the mortgage by the plaintiff; but on appeal to the appellate division the judgment was reversed, and a new trial granted. * * *

The agreement to run passenger cars on the road as often as once every half hour was not literally or absolutely performed, and the question is whether the omission in that respect constitutes such a breach of the defendant's contract as to give to the plaintiff the right to rescind, and to demand from the defendant the restoration of the benefits received under it. We do not think that it would be a fair construction of the contract to hold that the defendant was absolutely bound to run a car every half hour each day under all circumstances and conditions, whether possible or not, or that an omission in that regard, under the circumstances and conditions found, was a breach of the contract to operate the railroad in the manner specified. The whole contract, and its purpose and object, must be brought into view, and the language employed by the parties understood in a reasonable way. Neither party intended to be bound to do things that were impossible. The construction for which the learned counsel for the plaintiff contends would be unreasonable, and would place the defendant at the mercy of the elements, since it is well known that the operation of railroads is frequently interrupted by storms such as are mentioned in the findings in this case. * * *

It is a well-settled rule of law that where a party, by his own contract, absolutely engages to do an act, it is his own fault and folly that he did not thereby provide against contingencies, and exempt him-

self from responsibility in certain events. In such cases performance is not excused by inevitable accident or other contingency, although not foreseen or under the control of the party. When the contract is absolute, the vis major is not an excuse for nonperformance. * * * But there are many contracts from which by their very nature a condition may be implied that a party will be relieved from the consequences of nonperformance, in some slight particular, where the obligation is qualified, or when performance is rendered impossible without his fault, and we think the contract in question belonged to that class. * * *

In this case the covenant to run the cars every half hour was qualified, not only by the nature of the contract and the act to be performed, but by the use of the words, "as such street railroads are usually run." We are of opinion that there was no substantial breach of the agreement upon the facts found at the trial, when they are all taken together, since the railroad was constructed, maintained, and operated in conformity with the agreement, when reasonably and fairly construed. * * *

The order and judgment of reversal should be affirmed, and judgment absolute ordered for the defendant.

MOHA v. HUDSON BOXING CLUB.

(Supreme Court of Wisconsin. 1916. 164 Wis. 425, 160 N. W. 266, L. R. A. 1917B, 1238.)

Plaintiff is a professional boxer, and sues the defendant to recover 22½ per cent. of the gross receipts of a boxing contest held under the management of the club December 4, 1914, at Hudson, Wis. The contract was in writing, and provided in substance that the plaintiff would box Mike Gibbons of St. Paul ten rounds "to a no decision" at the defendant's boxing arena, receiving as consideration therefor 22½ per cent. of the gross receipts, together with certain transportation and hotel expenses, he to deposit with a named stakeholder $100 to guarantee that he would make the weight specified in the contract, which sum in case of his failure to appear or enter the contest was to belong to the defendant; that the revised Queensbury rules, as interpreted by the referee and in compliance with the laws of this state and the rules of the State Athletic Commission should govern the contest.

The contest began, and during the second round the referee decided that the plaintiff had struck a foul blow, i. e., a blow below the belt, and stopped the contest. Neither side introduced in evidence the revised Queensbury rules, nor the rules of the State Athletic Commission, but the referee testified that the rules prohibit the striking of a foul blow, and that he stopped the contest because the other man was disabled by the foul blow.

The trial court held that the plaintiff had failed to perform his contract, and hence could not recover. From this judgment, plaintiff appealed.

WINSLOW, C. J. Plaintiff sues to recover the contract price of his professional services. In order to succeed he must show at least substantial performance of his contract. It is certain that there has been none here. He contracted to box ten rounds under certain rules. At the outset of the contest, in the middle of the second round, he violated one of the rules, and as a result thereof disabled his opponent,

and thus by his own act made substantial performance impossible. Whether this act was deliberate or not cuts no figure. It was an act which he had contracted not to do, and it prevented performance. * * * It does not seem necessary to consider other questions; the considerations suggested are decisive.

Judgment affirmed.

SEWELL v. UNDERHILL.

(Court of Appeals of New York, 1910. 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. [N. S.] 233, 134 Am. St. Rep. 863, 18 Ann. Cas. 795.)

GRAY, J. The plaintiff and defendant had entered into an agreement for the sale by the latter and the purchase by the former, of a parcel of land at the price of $25,000. * * *

This action was brought by the plaintiff to recover the damage suffered by him through the destruction of the dwelling house, upon the theory that there had been a breach of the agreement, in the failure of the defendant to convey the house. * * * The one question which is presented by the plaintiff's appeal is: Should the loss, occasioned by the accidental destruction of the building upon the premises, be borne by the vendor, or the vendee? The appellant argues that, upon principle, the loss should fall upon the vendor, and insists that the contrary view rests upon a rule of the English courts, which is not only unjust, but which is not to be regarded as conclusive upon us.

I think that it is too late to dispute the English rule, and that we must consider it as established by decisions of the courts of this state. It was authoritatively stated by Lord Eldon, in Paine v. Meller, 6 Ves. Jr. 349, 31 Eng. Repr. 1088, departing from the rule asserted in the earlier case of Stent v. Bailis, 2 P. Wms. 220, 24 Eng. Repr. 705. In Paine v. Meller the buildings were destroyed by fire before the conveyance was ready. Somewhat like the present case, there, after the acceptance of the title, a delay occurred in the preparation and execution of the deeds. With respect to that objection of the vendee, which was grounded upon the fire, Lord Eldon said: "As to the mere effect of the accident itself, no valid objection can be founded upon that simply, for, if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his; chargeable as his; capable of being incumbered as his; they may be devised as his; they may be assets and they would descend to his heir." This case has been, repeatedly, recognized as an authority for the rule by the courts of this state. * * * A contrary view has been taken by courts in other states; but the great weight of authority is in favor of the English doctrine. * * *

HAWKES v. KEHOE et al.

(Supreme Judicial Court of Massachusetts, 1907. 193 Mass. 419, 79 N. E. 766, 10 L. R. A. [N. S.] 125, 9 Ann. Cas. 1053.)

SHELDON, J. * * * We need spend no time upon the numerous cases in England and in this country which the industry of counsel has brought to our notice as to the rights of parties to such agreements upon a total or partial destruction of the buildings by fire. * * * We are of opinion that in this commonwealth, when as in this case, the conveyance is to be made of the whole estate, including both lands

and buildings, for an entire price, and the value of the buildings constitutes a large part of the total value of the estate, and the terms of the agreement show that they constituted an important part of the subject-matter of the contract, it is now settled by the decisions in Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65, that the contract is to be construed as subject to the implied condition that it no longer shall be binding if, before the time for the conveyance to be made, the buildings are destroyed by fire. The loss by the fire falls upon the vendor, the owner; and if he has not protected himself by insurance, he can have no reimbursement of this loss; but the contract is no longer binding upon either party. If the purchaser has advanced any part of the price, he can recover it back. * * * If the change in the value of the estate is not so great, or if it appears that the buildings did not constitute so material a part of the estate to be conveyed as to result in an annulling of the contract, specific performance may be decreed, with compensation for any breach of agreement, or relief may be given in damages. * * *

TEBEAU v. RIDGE.

(Supreme Court of Missouri, 1914. 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367.)

Suit for specific performance by George Tebeau against Thomas S. Ridge and another. From a decree for complainant for less than the relief demanded, defendant appeals, and complainant prosecutes a cross-appeal.

FARIS, J. * * * Which brings us to a discussion of the plaintiff's cross-appeal and requires us to ascertain, if we can, what sort of decree should be entered. Should we affirm the case without diminution of price for the outstanding inchoate dower of Mrs. Ridge, leaving plaintiff to his action at law for relief, if any he has, or will ever have upon the facts here, or should we decree or order a decree for plaintiff after diminishing the purchase price to be paid by the value of Mrs. Ridge's inchoate dower, figured as one-third of such actual purchase price? * * *

There is no unanimity of decision on this question of diminution of purchase price. The cases are in much confusion and irreconcilable contrariety. Three views prevail: (1) The purchaser is entitled, as against inchoate dower, to have the purchase price diminished by such sum as represents the present value of the wife's contingent interest, estimated by the tables of mortality and by the statute of present values of estates less than a fee (in Alabama, Indiana, Iowa, New York, Massachusetts, Michigan, Minnesota, South Carolina, and Wisconsin), and in New Jersey, when refusal of the wife to convey is fraudulently brought about; (2) the view that the decree of the court may permit the vendee to retain one-third of the purchase price as an indemnity until the wife die or convey (in Alabama and Iowa); and (3) the view that the vendee shall have no abatement of the agreed purchase price on account of the wife's refusal to relinquish her inchoate dower, on the ground usually that such abatement would serve to put upon the wife unfair coercion to relinquish a right given to her by law (District of Columbia, Illinois, and New Jersey), unless wife's refusal was fraudulently collusive with husband, in which case rule in New Jersey is contra (New York, Pennsylvania, Virginia, Missouri). * * *

The last holding in this state was in Aiple-Hemmelmann Real Es-

tate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652, where, by a divided court of three to four, it was held by the majority opinion that the vendee might, if he so wishes, take the title of the husband at the original agreed purchase price, undiminished by the inchoate dower of the wife, but that nothing was to be ruled, so as to forbid the vendee from suing for his damages by reason of the outstanding inchoate dower of the wife. * * *

In my humble view the great weight of authority, both of the adjudged cases and the text-writers, adhere to the view that in a proper case—"a purchaser of real estate under a contract such as here * * * is entitled as of right to performance. The contracting parties write their own law in their contract. Courts sit to enforce the law. Hence they sit to enforce contracts, not abrogate them." Dissenting opinion by Lamm, J., Aiple-Hemmelmann Real Estate Co. v. Spelbrink, supra.

Should any or all of the facts that plaintiff, as here, did or did not know there was a wife in the case, or did not know that such wife would not sign, or that the defendant did not request and would not request his wife to sign, because the agreed sale price was inadequate, or had become so from an undreamed of increase in values, serve to prevent a court of equity, in an otherwise just case, from decreeing specific performance? Nevertheless one or more of these reasons is to be found present and controlling in every case where diminution of the purchase price is refused, and consequently specific performance denied, except upon condition that the plaintiff take such title only as the sole deed of the husband will convey. I say that the authorities ought not to say so; neither do the great weight of them say so, as I read them. Performance in a proper case will, it seems, almost always be decreed, but upon terms differing and utterly irreconcilable. * * * If, then, such contracts are to be enforced—and the rule is that, while the enforcement thereof is in the discretion of the chancellor, the discretion to be used is a sound, judicial, and not a capricious, discretion, and also the rule is that, other things being equal, they are to be enforced—then, in my opinion, both the weight of authority and the reason of the thing lie with the view that there should be a diminution of the purchase price by the present value of the wife's inchoate dower. The defaulting option giver should not get the whole purchase price and then as a reward for his breach of contract, keep one-third of the title in a life estate in the family. Therefore I am forced by the authorities and the text-writers, as well as by the logic and reason of the case, to follow the dissenting opinion in the Spelbrink Case. This is a stronger case than the Spelbrink Case; not so much stronger, it may be, as the difference in the rule connotes, but stronger nevertheless in that plaintiff was in ignorance of the marital status of defendant, and also in that defendant defiantly—approaching the twilight zone of fraudulently, in a constructive sense—refused to even request his wife to convey her inchoate dower; moreover, the estate covered by the letter of the option, while impliedly a fee, was not agreed to be warranted.

As forecast above, the cases which refuse to require specific performance, except the plaintiff take that title and estate only which the sole deed of the husband will convey, usually put refusal largely upon the ground that to do so would be to coerce the wife, but we have seen that the rule that specific performance will be decreed upon some terms

is almost universal, and that some of these terms are exceedingly harsh; e. g., the retention as indemnity of one-third of the purchase price till the wife dies or conveys.

Back of all of the few cases which neither decree diminution of purchase price nor provide for an indemnity to cover inchoate but contingent dower lies the idea that specific performance is a matter resting in the judicial discretion of the chancellor, which discretion will not be exercised, if the exercise thereof shall be beset with difficulties or shall afford opportunity of injustice such as may happen in dealing with the wholly contingent dower of a wife in the lands of a living husband. When these few cases, which neither indemnify the purchaser nor diminish the purchase price by reason of the inchoate dower of the wife, decree specific performance, it is done in a sense ex gratia (that is, the plaintiff is told in effect that he may not have that for which he sues), but, if he be willing to take less than he sued for and less than the option giver contracted to sell, he may have a partial specific performance. If he will not accept the half loaf of justice, he must then take nothing by his solemn contract. * * *

It would be bad policy to announce a rule of law which would result in rewarding those who wantonly break their solemn obligations. By compelling the husband to convey at a price diminished by the present value of the wife's inchoate dower, she personally and presently loses nothing; her husband suffers a loss which, somewhat like bread upon the waters, may come back to the wife. If it be conceded that she is coerced by her husband's present loss to an extent greater than she is buoyed up by the future hope of widowhood and dower in the land, there is no sufficient basis or reason in the view to account logically for the rule. For if she sign rather than refuse to do so, the full purchase price is paid to her spouse; and if—and this contingency must occur to aid her in either case supposed—her husband be gathered to his fathers before her, she takes her statutory interest in the money, to-wit, personal property, of her husband rather than in the land, subject only to her husband's debts. So that upon such view the case largely falls into the category of those things "which are six of one and half a dozen of the other." * * *

I am led by the authorities to conclude that the case of Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652, should no longer be followed, but that the views expressed in the dissenting opinion should be followed as being more in consonance with the reason of things and more in accord with the great weight of authority. * * *

It results, therefore, that this case should be reversed and remanded, with directions to the trial court to order specific performance in favor of plaintiff, and that if, within a reasonable time to be fixed by the court, defendant and his wife do not make, execute, acknowledge, and deliver to plaintiff a good and sufficient deed of conveyance covering the premises in controversy to plaintiff, the circuit court shall enter a decree divesting out of defendant Thomas S. Ridge all and singular the right, title, interest, and estate of him (said Ridge) in the land in controversy, and vesting the same in the plaintiff, upon the payment to defendant by plaintiff of the sum of $68,200, diminished by the value, as of the time of the trial, of the inchoate contingent dower of Mrs. Effie S. Ridge in the one-third part thereof, calculated at 6 per cent. upon the basis of a life in the contingent dowress of two years,

nine months, and six days more than that of defendant, and being therefore the sum of $2,863, and leaving to be paid to defendant the sum of $65,337. Glauque and McClure's Tables, pp. 18, 20, and 158. Taxes and special assessments, if any, since suit was begun to be paid by plaintiff; all costs to follow decree.

It is so ordered. * * *

BUCHANAN v. ORANGE.

(Supreme Court of Appeals of Virginia, 1916. 118 Va. 511, 88 S. E. 52, L. R. A. 1916E, 739, Ann. Cas. 1918D, 391.)

HARRISON, J. This is an attachment proceeding, brought by the plaintiff in error to recover of the defendant in error rent to become due under a certain contract of lease.

The evidence shows that Mrs. G. T. Orange entered into a deed of lease in writing, dated May 13, 1911, with D. Buchanan & Son, whereby she leased, for the term of five years from August 1, 1911, the second floor of a brick storehouse on Broad street, in the city of Richmond, to be used as a millinery establishment; the monthly rent of $60 being payable on the first day of each month. The lessor covenanted with her for quiet enjoyment, and further stipulated to furnish her, free from cost, with water, light, and furnace heat. Mrs. Orange continued in possession of the demised premises until October 31, 1914, when she removed to other quarters. * * *

Testimony of the defendant in error with respect to the discomfort of the premises from the lack of heat and lights is abundantly supported by numerous other witnesses who were familiar with the premises.

The question to be determined is whether the facts stated constitute a constructive eviction of the defendant in err
premises, thereby relieving her from the payment of the rent not due.

It is to be observed in the outset that the subject of the lease involved in this case was not land, out of which the rigid principles of the common law governing the relation of landlord and tenant grew, owing to the sanctity with which land was invested in the eyes of the common law, but the subject of the lease was only a floor in the building; the landlord controlling his own land and all of the rest of the building. * * *

In Taylor on Landlord and Tenant (9th Ed.) § 309a, it is said: "The rule is that, while an eviction was originally a dispossession of the tenant by some act of his landlord, or by failure of the latter's title, it has now come to include any wrongful act of the landlord, either of commission or omission, which may result in a substantial interference with the tenant's possession or enjoyment, in whole or in part. Actual force is not essential to constitute a wrongful eviction."

We are of opinion that the great weight of modern authority sustains the view that the facts of the instant case constitute a constructive eviction, and entitle the defendant to a release from the payment of rent not due when the premises are vacated. * * *

The plaintiff in error contends that in order for the acts or defaults of the landlord to amount to constructive eviction, they must be of a grave and permanent character, and they must clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises, or some material part thereof. Our view of this proposition is so clearly expressed by the learned judge of the

lower court, in his opinion filed with the record, that we cannot do better than quote what is there said:

"It is certainly difficult for the modern jurist to apply the stringent common-law principles concerning eviction, as between landlord and tenant, to the conditions of the present day. By eviction at common law originally was manifestly meant an actual dispossession of the tenant by the landlord, in order that the landlord might take possession of the premises, and with an intention on his part so to do, or the eviction may occur under the paramount title of a stranger. Whether the eviction be called actual or constructive, at common law, there must be, in the mind of the landlord, the intention of driving the tenant off of the land leased, so that he may take possession of it. To apply this idea to the modern custom of leasing a floor in a building, for business or living purposes, under a contract with varying stipulations as to the duties of the landlord towards the tenant, incompatible with the common-law lease, is a task impossible of exact accomplishment. * * * It seems to me that the law would be stultifying itself to lay down, as a maxim in these cases, that there can be no abandonment unless it be shown that the landlord intended to dispossess the tenant. I am satisfied that under the more modern doctrine in cases of this character, the intention of the landlord should be held to be a matter of law or of fact, to be inferred from the acts, so that if the acts of the landlord as a matter of fact resulted in dispossessing the tenant by giving him justifiable cause to vacate the premises, then the law imputes the intention to the landlord, on the general principle that every man must be held to intend the proximate consequences of the act. * * *"

[Judgment for defendant (tenant) affirmed.]

BETTINI v. GYE.

(High Court of Justice, 1876. 1 Q. B. Div. 183.)

Defendant was the director of the Royal Italian Opera in London, and the plaintiff was a dramatic artist and professional singer. Plaintiff contracted to sing for defendant from March 30, 1875, to July 13, 1875, and agreed to be in London "without fail" at least six days before the commencement of his engagement, for the purpose of rehearsals. The defendant refused to receive the plaintiff into his service under the contract. The defendant pleaded, in this action on the contract, that the plaintiff was not in London six days before the commencement of the engagement for the purpose of rehearsals.

BLACKBURN, J. * * * The question * * * is, not whether the plaintiff has any excuse for failing to fulfill this part of the contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfill his, the defendant's part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. * * *

We think the answer to this question depends on the true construction of the contract taken as a whole. Parties may think some matter,

apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the seventh paragraph of the agreement there had been added words to this effect: "And if Mr. Bettini is not there at the stipulated time, Mr. Gye may refuse to proceed further with the agreement;" or if, on the other hand, it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing rooms, both public and private, from the 30th of March to the 13th of July, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from the 1st of January to the 31st of December, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from the 1st of January to the 30th of March; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shows they must be so.

And, as far as we can see, the failure to attend at rehearsals during the six days immediately before the 30th of March could only affect the theatrical performances and, perhaps, the singing of duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts, for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent. The defendant

must, therefore, we think, seek redress by a cross-claim for damages. Judgment for the plaintiff.

NATIONAL CABLE & MFG. CO. v. FILBERT.

(Supreme Court of South Dakota, 1913. 31 S. D. 244, 140 N. W. 741, 45 L. R. A. [N. S.] 258.)

Action by the National Cable & Manufacturing Company, a corporation against W. F. Filbert. From judgment for plaintiff, defendant appeals.

POLLEY, J. This action grew out of a contract entered into between the plaintiff, and the defendant, a hardware and implement dealer at Twin Brooks, S. D. The contract was entered into on the 18th day of December, 1907, and provided for the sale, by the plaintiff to the defendant, of a quantity of copper cable and other material and equipment of lightning rods. The contract provided for the delivery, by the plaintiff, of the goods at the railway station at Niles, Mich. The contract gave the defendant the exclusive right to sell the merchandise described in the contract, and other merchandise of a similar character to be purchased from the plaintiff, but restricted the territory within which he might sell to Twin Brooks, Milbank, Corona, and Marvin, and limited the time within which he might sell to the period between the acceptance of the contract by the plaintiff and the last day of December, 1908. The defendant was also bound by the contract, during the above period, not to purchase any similar goods from any other manufacturer. It contained a covenant fixing the minimum price for which he should sell said copper cable, and also contained the following covenant, to wit: "That said first party (plaintiff) agrees to furnish a salesman to assist in starting the business as soon as possible after requested by said second party, and that said second party in case a salesman is furnished at his request, agrees that on arrival of said salesman, he, said second party, will furnish a man and team and at once proceed to canvass jointly with said salesman, exclusively for the sale of lightning rods, and that, as soon as said canvass is terminated, he, said second party, hereby agrees to pay said salesman, as compensation for his services, an amount equal to one-half of the profits arising from the sale of the goods during said canvass." Plaintiff's agent, also, in addition to the numerous restrictions contained in the written contract, gave defendant positive instructions not to attempt to put up any rods until they (meaning some of the plaintiff's agents) were there to show him how to put them up. * * *

The goods were shipped by the plaintiff and received by defendant at his place of business in Twin Brooks, S. D. No question was ever raised as to the value of the goods, or that they were not shipped according to contract; but the defendant claims that the plaintiff never furnished him with a saleman to assist in starting the business, as provided for in said contract, and justifies his refusal to pay the bill solely upon that ground. * * *

The case was tried to a jury. The plaintiff, on the trial, treated the agreement to furnish the expert as one of the "conditions precedent" to be performed by it, and directed the greater part of its somewhat voluminous testimony to an attempt to prove that it had complied with this requirement of the agreement. At the close of all the testimony,

the plaintiff moved the court to direct a verdict for it. * * * This motion was granted, and the defendant took exceptions.

As the case appears on appeal, the question involved depends wholly upon the construction to be put upon the above-quoted clause of the contract. It is strenuously contended by the respondent that this clause in the contract is an independent covenant to be performed by the plaintiff at some subsequent time, and without reference to defendant's liability, and that therefore the court was justified in taking the case from the jury. On the other hand, it is just as strenuously contended by the appellant that this covenant is one of the material elements of the contract, or was a "mutual and dependent condition," to be performed by it to entitle it to the purchase price. If this contention is correct, then the question should have been submitted to the jury.

We may state, at the outset that the fact that the defendant undertook to rescind by returning the goods to the plaintiff would ordinarily be wholly immaterial to a determination of the issues in the case. If it were necessary, as contended by defendant, that the plaintiff must comply with the disputed condition in the contract before it became entitled to the purchase price, it was unnecessary for him to rescind in order to avoid liability. He would have a perfect right to wait until the plaintiff had performed all of its obligations before he became liable for the purchase price. On the other hand, if the disputed clause in the contract was an independent covenant or "condition subsequent," then the defendant became fully liable upon plaintiff's delivery of the goods, and his attempted rescission would have been of no avail. * * *

The contract does not specifically state upon its face that this provision is a condition precedent, and therefore, whether it is such or not is a matter of construction for the court, and depends upon a consideration of the entire contract and the intent and understanding of the parties themselves, as disclosed by their conduct relative hereto.

The court having directed a verdict for the plaintiff, all the evidence of the defendant must be taken as true, and he must be given the benefit of all legitimate inferences therefrom. * * *

Provisions in contracts like the one in dispute in this case have been much litigated in the courts; but, owing to the peculiar nature of the question, each case must be determined in accordance with the fact involved. No definite rule, other than to determine the real intent of the parties, where the same is not clearly expressed by the terms of the contract, can be laid down; and it is rarely that the conclusions reached in one case can be decisive of another. As was said by Foot, J., in Grant v. Johnson, 5 N. Y. 255: "So many decisions have been made on the vexed question of what are, and what are not dependent covenants, and so many of them are irreconcilable that they rather perplex than aid the judgment in determining a given case. One rule is universal, and that is that the intent of the parties is to control." While this is true, the principles and reasoning that have been applied in the adjudicated cases are helpful in determining this vexed question. * * *

In Ink et al. v. Rohrig, 23 S. D. 548, 122 N. W. 594, this court announced the rule as follows: "The universal rule laid down under the authorities concerning the construction of covenants in contracts, as to whether they are dependent or independent, is that the relation

of covenants is to be determined according to the intention and meaning of the parties as the same appears in the instrument, and by the application of common sense to each particular case, to which intention, when once discovered, all technical forms of expression must give way. It is further held under the authorities that, in case of doubt, the courts will construe such covenants as dependent, rather than independent." And, quoting from Bank v. Hagner, 1 Pet. 464, 7 L. Ed. 219, the court said: "In contracts of this description the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would, in many cases, lead to the greatest injustice, and a purchaser might have payment of the consideration money forced upon him, yet be disabled from procuring the property for which he paid it. Although many nice distinctions are to be found in the books upon the question as to whether the covenants are promises of the respective parties to the contract or to be considered independent or dependent, yet it is evident the inclination of the courts strongly favored the most just. The seller ought not to be compelled to part with his property without receiving an equivalent in return."

In the case of Davis et al. v. Jeffris, 5 S. D. 352, 58 N. W. 815, this court used the following language: "Whether or not a covenant is dependent or independent must be ascertained from the contract and attending circumstances; the rule being that such covenants will be construed as dependent, unless a contrary intention appears from the terms of the contract." This was an action to recover on a contract for the construction of a creamery and cold storage plant, according to plans and specifications contained in the contract. The contract provided that the cold storage department should be constructed under the McCray Cold Storage and Refrigerator patents, and contained the following covenant: "We agree to furnish with said contract a patent deed from the McCray Refrigerator Company, conveying all the rights under said patents." The provisions of the contract, so far as the erection and equipment of the plant is concerned, were carried out by the plaintiff, but the patent deed for the McCray Cold Storage and Refrigerator patents was not furnished; plaintiff contending that the stipulation to furnish the said patent deed was an independent stipulation or covenant, and that the plaintiffs were not required to prove that they had furnished or tendered such deed to entitle them to recover on the contract. The contract provided that the defendants should pay for the creamery and cold storage when "Completed." The court held that the completion of the plant without the patent deed was not a "completion of the contract," and that proof that the patent deed had been furnished was essential to plaintiff's right of recovery, holding that, although the contract, so far as the completion of the plant is concerned, had been fully complied with by the plaintiff, still it would be of no value, and could be made of no use to the defendants, unless the patent deed conferring upon defendants, the right to use the McCray Cold Storage and Refrigerator process was furnished; that they contracted for something that they knew would be valueless to them when they got it, or else the covenant to furnish the patent deed was one of the essential elements of the contract.

This case is directly in point with the case at bar. When all the surroundings and attending circumstances are taken into consideration, it cannot but appear that, when the defendant entered into the contract

sued upon, the furnishing of a salesman to help defendant dispose of the goods contracted for was as important an element in the transaction as the goods themselves. The goods sued for were not staple goods; they could not be placed upon the shelves in defendant's store and sold in the ordinary course of business. In order to dispose of them, it was necessary to canvass the territory over which they were to be sold, and to attach them to the buildings of purchasers as they went along. * * *

Again a careful examination of the disputed clause in this contract, in view of the attending circumstances, will be instructive. It will show that the covenant contained in this provision was as much in contemplation of the parties hereto, at the time of entering into the contract, as the shipment of the merchandise itself. It was the inducement that led defendant to enter into the transaction; it was not an afterthought nor a mere gratuitous act on the part of the plaintiff, to be performed only at the option of defendant. Plaintiff agrees absolutely to do it. True, it is to be done so soon as possible after requested, but it is to be done whether requested or not; and the only option the defendant had in the matter was by making the request to fix the time, or rather to hasten the time, of his coming. Neither is the condition requiring the defendant to furnish a man and to assist such agent and to pay his compensation out of the profits from sales they jointly made an absolute condition to be performed at all events. He is to do this only in case he has made the request to have the agent sent. If plaintiff sent him in compliance with the terms of his agreement, it would be without cost to the defendant.

It was to the pecuniary interest of the plaintiff to have the goods shipped to defendant disposed of at as early a date as possible; and it was also to its pecuniary interest to have the lightning rods, when sold, properly attached to the buildings for the purchasers, in order that a market for other similar goods might be created as contemplated by the terms of the agreement. It was for this reason that plaintiff, through its agents, instructed the defendant not to try to put up any of the lightning rods until they were there to show him how to do it, and for this reason defendant could not dispose of the goods nor derive any benefit whatever from the purchase until this assistance was furnished. Thus, it will appear that the furnishing of the assistance provided for in the disputed clause of this contract is one of the most important and essential elements of the entire agreement. And this is the view taken by both plaintiff and defendant. Ample time for its performance was allowed between the sale of the goods and the time the purchase price was to become due. During this time, one or two of plaintiff's agents visited the defendant, and plaintiff claimed they had complied with the agreement. Defendant claimed they did not, and refused payment on that account. Later on plaintiff sent other of its agents to defendant, who they claimed rendered defendant the assistance provided for in the contract, but this was disputed by defendant; and whether they did or not was the principal and practically the only issue raised at the trial. That plaintiff so regarded this condition is apparent from the fact that it assumed the burden on its main case of showing that this clause in the contract had been fully complied with.

If the intent of the parties, when entering into the contract, is to be gathered from their understanding of and conduct relative thereto,

then certainly the agreement to furnish the defendant this assistance in starting the business was one of the essential elements of the contract; and the question whether it had been complied with or not should have been submitted to the jury.

The judgment and order appealed from should be reversed, and a new trial awarded.

MAYO v. AMERICAN MALTING CO.

(United States Circuit Court of Appeals, Fourth Circuit, 1914. 211 Fed. 945, 128 C. C. A. 443.)

Action by the American Malting Company against George D. Mayo, trading as the Mayo Milling Company. Judgment for plaintiff, and defendant brings error.

ROSE, District Judge. The parties will be designated as they were below. The malting company was there the plaintiff, Mr. Mayo the defendant. On October 26, 1911, the defendant agreed to buy 6,250 bushels of malt from the plaintiff. He was to pay $1.32 a bushel for it. The terms were sight draft, bill of lading attached. He was to order the malt shipped in approximately equal monthly installments prior to June 1, 1912. * * *

The defendant never ordered any of this malt. * * * The relations between the parties began in September, 1911. Defendant then wrote to plaintiff for its prices for distillers' malt. An agent of the plaintiff thereupon called upon the defendant. At the interview an understanding was reached that defendant would buy malt from the plaintiff, and that the latter would not quote prices on distillers' malt to other persons in Virginia. * * * For some reason during the season of 1912, the Richmond distillers bought much less than the usual quantity of malt. The barley crop of 1912 was large and of high average quality. The prices of malt fell rapidly. * * * While things were thus drifting along a car of distillers' malt sold by the plaintiff to the Adams Grain & Provision Company of Richmond arrived in that city. The defendant learned of the incident almost immediately. He at once, on the 23d of October, wrote to the plaintiff that he regarded this sale to one whom he described as a competitor as a breach of the contract with him, and told it that he would not take any of the malt.

In the court below and here he contends that he had the right to take this position, and that it is a complete answer to plaintiff's demand. It is to the refusal to tell the jury that the shipment in question in itself entitled the defendant to rescind, that he makes his most serious objection. It is not every breach of a term or provision of a contract which will justify its rescission by the other party. If the breach did him no hurt, it was immaterial. If the shipment in question forced down the price of defendant's malt, or kept him from selling it, he was injured by it. It could not have harmed him in any other way. Whether it did him that harm was squarely submitted to the jury. They decided against him. * * * We do not see that the defendant has any reason to complain of the action of either court or jury.

Affirmed.

PELICAN v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of Montana, 1911. 44 Mont. 277, 119 Pac. 778.)

Action by Jennie Pelican against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant appeals.

BRANTLY, C. J. Plaintiff, being sworn, testified that she was the surviving wife of Henry Pelican, the beneficiary named in the policy and that no part of the sum stipulated for therein had been paid. Her counsel then introduced the policy and rested. Thereupon counsel for defendant moved for a nonsuit on the ground that plaintiff had failed to show that Pelican was in good health at the time the policy was delivered. The motion was overruled. Defendant assigns error. Counsel argue that, since in the application Pelican agreed that the contract should not become effective unless the first premium was paid and the policy was issued during his "continuance in good health," it had not become a binding contract in the absence of evidence showing that he was in good health at the date of its issuance. The ruling was proper. * * *

The general rule is that a warranty must be a part and parcel of the contract—made so by express agreement of the parties upon the face of the policy. It is in the nature of a condition precedent and must be strictly complied with or literally fulfilled, to entitle the assured to recover on the policy. It need not be actually material to the risk; its falsity will bar recovery because by the express stipulation the statement is warranted to be true, and thus is made material. * * *

"A representation is not, strictly speaking, a part of the contract of insurance, or of the essence of it, but rather something collateral or preliminary, and in the nature of an inducement to it. A false representation, unlike a false warranty, will not operate to vitiate the contract, or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. It is sufficient if representations be substantially true. They need not be strictly, or literally, so. A misrepresentation renders the policy void on the ground of fraud, while a noncompliance with a warranty operates as an express breach of the contract." Alabama Gold Life Ins. Co. v. Johnston, 80 Ala. 467, 2 South. 125, 59 Am. Rep. 816. * * *

It is true that in the application there is found the statement that the answers made to the medical examiner were true and were made to the company "as an inducement to issue the proposed policy." Yet it appears, from the condition quoted above from the policy itself, that in the absence of fraud these statements were to be "deemed as representations and not warranties." * * *

The evidence tends to show that Pelican died of pulmonary tuberculosis, attended by chronic pleurisy and chronic pleuropercarditis. * * *

The evidence left in doubt the truth of the answers of Pelican to the several questions, as well as his good faith in making them. If he was suffering from tuberculosis on September 12, 1908, and died in an advanced stage of the disease in July, 1909, the ordinary layman might suspect that he was afflicted with it at the date of his application [August 26, 1908]. Yet the testimony of Dr. Hammond tends to show that he was entirely free from it at that time, and the fact that

the doctor found him insurable indicates that he was then in good health. Therefore the truth or falsity of his answers to questions, which all reflected upon the condition of his health, depended upon the proper inferences to be drawn from the evidence. There was evidence tending to show that, when Dr. Matthews visited him, he informed him that he was suffering from influenza. Even though he was then suffering from pleuritic tuberculosis, nevertheless, being a layman, he could not himself be expected to have a better knowledge of diseases or of the condition of his health, than had Dr. Hammond, who about a month later made a careful examination to ascertain if the disease was present. Hence, also, the inference of his good or bad faith in making these several answers was to be drawn from conflicting evidence. * * * It was peculiarly within the province of the jury to determine whether, upon the whole of the evidence as to any of his answers, Pelican was guilty of fraud within the rule stated above. The apparent haste with which he proceeded to have his life insured, after his illness in 1908, the short time that he was at work thereafter, and the condition of his body as described by the physicians who performed the autopsy, some nine months later, might well be regarded as sufficient to create a suspicion that his statements were intentionally untrue. Nevertheless, the court properly refused to take the case from the jury. * * *

The judgment and order are affirmed.

KAUFFMAN v. RAEDER et al.

(United States Circuit Court of Appeals, Eighth Circuit, 1901. 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247.)

SANBORN, Circuit Judge. May one party to a contract, who has accepted and retained the benefits of its substantial performance by the other party, retain and enjoy these benefits, and still rescind the agreement, and escape all the burdens and liabilities of the contract, because the first party has failed to perform at the exact time stipulated therein a subordinate covenant, incidental to the main purpose of the agreement, which goes only to a part of the consideration, and whose breach may be compensated by damages? This is the most important question which this case presents. It will be conducive to brevity and perspicuity to obtain a clear idea of the relations of the parties to the agreement to be considered, their respective covenants therein, and the moving considerations which induced them to make their stipulations before entering upon the discussion of this issue. This conception must be secured by the light of the fundamental rule that the situation of the parties when the contract was made, its subject-matter, and the purpose of its execution are material to determine the intention of the parties and the meaning of the terms they used, and that when these are ascertained they must prevail over the dry words of the stipulations. * * *

On June 19, 1895, when this agreement was made, the plaintiff, John W. Kauffman, had made a lease of the valuable premises in the heart of the city of St. Louis, involved in the negotiation, to the Central Realty & Improvement Company for a term of years, whereby he was secured—First, by his legal right to eject the lessee and to take back the premises upon default in the payment of any installment of

the rent; and, second, by the covenant of the lessee in the receipt during the year then ensuing of a rent of $35,000 in quarterly payments. The defendants had formed the project of organizing a corporation, the Century Building Company, of purchasing this lease from the lessee, of assuming its covenants, and of constructing a building on the leased premises in the name of this prospective corporation. They could derive no rents or income from the premises during the year then ensuing, while the building was in course of construction, and they desired to carry the time of payment of this $35,000 forward to a period when the building would be completed and the property would be yielding an income. For this purpose they induced the plaintiff to make the contract under consideration. In this agreement the plaintiff and the defendants made certain covenants with each other. By the dry words of the contract the plaintiff covenanted to accept preferred stock of the Century Company at its par value for the $35,000 rent which was coming due in the then ensuing year, and to assign and transfer this stock to the defendants and their associates for $35,000 and interest thereon at 6 per cent. per annum from the time that the rent fell due by the terms of the lease.

On the other hand, the defendants covenanted to pay this $35,000 and interest to the plaintiff on or before July 1, 1898. The legal effect, the real meaning, of the agreement was that Kauffman covenanted to release (1) the security of his right to eject the lessee and its assignee, and to recover back the premises, for a failure to pay any installment of this rent, and (2) the security of his lessee's agreement to pay it, and to accept in lieu of this security the personal covenant of the defendants that they would pay the rent, with interest, on or before July 1, 1898, and the preferred stock of the prospective corporation, which he agreed to hold and to deliver to the defendants upon their performance of their covenant to pay the rent. The considerations which Kauffman agreed to give to the defendants for their covenant to pay the rent and interest were (1) the use by the prospective corporation of the leased premises for a year without the payment of any rent; (2) the release of the premises from Kauffman's right to retake them for the failure to pay any installment of this rent; (3) the release of the realty company and of its proposed assignee, the Century Company, from liability to pay this rent; and (4) the assignment and transfer of the 350 shares of stock. The single consideration which the defendant agreed to give to the plaintiff for all these covenants was the payment of the $35,000 and interest on or before July 1, 1898. Thus it will be seen that the main purpose of the contract was the novation, the release by the plaintiff of the leased premises, of the lessee and of its proposed assignee from liability for the rent, and the covenant of the defendants to pay it with interest. The desideratum which induced the agreement and which went to the whole consideration of both sides was this novation. Without that the contract would never have been made. The covenant of Kauffman to take, to hold, and to assign and transfer the stock to the defendants was subordinate and incidental to the main purpose of the agreement, never induced its making, and went only to a part of the consideration. * * *

The plaintiff has released his property, his lessee, and its assignee, the Century Company, from liability for the $35,000 rent, has furnished the use of his property to the defendants' corporation for a year without the payment of any rent, has accepted and held the preferred

stock from 1896 until the present time, and has offered and still offers to assign and deliver it to the defendants, as he agreed to do. The defendants have accepted, enjoyed, and still retain the use of the leased premises by their corporation during that year without the payment of rent, and the release of the property, of the lessee, and of its assignee from liability for the $35,000. They have received and retained the great desiderata which induced them to make their promise, and yet they refuse to pay a dollar for these benefits and insist that they are absolved from all liability because the plaintiff did not offer to assign and deliver the stock to them in accordance with every legal technicality on the very day when their obligation matured, although he was always ready and willing, and within four months thereafter he offered to do so in compliance with every requirement of the law which the defendants did not waive. Can a party to a contract retain all the benefits of a substantial performance of it by the other party, and then escape all its burdens and repudiate all his obligations by means of such a technicality as this? This issue will be considered and discussed on the assumption that the defendant's theory of this case is sustained by the facts—on the assumption that the plaintiff made no sufficient offer to assign or deliver the stock until after July 1, 1898, and that his failure to make this offer was never waived by the defendants. The evidence, however, is conclusive that within four months after that date an adequate offer on the part of the plaintiff to complete his performance of the agreement was made and still the defendants refused to pay any part of the $35,000, and interest. * * *

There is another principle of law which equally prohibits the maintenance of the theory of the defendants in this case. It is stated by Lord Mansfield in Boone v. Eyre, 1 H. Bl. 273, in these words: "Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." * * *

The breach of a covenant of the first class—a dependent covenant, one which goes to the whole consideration of the contract—gives to the injured party the right to treat the entire contract as broken and to recover damages for a total breach. * * * But a breach of a covenant of the second class, an independent covenant, a covenant which does not go to the whole consideration of the contract and is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, does not authorize the injured party to rescind the agreement, but he is still bound to perform his part of it, and his only remedy is a recovery of damages for the breach. * * * Now, the covenant of the plaintiff to assign and transfer the stock to the defendants did not go to the whole consideration of the contract, but was subordinate and incidental to its main purpose, as has already been shown. Its breach was susceptible of compensation in damages. Therefore, even though the plaintiff committed a technical breach of it, the defendants, who had accomplished the main purpose of their contract, and had accepted the benefits of the plaintiff's performance of that part of his covenants which went to the whole consideration of the agreement, the use of the leased premises by their corporation for a year without payment of the rent, and the release of the prem-

ises, of the lessee, and of its assignee from liability therefor, were still bound by their agreement to pay this rent and interest, and their only remedy for the plaintiff's breach was compensation in damages. * * *

A large number of cases have been discussed which simply hold that, before a party to mutual dependent covenants which are to be performed at the same time can maintain an action for the breach, he must perform or offer to perform his part of them, unless the offer is waived by the other party to the contract. * * * But none of these decisions hold that a failure of one party to perform or to offer to perform on the day fixed releases the other party from his obligation to fulfill his covenants. * * *

The facts of this case bring it squarely under the salutary rules that (1) when a covenant goes only to a part of the consideration of a contract, is incidental and subordinate to its main purpose, and its breach may be compensated in damages, such a breach does not warrant a rescission of the contract, but the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom, and (2) where one party to a contract has received and retained the benefits of a substantial partial performance of the agreement by the other party, who has failed to completely fulfill all his covenants, the first party cannot retain the benefits and repudiate the burdens of the contract, but he is bound to perform his part of the agreement, and his remedy for the breach is limited to compensation in damages. The first party upon plea and proof of his substantial partial performance, and without plea or proof of his complete performance, may maintain an action either for specific performance or for damages on account of the failure of the second party to perform, and the latter may secure his damages for the plaintiff's breach either by counterclaim or by an independent action.

The failure of the court below to try this case in accordance with these established principles of the law necessitates a reversal of the judgment in favor of the defendants and another trial of this case.

SECTION 8.—TENDER OF PERFORMANCE AS A CONDITION

DELAWARE TRUST CO. v. CALM et al.

(Court of Appeals of New York, 1909. 195 N. Y. 231, 88 N. E. 53.)

VANN, J. When the assignors of the plaintiff exercised the option given by the sixth clause of the agreement in question, the arrangement became a contract, whereby one party agreed to purchase, and, by necessary implication, the other party agreed to sell "for cash, all the right and interest of" the latter "in said business" and said "agreement." The buyers were to pay for the actual amount of cash "paid out or expended" by the sellers "in and about said business." * * * The evidence warrants the inference that both real and personal property had been acquired in the business, and that the evidence of title stood in the names of various individuals, some of whom, and among

them certain "nominees" of the sellers, were parties neither to the agreement nor the action. Thus an executory contract came into existence as of the date when the option was exercised for the purchase and sale of both kinds of property. * * * The contract was thus made, but neither party performed it by simply making it, and no time or place for performance was specified. * * *

Under these circumstances, it was the duty of the plaintiff or its assignors to tender performance on their part and to demand performance on the part of the defendants before subjecting them to the expense and annoyance of an action to recover the amount of the purchase price. Otherwise the sellers would have both money and property and the buyers nothing. * * *

The action was brought on the theory that it was for the recovery of a debt, and that the commencement of the suit was a sufficient demand, but there was no debt. The express promise of the buyers was to purchase and pay for various rights and interests in a certain business and agreement, and the implied promise of the sellers was to transfer or assign those rights and interests to the purchasers, for there can be no purchase without a sale. Some of the rights were in the nature of an interest in realty, and the written evidence of title stood in the names of outsiders who had been nominated by the sellers. Concurrent action was required, and no debt could come into existence until the sellers had assigned or offered to assign that which they had agreed to sell. The obligations of the parties were mutual and dependent, for both were to be performed at the same time. * * * "The general rule is to consider all covenants dependent, in absence of a contrary intention, for this is the way most men make their bargains, neither party intending to perform unless the other at the same time performs on his part." 29 Am. & Eng. Encyc. of Law (2d Ed.) 689.

One party had something to sell and agreed to sell it, but it was a kind of property that required a written transfer not only from themselves, but from their nominees or representatives, before the sale could be completed and a debt created. As was said by this court in an early case: "The purchaser is not bound to pay the purchase money unless he receives the thing purchased; and how can it be said that he has refused to receive the thing purchased, and to pay the money for it, when he has never had the opportunity of receiving it?" Lester v. Jewett, 11 N. Y. 453, 454. "In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money forced upon him, and yet be disabled from procuring the property for which he paid it." President, etc., Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. Ed. 219. * * * The agreement itself was not a transfer, but merely an implied promise to transfer upon performance by the other party. Where a contract requires contemporaneous performance, neither party can sue at law until he has put the other in default. An offer to perform made in the pleadings or during the trial is not enough, and even that kind of an offer was not made in this case. * * *

Complaint dismissed.

GLENN v. ROSSLER et al.

(Court of Appeals of New York, 1898. 156 N. Y. 161, 50 N. E. 785.)

Action by James S. Glenn against Charles Rossler and Richard R. Ditzell. From a judgment affirming a judgment on a verdict for plaintiff, defendants appeal.

While the action as originally commenced included other purposes, it was finally treated simply as an action at law by the vendee of real property to recover the payments of purchase money made to the vendor. The property which was the subject of the sale consisted of about 125 acres of land located in the town of Tonawanda, Erie county, N. Y. On March 11, 1893, a contract was entered into between the defendants and the plaintiff by which the former agreed to sell the latter the premises mentioned for the price of $138,347, to be paid as follows: $1,000 seven days from the date of the contract; $5,000 April 15, 1893; $10,000 October 1, 1893—with interest at the rate of 6 per cent. on all sums from time to time remaining unpaid, payable at the time of each payment. Then followed this provision: "The party of the first part shall, after the payments mentioned herein are fully made on this contract, at their own proper cost and expense, execute and deliver to the said party of the second part a good and sufficient warranty deed of said premises, and at the time deliver to the second party a tax and title search made by one of the guaranty search companies of the city of Buffalo, showing good and perfect title; and, at the time deed to said premises is executed and delivered by the first parties to the second party, the party of the second part agrees to execute and deliver to first parties a bond and mortgage for the sum of one hundred and twelve thousand two hundred and thirty-seven ($112,237) dollars, due and payable six years from October 1, 1892, with interest at the rate of 6 per cent. per annum, payable semi-annually."

The plaintiff paid on his contract $1,000 March 17, 1893; $5,000 April 15, 1893; and $7,000 July 3, 1893. There was a subsequent agreement between the parties by which the payment of the remaining $3,000 due July 1st was postponed until October 1st of that year. October 1st was Sunday. On the preceding day the parties met and agreed that the contract should be performed on Monday. Upon that day they again met, and the plaintiff tendered to the defendants the sum of $17,330, which was the balance required to make up the sum of the payments due when a deed was to be delivered and a mortgage executed. When that tender was made, the defendants were unable to give the plaintiff title, and asked him to extend the time for the delivery of the deed. The plaintiff declined, and demanded a deed upon that day, which was not given. On the next day he demanded a return of the purchase price paid. The defendants refused to repay it, and several days after this action was commenced.

MARTIN, J. That the defendants had no title to the premises, and were unable to convey them to the plaintiff when a deed was demanded, are undisputed. Whether the covenants in the agreement in suit on one hand to pay, and on the other to give a deed, were concurrent and dependent so far as the payments to be made on the 1st of October were concerned, or whether they were independent, and the payment of the entire amount then due was a condition precedent to the right of the plaintiff to a conveyance of the property, or upon default to

rescind the contract, is practically the only question in this case. The contention of the appellants is that all the provisions of the contract relating to the payment of that portion of the consideration constituted independent covenants which the plaintiff was required to fully perform by paying the entire amount before he became entitled to a deed, and it was only within a reasonable time after such payments were made that the defendants were required to give him a conveyance of the property. As sustaining that contention, the plaintiff relies chiefly upon the language of the contract. It is to be observed that it, in terms, provides that, after the payments mentioned are fully made, the defendants shall execute and deliver a sufficient deed of the premises, and "at the time" deliver a tax and title search, and that "at the time" the plaintiff should execute and deliver a mortgage to the defendants. The appellants claim that this language should be construed as not requiring the delivery of the deed until a reasonable time after the payments were made. * * *

While an examination displays a want of harmony in the authorities upon this question when particular cases are examined and compared, yet it is quite obvious that they all recognize the principle that the intention of the parties is to control in determining the question of the dependence or independence of the covenants in such contracts. In the language of Lord Mansfield in Kingston v. Preston, 2 Doug. 690: "The dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." Hence the real question to be determined in this case, upon a reading of the entire contract between the parties, is whether it was their intention that the payments which were due October 1st and the delivery of the deed were to be simultaneous and concurrent acts. The rule, as stated by Thompson, J., in Bank v. Hagner, 1 Pet. 455, 464, 7 L. Ed. 219, is that, "in contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would, in many cases, lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it." An application of these principles renders it quite evident that although a literal reading of a portion of the agreement may tend to sustain the contention of the appellants, still, when the whole agreement is read and properly construed, the payments due October 1st and the giving of the deed were intended to be dependent and concurrent acts. The plain inference to be drawn from all its provisions is that the deed was to be executed and delivered at the time of the payment of the account due October 1st. No fair reading of it would justify the conclusion that the payment of the entire consideration then due, amounting to many thousands of dollars, was to precede the transfer of the title. We think the trial court properly decided this case, and that the judgment should be affirmed, with costs.

MOORE v. NORMAN.

(Supreme Court of Minnesota. 1892. 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526.)

Action by Ella M. Moore against H. G. Norman to recover possession of personal property. Verdict for defendant. From an order refusing a new trial, plaintiff appeals.

DICKINSON, J. The defendant, to secure two promissory notes executed by him to the plaintiff, mortgaged certain personal property to her. She prosecutes this action to recover possession of a part of the mortgaged property by virtue of her rights as such mortgagee. * * *

The only issue to which reference is now necessary is as to whether certain payments and a tender of payment made by the defendant were sufficient and effectual to discharge the mortgages. The whole transaction on the part of the plaintiff was conducted by one George R. Moore, who was her general agent. Long after the maturity of the notes the defendant made a tender of payment to the plaintiff, which on his part is claimed to have been sufficient in amount, with payments which had been previously made, to complete the payment of the debt, and hence to discharge the mortgages. * * *

The plaintiff, however, then claimed that the amount tendered was not sufficient to pay the debt; and whether it was so or not was one of the issues in this case, in respect to which the plaintiff's contention, that the amount was insufficient, was supported by evidence which would have sustained a verdict in her favor. The evidence tended to show that the tender was accompanied by a demand that the notes be surrendered; that such surrender was refused, a larger sum being claimed to be due; but that the plaintiff (by her agent, who held the notes) offered to receive the money tendered, and indorse it on the notes, which offer the defendant refused to accept. The court, at the request of the defendant, charged the jury to the effect that if the amount tendered was sufficient the defendant had a right to demand the surrender of his notes. This constitutes one of the errors assigned.

We think, as applied to the circumstances of this case, this instruction was erroneous. It may be stated as a general proposition, applicable at least where it appears that a larger sum than that tendered is in good faith claimed to be due, that the tender is not effectual as such if it be coupled with such conditions that the acceptance of it, as tendered, will involve an admission by the party accepting it that no more is due. * * *

The most common and familiar illustrations of the proposition above stated are cases where the tender is made as being all that is due, or as payment in full. It is everywhere held that such a tender is not good. The debtor has no right to the benefit of a tender, as having the effect of a payment, when it is burdened with such a condition that the creditor cannot accept the money without compromising his legal right to recover the further sum which he claims to be due. This case falls within the same principle. By offering to pay the money only upon the condition that the plaintiff deliver up the notes (if such was the fact), the defendant insisted upon a condition the acceptance of which would at least seriously compromise the right of the plaintiff to recover any more, even though it should be true that the amount un-

paid exceeded the sum tendered. The acceptance of the money and the surrender of the notes would be at least strong evidence against her, in the nature of an admission, that the notes were thereby fully paid.

The defendant should not be heard to assert that a mere offer to pay a specified sum, less than was supposed by the other party to be due, has the effect of a payment, so as to discharge the mortgage, when the offer was burdened with such a condition. It was enough for his protection that the plaintiff would have received the money offered and have indorsed its payment on the notes, which were already overdue and still in the hands of the plaintiff. If the defendant rejected this offer, and insisted upon the surrender of the notes, the natural and only reasonable construction to be put upon his conduct was that he insisted that the tender, if accepted, should be accepted as payment of the notes in full. If that was the effect of the tender, it was bad, under all the authorities. A mere tender should not be effectual to discharge the lien of a mortgage unless it be certainly sufficient in amount, and unburdened with any conditions which the debtor has not a clear right to impose. * * *

A new trial must be granted for the reason above stated. * * * Order reversed

SECTION 9.—DIVISIBLE CONTRACTS

PRODUCERS' COKE CO. v. HILLMAN et al.

(Supreme Court of Pennsylvania, 1914. 243 Pa. 313, 90 Atl. 144.)

STEWART, J. The action was for recovery of a definite quantity of coke sold and delivered by the plaintiff company to the defendants between 3d July, 1912, and the 29th of the same month, at specified rates per ton, on an implied promise that the defendants would pay for the coke furnished. In the affidavit of defense filed defendants aver that on or about 10th May, 1912, the plaintiff company and the defendants entered into a contract, evidenced by writings, by which the plaintiff agreed to place in the hands of the defendants for sale substantially all the coke it produced during the six months from 1st July to December 31, 1912; that, under this contract, the defendants made sales of large quantities of coke in their own names for delivery between 1st July and 31st December; that about 20th July, the same year, the plaintiff desiring to be relieved of its obligations to furnish defendants all the coke it produced within the period named, by mutual agreement the original contract was rescinded, and, as a consideration for defendants' consent to the rescission, the plaintiff promised and agreed that defendant should be protected as to the coke which up to that time they had sold; and that, to this end, it would deliver during the balance of the year the coke which had been sold by the defendants on certain terms then and there specified, as follows: "During the month of July 3,680 tons at the price of $2.379 per net ton, and 2,124 tons per month for the months of August, September, October, November, and December at the price of $2.345 per net ton." The plaintiff delivered to the defendants during July about 844½ tons less than the amount called for, and failed to deliver any coke what-

ever during the month of September. The suit was brought 19th September, 1912, to recover for coke delivered during July. The contention on part of defendants was that the contract set up in the affidavit of defense was entire, and that there could be no recovery by plaintiff for any partial performance. A rule for a judgment for want of a sufficient affidavit of defense was made absolute, and judgment followed. * * *

Where a question of this kind arises, it is the intention of the parties that controls, and not the divisibility of the subject, * * * and this intention is to be collected from the words employed, where the intention can be clearly derived therefrom. When, as understood in their ordinary sense, the words do not disclose the manner and intent to which the parties intended to be bound, resort must be had to rules of construction as aids. Having regard simply to the words employed in this contract, the inference that the contract was intended to be entire would be quite as reasonable as that it was intended to be divisible. If there are provisions which indicate that a divisible contract was intended, there are others which quite as clearly indicate the opposite.

The distinguishing mark of a divisible contract is that it admits of apportionment of the consideration on either side so as to correspond to the unascertained consideration on the other side. Where such a purpose appears in the contract, or is clearly deducible therefrom, it is allowed great significance when ascertaining the intention of the parties. It is a mistake, however, to suppose that in every case it is conclusive in itself. It is determining only when there are no opposing signs or marks. Where these latter are present it becomes a question of preponderance. * * *

While it is not averred in the affidavit that failure to complete the contract of plaintiffs would have affected the sale in this case, it is a reasonable inference, in view of the situation of the parties and the object contemplated, that it would have done so. It was not required that it should have been averred in the affidavit. The courts always seek to avoid, as far as they consistently can, a construction that would render a contract ineffectual. The present is a case in which the manifest purpose of the agreement would be defeated were it held to be a divisible contract, thereby allowing the plaintiff not simply to disappoint the defendants in what it was intended they should receive for a specific and express purpose, but requiring from the defendants payment for so much performance as met the pleasure, convenience, and advantage of the plaintiff. As against such construction, the defendants might well reply, in hæc foedera non venimus. We have discussed the case as though the contract were as averred in the affidavit. The defendants should be allowed an opportunity to prove the averment. * * * The judgment is reversed. * * *

STEWART v. NEWBURY et al.

(Court of Appeals of New York, 1917. 220 N. Y. 379, 115 N. E. 984, 2 A. L. R. 519.)

Action by Alexander Stewart against Herbert A. Newbury and others, doing business under the firm name and style of the Newbury Manufacturing Company. From a judgment for plaintiff, defendants appeal.

CRANE, J. The defendants are partners in the pipe fitting business under the name of Newbury Manufacturing Company. The plaintiff is a contractor and builder residing at Tuxedo, N. Y. Plaintiff agreed to do all excavation and concrete work upon a foundry building for defendants. The parties agreed as to amounts to be paid for the work. Nothing was said in writing about the time or manner of payment. * * *

In July the plaintiff commenced work and continued until September 29th, at which time he had progressed with the construction as far as the first floor. He then sent a bill for the work done up to that date for $896.35. The defendants refused to pay the bill and work was discontinued. * * *

In this action, which is brought to recover the amount of the bill presented, as the agreed price and $95.68 damages for breach of contract, the plaintiff had a verdict for the amount stated in the bill, but not for the other damages claimed, and the judgment entered thereon has been affirmed by the Appellate Division. The appeal to us is upon exceptions to the judge's charge. * * *

The jury was plainly told that if there were no agreement as to payments, yet the plaintiff would be entitled to part payment at reasonable times as the work progressed, and if such payments were refused he could abandon the work and recover the amount due for the work performed.

This is not the law. Counsel for the plaintiff omits to call our attention to any authority sustaining such a proposition and our search reveals none. In fact, the law is very well settled to the contrary. This was an entire contract. * * * Where a contract is made to perform work and no agreement is made as to payment, the work must be substantially performed before payment can be demanded. * * *

The judgment should be reversed, and a new trial ordered.

NORRINGTON v. WRIGHT et al.

(Supreme Court of the United States, 1885. 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.)

GRAY, J. This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at forty-five dollars ($45.00) per ton of 2240 lbs. customhouse weight, ex ship Philadelphia. Settlement, cash, on presentation of bills accompanied by customhouse certificate of weight. Edward J. Etting, Metal Broker."

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment. The defendants received and paid for the February shipment upon its arrival in March, and

in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, they gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th, as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances, and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. * * * If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments: "* * * You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits. * * * You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application." * * * From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended: (1) That under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month; (2) that, if this was not so the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff. But the court instructed the jury that if the defendants, at

the time accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them. The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. * * * The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances—such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission. The defendants, immediately after the arrival of the March shipments, and as

soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties. * * *

For these reasons we are of opinion that the judgment below should be affirmed.

HELGAR CORP. v. WARNER'S FEATURES, Inc.

(Court of Appeals of New York, 1918. 222 N. Y. 449, 119 N. E. 113.)

Action by the Helgar Corporation against Warner's Features, Incorporated.

CARDOZO, J. The plaintiff's assignor made a contract with the defendant for the sale of films for moving pictures. At least one film was to be delivered every month. Deliveries were to begin in November, 1913, and to end in October, 1914. The price was fixed at eight cents per foot, and payment for each film was to be made within 30 days after exhibition to the public. By way of additional compensation, the defendant was also to pay one-half of the net profits realized by it as the result of foreign sales.

The plaintiff, having received an assignment of the contract, delivered pictures of the value at the contract rate of nearly $10,000. The price was payable on December 24, 1913. The finding is that payment was then demanded, and that "the defendant refused and neglected to pay the same or any part thereof, nor did the defendant offer or tender a part payment of said amount or offer to pay the same in installments." Two days later this action was begun. The plaintiff alleged its election to terminate the contract by reason of the breach. Judgment was demanded for the price of the films delivered, and also for the profits that would have been gained through the completion of the contract. The referee gave judgment for the price, but refused to award the profits. In his opinion, he put his refusal upon the ground that the failure to make punctual payment was not accompanied by acts or words evincing repudiation or abandonment. The Appellate Division added $2,000 to the judgment. This was the estimated value of foreign rights which attached to the sales already made. That value was thought to be recoverable as an incident to the price. With this modification, the judgment was unanimously affirmed. There are cross-appeals in this court.

The rights of vendor and vendee upon the breach of an installment contract are now regulated by statute. The rule is to be found in section 45, subdivision 2, of the statute governing sales of goods: "**Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so ma-**

terial as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken." Uniform Sales Act, § 45, subd. 2.

The statute thus establishes a like test for vendor and for vendee. The earlier cases may not be wholly uniform. * * * We do not need to reconcile them. We have departed from the rule of the English statute (St. 56 & 57 Vict. c. 71, § 31, subd. 2), which keeps the contract alive unless the breach is equivalent to repudiation. We have established a new test which weighs the effect of the default, and adjusts the rigor of the remedy to the gravity of the wrong. "It depends in each case on the terms of the contract and the circumstances of the case" whether the breach is "so material" as to affect the contract as a whole.

The answer to that question must vary with the facts. Williston on Sales, p. 810. Default in respect of one installment, though falling short of repudiation, may under some conditions, be so material that there should be an end to the obligation to keep the contract alive. Under other conditions, the default may be nothing but a technical omission to observe the letter of a promise. * * * General statements abound that, at law, time is always of the essence. Williston, supra; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. For some purposes this is still true. The vendor who fails to receive payment of an installment the very day that it is due may sue at once for the price. But it does not follow that he may be equally precipitate in his election to declare the contract at an end. * * * That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purposes of the parties. Whatever the rule may once have been, this is the test that is now prescribed by statute. The failure to make punctual payment may be material or trivial according to the circumstances. We must know the cause of the default, the length of the delay, the needs of the vendor, and the expectations of the vendee. If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is willful, if there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent so that continued performance is imperiled, in these and in other circumstances, there may be another conclusion. Sometimes the conclusion will follow from all the circumstances as an inference of law to be drawn by the judge; sometimes, as an inference of fact to be drawn by the jury.

The findings in this case do not enable us to say that the plaintiff was justified in its precipitate election to declare the contract at an end. There is a finding that payment was refused. That is inconclusive by itself. The refusal may have been nothing more than a declaration of inability to make payment on the instant. There is a finding that the defendant did not offer part payment or payment in installments. That again is inconclusive. It is not an ultimate, but at most an evidentiary, fact. The circumstances may none the less have indicated a temporary default to be followed promptly by full payment. The referee must have interpreted the situation in that way, for he

states in his opinion that the default was not accompanied by any act or declaration that would indicate abandonment. If we were at liberty to look into the evidence and draw our own inferences, we might reach a contrary conclusion. But the evidence is not open to our scrutiny. The plaintiff has not requested the referee to find the ultimate fact on which the right to the recovery of profits depends. It has not requested a finding that the breach was so material as to justify its hasty election to declare the contract at an end. It has not requested a finding of the circumstances preceding or accompanying the default. There is not even a request which brings before us in due form the ruling that all profits must be excluded. The only request made specifies the extent of the loss, and includes elements of damage which the referee, in any view of the breach, was at liberty to reject. In these circumstances, we must hold the plaintiff to the rule which requires a request to find and an exception. * * * The findings as made leave the character of the default equivocal. In the absence of an appropriate request for other findings, the evidence is not before us. The rule would be different if we were asked to go behind the findings for the purpose of affirmance. * * * The plaintiff asks us to go behind them for the purpose of reversal. Its appeal must therefore fail.

The defendant complains of the increase of the judgment directed at the Appellate Division. We think the increase was erroneous. We have seen that the plaintiff was not at liberty to treat the entire contract as broken. Its cause of action was limited to the recovery of payments in default. But there has thus far been no default in respect of foreign sales. No foreign sales have yet been made. The award in that respect is an estimate of sales to be made hereafter. Until the conditions prescribed by the contract have been satisfied, the extra compensation is not payable. The plaintiff's recovery must be limited to payments already due.

The judgment of the Appellate Division to the extent that it modifies the judgment entered on the report of the referee should be reversed, and the judgment entered upon such report affirmed, with costs in this court to the defendant. Judgment accordingly.

SECTION 10.—CONDITIONS SUBSEQUENT

MOODY v. AMAZON INS. CO.

(Supreme Court of Ohio, 1894. 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. Rep. 699.)

Action by one Moody against insurance company. From a judgment of the circuit court affirming a judgment rendered on a verdict directed in favor of defendant, plaintiff brings error.

The original action was upon a policy of insurance, by the terms of which the defendant insured the plaintiff, to the amount of $500, against loss or damage by fire, on his dwelling house in Ashtabula county, for the period of three years from the 1st day of January, 1887. The building was totally destroyed by fire on the 28th day of September, 1888.

WILLIAMS, J. The policy of insurance upon which the plaintiff sought to recover in the action below provides, among its many con-

ditions, that "no liability shall exist under this policy for loss or damage in or on vacant or unoccupied buildings, unless consent for such vacancy or inoccupancy be indorsed hereon. The answer alleges that the house insured by the policy was burned while it was unoccupied; and, though that allegation was denied, the court required the plaintiff to take the burden of proving that the building was occupied. That action of the court is assigned for error, and presents the first question for consideration. The court went upon the theory that the provision of the policy above quoted constitutes a condition precedent, the performance of which was put in issue by the denial of the averments of the petition. In an action on a policy of fire insurance, the plaintiff may plead generally, as was done in this case, the due performance of all the conditions precedent on his part, and when the allegation is controverted the burden is undoubtedly upon him to show such performance. But we do not understand the clause of the policy in question to be a condition of that kind. An unexpired policy of fire insurance, which has been regularly issued, and remains uncanceled, must, in the absence of a showing to the contrary, be regarded as a valid and effective policy, upon which the assured is prima facie entitled to recover when the loss occurs, and the steps necessary to establish it have been taken; and, hence, the conditions precedent in such a policy included only those affirmative acts on the part of the assured the performance of which is necessary in order to perfect his right of action on the policy, such as giving notice and making proof of the loss, furnishing the certificate of a magistrate when required by the terms of the policy, and, it may be, in some cases, other steps of a like nature.

Those clauses usually contained in policies of insurance, which provide that the policy shall become void, or its operation defeated or suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing or omission to do some act, are not in any proper sense conditions precedent. If they may be properly called conditions, they are conditions subsequent, and matters of defense, which, together with their breach, must be pleaded by the insurer, to be available as a means of defeating a recovery on the policy; and the burden of establishing the defense, if controverted, is, of course, upon the party pleading it. This precise question has not heretofore received the consideration of this court, but it has been raised in other states under various clauses of insurance policies. In the case of Lounsbury v. Insurance Co., 8 Conn. 459, 21 Am. Dec. 686, the question was presented in an action on a policy of fire insurance which provided "that the insurers would not be liable for loss or damage happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; also that if the building insured should be used during the term of insurance for any occupation, or for the purpose of storing therein any goods, denominated 'hazardous' or 'extra hazardous' in the conditions annexed to the policy (unless otherwise specially provided for), the policy should cease and have no effect." It was held these were not conditions precedent to the plaintiff's right of recovery, but were matters of defense, to be taken advantage of by pleading. The court in that case say: "All these conditions, if such they may be called, are inserted in the policy by way of proviso, and not at all as conditions precedent. They are introduced for the benefit of the defendants; and they must be taken advantage of, if at all, by pleading." In Newman v. Insurance

Co., 17 Minn. 123 (Gil. 98), it is held that "under a stipulation in a policy that if the risk be increased by any means whatever, within the control of the insured, the insurance shall be void, the assured is not to plead and prove affirmatively that it has not been thus increased; but, if it has, it is a matter of defense, to be alleged and proved by the defendant." * * * The vacancy, or want of occupancy, of a building, is as much an affirmative fact as its occupancy, and as capable of proof; and the burden upon that subject, under the issues in this case was, we think, upon the defendant.

The court also erred in its direction to the jury, because, as we have seen, it was not incumbent upon the plaintiff to show the house was occupied; the burden being upon the defendant to prove that it was vacant and unoccupied. * * * No rule is better settled than that such conditions in policies should receive a strict construction, and, when ambiguous, be construed most strongly against the insurer, for the reason that they are prepared by, and inserted for the benefit of, the insurer. The condition of the policy in the present case is not more specific or comprehensive in its requirements concerning the occupancy of the building insured than the one involved in the Kentucky case. Insurance Co. v. Kiernan, 83 Ky. 468. It declares that no liability shall exist under the policy for loss or damage to an unoccupied building, but does not stipulate that the insured building shall be used as a dwelling, or require any particular mode of occupancy. Strictly construed, occupancy for any lawful purpose would satisfy the condition, and preserve the obligation of the policy. At all events, it was not essential that the building should be put to all the uses ordinarily made of a dwelling, or to some of those uses all of the time; nor that the whole house should be subjected to that use. Nor does it follow, as a matter of law, that a dwelling house is to be considered as unoccupied merely because it has ceased to be used as a family residence, where the household goods remain ready for use, and it continues to be occupied by one or more members of the family who have access to the entire building for the purpose of caring for it, and who do care for it, and make some use of it as a place of abode. * * *

For each of the errors pointed out, the judgment of the common pleas and of the circuit court will be reversed, and the cause remanded. Judgment accordingly.

SECTION 11.—PREVENTION AS AN EXCUSE FOR NONPERFORMANCE

If A. has contracted to perform services for B., for example, to cut timber on B.'s land, and B., by force or otherwise, keeps A. from entering the premises, it is clear that A. is excused from performing, and so A. will not be liable for breach of contract. The conduct of B. may also amount to a breach of an implied promise on his part which will render him liable to A. Similarly, with respect to the prevention of the fulfillment of a condition, if, for example, A. has contracted to build a house for B., and B. has agreed to pay the contract price upon the express condition that A. procure the certificate of Architect X. that the building was completed in

accordance with the plans and specifications, and B. by fraud, induces X. not to give the certificate to A., A. will be excused from the duty to obtain the certificate as a condition precedent to A.'s right to recover the contract price. In a great variety of ways, one party to a contract may prevent the other party's performance. The performance of many contracts is dependent upon a certain amount of cooperation by the parties. If one of them withdraws his support, the other party will not have the means of performance. The effect of prevention is, therefore, to excuse performance by the party thus restrained, and such act may justify rescission of the contract by him, and the party guilty of the wrongful conduct may be liable for breach.

PATTERSON v. MEYERHOFER.

(Court of Appeals of New York, 1912. 204 N. Y. 96, 97 N. E. 472.)

Action by Benjamin Patterson against Anna Meyerhofer. From a judgment for defendant, plaintiff appeals.

WILLARD BARTLETT, J. The parties to this action entered into a written contract whereby the plaintiff agreed to sell, and the defendant agreed to buy, four several parcels of land with the houses thereon for the sum of $23,000, to be partly in cash and partly by taking title subject to certain mortgages upon the property. When she executed this contract, the defendant knew that the plaintiff was not then the owner of the premises which he agreed to sell to her, but that he expected and intended to acquire title thereto by purchasing the same at a foreclosure sale. Before this foreclosure sale took place, the defendant stated to the plaintiff that she would not perform the contract on her part, but intended to buy the premises for her own account without in any way recognizing the said contract as binding upon her, and this she did, buying the four parcels for $5,595 each. The plaintiff attended the foreclosure sale, able, ready, and willing to purchase the premises, and he bid for the same, but in every instance of a bid made by him the defendant bid a higher sum. The result was that she acquired each lot for $155 less than she had obligated herself to pay the plaintiff therefor under the contract or $620 less in all. * * *

The complaint also prays that the plaintiff be awarded the sum of $620 damages, being the difference between the price which the defendant paid at the foreclosure sale for the four houses mentioned in the ocntract and the price which she would have had to pay the plaintiff thereunder. * * *

In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part. This proposition necessarily follows from the general rule that a party who causes or sanctions the breach of an agreement is thereby precluded from recovering damages for its nonperformance or from interposing it as a defense to an action upon the contract. * * *

By entering into the contract to purchase from the plaintiff property which she knew he would have to buy at a foreclosure sale in order to convey it to her, the defendant impliedly agreed that she would do

nothing to prevent him from acquiring the property at such sale. The defendant violated the agreement thus implied on her part by bidding for and buying the premises herself. Although the plaintiff bid therefor, she uniformly outbid him. Presumably, if she had not interfered, he could have bought the property for the same price which she paid for it. He would then have been able to sell it to her for the price specified in the contract (assuming that she fulfilled the contract), which was $620 more. This sum, therefore, represents the loss which he has suffered. It is the measure of the plaintiff's damages for the defendant's breach of contract. * * *

For these reasons, the judgments of the Appellate Division and the Special Term should be reversed and a new trial granted, with costs to abide the event.

DEWEY v. UNION SCHOOL DIST. OF THE CITY OF ALPENA.

(Supreme Court of Michigan, 1880. 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206.)

GRAVES, J. The plaintiff was regularly hired by the district to serve as teacher in its public schools for 10 months, for $130 per month. He entered on his duties on the second of September, and continued up to the tenth of December, at which time the district officers closed the schools, on account of the prevalence of small-pox in the city, and kept them closed thereafter, for the same reason, until the seventeenth of March. They were then reopened, and the plaintiff resumed his duties. * * * The district refused to pay him for the period of suspension, and he brought this action to recover it. * * *

Beyond controversy the closing of the schools was a wise and timely expedient; but the defense interposed cannot rest on that. * * * It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools; but this is all the evidence tended to show. The contract between the parties was positive and for lawful objects. On one side school buildings and pupils were to be provided, and on the other personal service as teacher. The plaintiff continued ready to perform, but the district refused to open its houses and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district, and not the plaintiff, ought to bear it.

The occasion which was presented to the district was not within the principle contended for. It was not one of absolute necessity but of strong expediency. To let in the defense that the suspension precluded recovery the agreement must have provided for it. But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community, and the contract cannot be regarded as tacitly subject to such a condition.

The judgment for defendant must be reversed, with costs, and a new trial granted.

SECTION 12.—WAIVER AS AN EXCUSE FOR NON-PERFORMANCE

RICHARD DEEVES & SON v. MANHATTAN LIFE INS. CO.

(Court of Appeals of New York, 1909. 195 N. Y. 324, 88 N. E. 395.)

CHASE, J. * * * Where a building contract provides that the materials shall be furnished and the labor performed for a gross sum and by a day fixed in the contract for the full completion thereof, and the contractor fails to perform by the day so fixed, the owner may insist on his strict legal right, and put an end to the contract. * * * If the owner voluntarily permits the contractor to proceed with such a contract and accepts the materials and labor thereafter furnished and performed, and the contractor fully performs his contract, except as to the time provided for the completion thereof, he is estopped from interposing the delay as a defense to the action for the agreed price. One cannot receive and enjoy the benefit of the labor and materials so furnished under the contract and refuse to pay for them simply because the contract was not completed within the time specified. * * * This does not mean that an owner is without remedy. He may recover his damages by an independent action or by counterclaim in an action brought by the contractor for the contract price. * * *

PABST BREWING CO. v. CITY OF MILWAUKEE.

(Supreme Court of Wisconsin, 1905. 126 Wis. 110, 105 N. W. 563.)

MARSHALL, J. * * * The distinguishing features between the different phases of waiver, as viewed in its general sense, are so slight as to hardly be appreciable. Generally speaking, in neither is any consideration in a pecuniary sense nor any element of estoppel required. The contrary of this may be found asserted, but the soundness of the foregoing is easily demonstrable by reference to the different situations to which it has been frequently applied. In case of payment of a tax without protest, or other claim voluntarily and with knowledge of the facts, an action cannot be maintained to recover back the money, regardless of whether the payee so changed his position on the faith of such payment that the previous status cannot be fully restored by a return of the money. It is manifest that the disability to enforce such return cannot be based on any other reason than that of unqualified submission to the attitude of the payee—the doctrine that one cannot blow hot and then blow cold and have the aid of judicial remedies in the matter. That is not of such universal application as the doctrine of estoppel.

The efforts of courts and text-writers to harmonize the situations to which the principle of waiver has been applied with the idea that some element of estoppel or some consideration is necessary to support the defense has led to many interesting discussions and the assignment of reasons much too shadowy to be appreciated by minds general, if at all. It must be conceded that in many cases where the defense of waiver has prevailed no element of estoppel can be pointed to. If it were otherwise, many instances of supposed waiver would be misnamed, the proper designation of the defense being estoppel.

It may be that the theory advanced by a learned writer that in every case where the law of waiver is applicable and there is no element of estoppel, there is one of consideration, in the broad sense of the term as applicable to contracts. A consideration essential to a contract is satisfied by a disadvantage to the promisee as well as by a benefit to him. Parsons on Contracts (9th Ed.) vol. 1, § 431. So waiver may perhaps be viewed as involving a consideration and supported on that theory. In every case where the waivee asserts as a defense submission by the waivor, the former would be prejudiced if the latter were allowed to successfully change his position. 58 Cent. Law J. 264.

It would seem that the more satisfactory ground to support the doctrine of waiver on is that it is a rule of judicial policy—the legal outgrowth of judicial abhorrence, so to speak, of a person's taking inconsistent positions and gaining advantages thereby through the aid of courts. A rule by which regardless of any element of estoppel or consideration, as those terms are popularly understood, the saying that one should not be permitted to blow hot and with advantage to himself turn and blow cold, within limits sanctioned by long experience as required for the due administration of justice, has been prohibitively applied. It is applied where one with knowledge of the facts voluntarily pays a demand upon him. It is applied when one with knowledge, or reasonable means of knowledge, of the facts having two inconsistent remedies chooses one of them. It is applied where one without objection and with such knowledge, or means of knowledge, receives property in consummation of an executory contract. The tendency of courts is to consider as within one of the exceptional classes any situation which is within the principle of it, both as regards the mere fact of waiver and the importance in the administration of justice of holding the waivor to the position he voluntarily and with knowledge of the facts has elected to take. * * *

It is suggested that there can be no waiver without intent to waive based on knowledge of the facts. True, but one is presumed to know that which in contemplation of law he ought to know, and one is presumed to waive that which is necessarily implied from his conduct. Constructive as well as actual knowledge of the facts, and implied as well as express intent, satisfies the prime essential of a conclusive waiver. * * * A standard reference work puts the matter thus:

"The intent to waive may appear as a legal result of conduct. The actuating motive, or the intention to abandon a right, is generally a matter of inference to be deduced with more or less certainty from the external and visible acts of the party, and all the accompanying circumstances of the transaction, regardless of whether there was an actual but undisclosed intention to the contrary." Am. & Eng. Enc. of Law (2d Ed.) vol. 29, p. 1095.

Waiver, acquiescence or election by one often precludes him from insisting successfully upon advantages which he has concluded with knowledge of the facts to forego, but that forms but an element producing the legal consequences denominated estoppel in pais. The crowning element of such legal consequences is the change of position, in reliance upon the prior element mentioned, to one from which there can be no retreat without loss. * * *

ALSENS AMERICAN PORTLAND CEMENT WORKS v. DEGNON CONTRACTING CO.

(Court of Appeals of New York, 1917. 222 N. Y. 34, 118 N. E. 210.)

Action by the Alsens American Portland Cement Works against the Degnon Contracting Company. Judgment in favor of plaintiff, and it appealed.

COLLIN, J. The action is to recover the purchase price, at the rate of $1.62 per barrel, of cement sold by the plaintiff to the defendant. The trial justice directed a verdict based upon the purchase price of $1.41 per barrel. A question to be determined, under proper exceptions, is whether or not there was any evidence creating a question of fact to be submitted to and determined by the jury.

The evidence is free of contradiction. The undisputed facts, briefly and adequately stated are: In May, 1909, the parties entered into a contract which provided for the sale by the plaintiff to the defendant of 175,000 barrels of cement, to be totally ordered for shipment by the defendant before March 1, 1913, at the price of $1.41 per barrel. On March 1, 1913, there remained unordered for shipment 36,000 barrels. Between March 1, 1913, and May 8, 1913, the defendant ordered of and received from the plaintiff 1,900 barrels. Throughout that period the market value was $1.62 per barrel. The plaintiff by this action claims that the 1,900 barrels were not sold under the contract, and should be paid for (except the first two shipments) at the market value. The defendant claims that the sale was within the contract, and the plaintiff should be paid $1.41 per barrel.

The defendant rightly concedes that the defendant was bound by the contract to order for shipment before March 1, 1913, the total amount of 175,000 barrels, and after that date the plaintiff was free to refuse to make any delivery under the contract. It asserted at the trial and asserts here that the stipulation of the contract thus binding it was, as a matter of law, waived by the acts of the plaintiff. Therein it errs. Under the evidence, whether or not there was a waiver on the part of the plaintiff was a question of fact determinable by the jury.

In reversing the judgment and granting a new trial, we may not with propriety attempt to define the effect due, in our opinion to any part of the evidence. A waiver, not express, found in the acts, conduct, or language of a party, is rarely established as a matter of law rather than as a matter of fact. This conclusion inheres in its nature and character. A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed. It is the voluntary act of the party, and does not require or depend upon a new contract, new consideration, or an estoppel. It cannot be recalled or expunged. * * * It is essentially a matter of intention. Negligence, oversight, or thoughtlessness does not create it. The intention to relinquish the right or advantage must be proved. Occasionally it is proved by the express declaration of the party, or by his undisputed acts or language so inconsistent with his purpose to stand upon his rights as to leave no opportunity for a reasonable inference to the contrary. Then the waiver is established as a matter of law. Commonly it is sought to be proved by various species of proofs and evidence, by declarations, by acts, and by nonfeasance, permitting differing inferences, and which do not directly,

unmistakably, or unequivocally establish it. Then it is for the jury to determine from the facts as proved or found by them whether or not the intention existed. * * *

In the present case whether or not the plaintiff waived the default of the defendant was a question of fact. There was no express waiver. In the shipments by the plaintiff under defendant's orders of March 14th and 28th and the plaintiff's invoices of them, there was evidence that the plaintiff through and by means of them waived the default. The effect of the testimony of Mr. Corbett and the other evidence relating to those orders and invoices must be measured by the jury. In the acts, letters, and invoices of the plaintiff subsequent to April 3d and in certain letters prior to March first is evidence that there was not the waiver. The evidence throughout was of an inconclusive or equivocal nature, and furnished only grounds of inference and deduction, which it is the appropriate province of a jury only to consider.

The judgment should be reversed, and a new trial granted.

STEARNS SALT & LUMBER CO. v. DENNIS LUMBER CO.

(Supreme Court of Michigan, 1915. 188 Mich. 700, 154 N. W. 91, 2 A. L. R. 638.)

Action by the Stearns Salt & Lumber Company against the Dennis Lumber Company. Judgment for defendant, and plaintiff brings error.

KUHN, J. On December 29, 1911, the defendant company placed an order with the plaintiff company by telephone for two car loads of a certain grade of lumber, and followed this by letter confirming the same. * * * To this communication the plaintiff company replied under date of December 30, 1911, advising that the lumber would be shipped at once.

On January 6, 1912, the plaintiff mailed to the defendant an invoice of the first car of lumber shipped, and on January 11, 1912, sent an invoice of the second car load shipped. The first car of lumber was placed for unloading February 19, 1912, and was unloaded on the following day. The other car was placed for unloading on February 21, 1912, and the unloading of that car was completed within two days, on February 23d. On the next day, February 24, 1912, defendant notified plaintiff of the rejection of part of the lumber received. * * *

The plaintiff company immediately replied that it would not consent to any loss on the car, and must have settlement in full. Further correspondence was had between the parties, and finally suit was brought to recover the sum of $50.75, the claimed balance due on the two cars in question, the value of the lumber rejected. Suit was started in the justice court, which resulted in a judgment in favor of the defendant, and on appeal taken to the circuit court the trial judge directed a verdict of no cause of action.

It is contended here that the circuit judge erred in holding and instructing the jury that the contract in question was severable, and that the defendant had a right to reject part of the lumber in question and accept the remainder. It is the contention of the plaintiff that the defendant had purchased these two cars of lumber, of one quality and grade, and as soon as the cars arrived the defendant had a reasonable time in which to inspect the same and ascertain if they complied with

the requirements of the contract as to quality and grade, and after such examination defendant was obliged to either accept or reject all of the lumber; and if he accepted a part of the lumber, and then used the same, he was obliged to pay the contract price of all of the lumber. * * *

It is true that it is the rule of law in this state that in an executory contract for the sale of personal property, where there is an implied warranty, the warranty does not survive the acceptance of the goods, and it becomes the duty of the purchaser to make an inspection and reject or pay the contract price. * * * But the question here is rather whether or not the contract in question is a severable one, and whether or not the defendant could after inspection, in view of the rule of law here established, reject that part of the lumber which did not meet the specifications. * * *

In the instant case, if the defendant had taken into possession the rejected lumber and assumed to dispose of it at a less price, * * * there could be no question that under the law in this state the damages thus sustained could not have been recouped in an action to recover for the rejected lumber. But here the defendant moved promptly by notifying the plaintiff the very next day after the inspection, of the rejection of the lumber in question.

In a similar case in Maryland, Canton Lumber Co. v. Liller, 107 Md. 146, 68 Atl. 500, the court held that the plaintiff had a right to accept lumber which was up to the grade contracted for, and that by so doing it did not accept the part which was below grade. In its opinion the court said:

"* * * Can it be supposed then that it was the intention of either of the parties that if one-half or one-quarter of the lumber passed the inspection, and the remainder was rejected, that the plaintiff could not use the former for the specific purpose for which it was bought, without being required to take also the rejected portion which he could not use? Such a conclusion is as irrational when attributed to the defendant as when attributed to the plaintiff, under all the circumstances of this case. * * * As illustrative of this view, it was said in Richards v. Shaw, 67 Ill. 222, that the modern rule is that the entirety of a contract of sale is severed by the buyers receiving and retaining a part after the seller has refused or failed to deliver the residue of the specific quantity of goods bargained for.

"The case of Holmes v. Gregg, 66 N. H. 621, 28 Atl. 17, relied on by the plaintiff, is directly in point, and meets with our full concurrence. That was a sale of lumber shipped on cars in five lots, three of which were accepted and used by the defendants, and the others, not conforming to the order in quality, were rejected and piled in their yard, where they remained, subject to the plaintiff's order. The defendants seasonably informed the plaintiffs of their action, and tendered the price of the accepted lumber, and the court said: 'Without an express stipulation that the contract was or was not entire, the parties might have understood that it was severable in such a sense that the defendants could accept the lumber that conformed to the contract and reject the rest.'"

We are of the opinion that the trial court was correct in holding that the contract was a severable one, and no error was committed in charging the jury. Judgment affirmed.

CHICAGO WASHED COAL CO. v. WHITSETT et al.

(Supreme Court of Illinois, 1917. 278 Ill. 623, 116 N. E. 115.)

Action by the Chicago Washed Coal Company against R. C. Whitsett and others. From a judgment for defendant, plaintiff appeals.

CRAIG, C. J. Appellant, the Chicago Washed Coal Company, on December 3, 1910, brought suit in the municipal court of Chicago against the appellees, R. C. and A. H. Whitsett, co-partners doing business as the R. C. Whitsett Coal & Mining Company, to recover damages for an alleged breach of contract to furnish it certain grades of coal at the rate of 150 tons per day from December 28, 1909, to March 30, 1910. * * *

The contract was entered into December 24, 1909, and provides that appellees were to furnish appellant with coal from the mine at Ward, Ill., from December 28, 1909, to March 30, 1910, at the rate of 50 tons per day of No. 3 screenings at 72½ cents per ton, and 100 tons per day of 6 x 3 egg at $1.45 per ton, f. o. b. the mines. The freight rate from the mines to Chicago was 90 cents a ton by way of the Illinois Central Railroad. The coal was to be shipped from the Chicago-Carbondale Coal Company's mines, appellant to have preference over all other shipments, and all deliveries to be made subject to the usual contingencies occasioned by strikes, lockouts, delays in transportation, changes in freight rates, or other causes beyond the control of appellees. All payments were to be made on or before the 10th day of each month for all shipments made during the preceding month. Appellees were unable to secure the kind of coal contracted for the December delivery, and a verbal agreement was made whereby a different kind of coal was received on the contract during that month. The total deliveries for December amounted to $101.83. Appellees rendered appellant a statement for the coal so delivered on December 31, 1909. Appellant failed to make payment of this account on or before January 10th, as provided by the contract, and appellees ceased to make deliveries on the contract after that date. The last coal delivered by them was January 9, 1910.

On January 15th appellant paid its account for coal delivered in December in full, and on January 17th wrote appellees as follows: "We beg to call your attention to the fact that we have received no shipments on our contract made with you for coal from Ward, Ill., since January 8th, and have had the matter up with your Mr. Stinson, and was assured by him that he was watching the same and was doing all he could to get same forwarded to us. We must insist that we receive shipment on this contract to the extent of 150 tons per day, as stipulated. Trusting we may hear favorably from you by return mail, we remain."

To which appellees replied on January 18th as follows: "We are in receipt of your favor of the 17th inst., and are surprised to note that you still expect to receive shipments under this contract. If you refer to your contract, you will note that it calls for payment on or before the 10th of each month for all shipments made during the preceding month. Therefore, inasmuch as we did not receive your remittance on the 10th inst., we canceled your contract on the 11th inst."

The total shipments of coal made during the month of January, until the contract was canceled on January 11th, amounted to $281.76. Ap-

pellant also failed and refused to pay this account on or before February 10th, as provided in the contract, or at any time thereafter, until suit was brought and a judgment recovered against it for such amount.

Appellees rely upon the failure of appellant to pay its December account on or before January 10th and their letter of January 17th notifying appellant of the cancellation of the contract as constituting a rescission of the contract; also the failure of appellant to pay the January account on or before February 10th as such an abandonment of the contract as to preclude a recovery thereon by appellant at this time, even if the prior rescission was wrongful, which they do not concede. Appellant insists that the acceptance of the payment for the December delivery on January 15th was a waiver of its failure to pay on or before the 10th of the month, and the letter notifying it of the cancellation of the contract was such a repudiation of the contract by appellees as to excuse appellant from a further performance of the contract on its part. Both the trial and Appellate Courts adopted the view of appellees, and we concur in their views. When appellees ceased to make deliveries on the contract after January 8, 1910, and thereafter notified appellant the contract had been canceled, the contract was terminated for all purposes so far as appellees were concerned. Their repudiation of the agreement could not have been made more emphatic or complete. The acceptance of the payment for the past-due account did not estop them from insisting upon a rescission of the contract, when they were, at the time of accepting such payment, refusing to further comply with such contract.

They had the right to receive or accept payment for coal already delivered in any event, whether the contract was canceled or not. If appellant deemed the contract still valid and binding, it then had the right to treat the contract as terminated for all purposes and bring an action for its breach, and for all the damages which it had sustained by reason of nonperformance, or being prevented from performing the contract, or it had a right to treat the contract as subsisting and to keep it alive for the benefit of both parties, keeping itself at all times ready, able, and willing to perform its part of the contract, and at the expiration of the term of the contract sue for its damages sustained by reason of the wrongful nonperformance by appellees; but it could not do both. * * * If it elected to keep the contract alive and in force for the purpose of recovering damages for future profits, it must do so for the benefit of both parties, and must both allege and prove performance of the contract upon its part, or a legal excuse for its nonperformance, before there could be a recovery on the contract. * * * In the present instance appellant did neither, although it evidently tried to do both. It treated the contract as subsisting in so far as its right to demand delivery of coal thereunder was concerned, and broken in so far as appellees' right to demand payment of the coal previously delivered was concerned. This was fatal to appellant's right of action on the contract. * * *

If it elected to keep the contract alive, it must show performance on its part, or legal excuse for its nonperformance. In order to do this, it was incumbent upon appellant to show payment for the coal previously delivered, or an offer to do so, or set the same off against its damages on the contract and at the time and in the manner provided by such instrument. * * *

Judgment affirmed.

SECTION 13.—ANTICIPATORY BREACH OF CONTRACT

Our particular problem here is to determine whether or not a declaration, by one of the parties to a contract that he intends not to perform his future obligations under the contract, will have the same or any of the legal effects brought about by a nonperformance of existing obligations. If A. has contracted to build a house for B. according to certain specifications and to have the same completed by January 1 next, and this date arrives and the house is not so built, we know from previous cases what effect is thereby brought about in the relations of A. and B. Suppose, however, that, a few days after the contract was entered into, and before performance has started, A., the builder, informs B. that he will not build the house—does this act of A. constitute a breach of contract? The situation should be looked upon from the following standpoints: (1) Does A.'s act justify B. in not performing his duties which were to arise before January 1? (2) May B. then sue A. for damages, or must A. wait until after January 1 before bringing suit? (3) If B. chooses to wait until after January 1 to sue A., may B. recover damages based upon the state of affairs existing on January 1, or will he be limited to the recovery of damages calculated as of the date of the repudiation? This involves also the further question: May B. perform all of his duties under the contract and, after January 1, hold A. liable for the payment for such performance? (4) In the event that B. does not sue A. immediately upon A.'s repudiation, may A., by recalling his repudiation, restore the relations which existed before he declared that he would not perform?

O'NEILL v. SUPREME COUNCIL A. L. OF H.

(Supreme Court of New Jersey, 1904. 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422.)

Action by Thomas O'Neill against the Supreme Council American Legion of Honor.

PITNEY, J. The declaration avers that in the year 1891 the defendant was a corporation of the state of Massachusetts, engaged in business in the state of New Jersey, and made a contract under seal with the plaintiff, known as a benefit certificate, * * * whereby it was certified that the plaintiff was a companion of the American Legion of Honor, and thereupon, in consideration of full compliance by him with all by-laws of the supreme council of that order, then existing or thereafter adopted, and the conditions in the benefit certificate contained, the supreme council agreed to pay to the plaintiff's sister, in trust for his six children, the sum of $5,000, upon satisfactory proof of the plaintiff's death while in good standing upon the books of the supreme council. It alleges that the contract was made in consideration of the payment by the plaintiff of the assessments or premiums which might from time to time be called by the defendant. It avers payment by the plaintiff of all assessments called, and performance by him of all conditions, until the defendant broke the contract and de-

clared the same void. It sets up that the defendant has failed, neglected, and refused to carry out the conditions of the contract, in that on August 22, 1900, on December 10, 1901, and on divers other days between those dates, the defendant declared to the plaintiff that it would not perform the contract or pay the insurance money thereby agreed to be paid, and that upon the plaintiff's death the beneficiaries should receive only $2,000. The declaration further avers that upon the breach of the contract by the defendant as aforesaid, and upon the several dates mentioned above, the plaintiff tendered to the defendant the same monthly assessments and payments as had been theretofore called or required by the defendant upon the contract, and the plaintiff offered and agreed to continue making such payments, and in all respects offered to comply with the terms and conditions of the contract; yet the defendant refused to accept from the plaintiff the assessments so tendered, and refused to recognize the contract or continue it in force; whereby the plaintiff has sustained damages, to recover which the action is brought. The defendant has pleaded the general issue and five special pleas. To each of the latter the plaintiff demurs.

The first question for consideration is whether the declaration sets forth a good cause of action. The cause of action asserted is not the right to recover the sum named in the benefit certificate according to its terms, but to recover damages for a renunciation of the agreement, by the party bound, in advance of the time set for performance. Numerous reported decisions have laid down the doctrine that where a contract embodies mutual and interdependent conditions and obligations, and one party either disables himself from performing, or prevents the other from performing, or repudiates in advance his obligations under the contract, and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may at his option treat the contract as terminated for all purposes of performance, and maintain an action at once for damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant. This doctrine has been followed in the English courts for more than half a century. * * *

In the leading case of Hochster v. De La Tour (1853) 2 El. & Black. 678, 22 L. J. Q. B. 455, 17 Jur. 972, 6 Eng. Rul. Cas. 576, Crompton, J., said, during the argument: "When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time (meaning, of course, for purposes of further performance); but I will hold you liable for the damage I have sustained, and I will proceed to make that damage as little as possible by making the best use I can of my liberty.' This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal." And Lord Campbell, C. J., in delivering judgment, said: "It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion,

and that an opportunity is not left to him of changing his mind. * * * The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer."

The same rule prevails in the Supreme Court of the United States. Roehm v. Horst (1899) 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, where numerous previous decisions of the same court are cited. And the great weight of authority in the state courts is to the same effect. * * *

The doctrine of Hochster v. De La Tour is generally recognized by the text-writers as established law. * * * So far as observed, the only states dissenting from the doctrine are Massachusetts, Nebraska, and North Dakota. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757; King v. Waterman, 55 Neb. 324, 75 N. W. 830; Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760. The latter decision is based partly, and the Nebraska decisions principally, upon the authority of Daniels v. Newton, which is the leading case upon this side of the question. It is there held that a mere refusal of performance by the promisor, before the time for performance arrives, cannot form a ground for damages. But in Parker v. Russell, 133 Mass. 74, it was held a refusal of performance of a substantial part of the contract, after the time of entering upon performance has begun, entitles the injured party to treat the entire contract as absolutely broken, and to recover immediately his damages, based upon the whole value of the contract, including compensation for nonperformance in the future as well as in the past. In Ballou v. Billings, 136 Mass. 307, it was held that, for purposes of rescission by the promisee, notice that the promisor will not perform has the same effect as an actual breach. These and other cases show that, even in Massachusetts, the reasoning on which the decision in Daniels v. Newton was based is hardly carried to its logical conclusion. * * * Upon the precise point now presented, however, the authority of Daniels v. Newton is still recognized in Massachusetts, as appears from a recent decision in a case that is "on all fours" with the one now before us. Porter v. American Legion of Honor (1903), 183 Mass. 326, 67 N. E. 238.

The general question of repudiation of contracts is ably discussed by Prof. Williston in 14 Harv. Law Rev. 317, 421, with an ample citation of cases. He combats the doctrine of Hochster v. De La Tour, while conceding that it is sustained by the great weight of authority.

There seems to be no controlling decision in our own state; at least, no reported case that is precisely in point. In Parker v. Pettit, 43 N. J. Law 512, which was an action brought by the purchaser to recover damages for refusal to deliver goods purchased, the vendor, prior to the time of performance, had declared his intention not to perform, and had likewise disabled himself from performing by selling the goods to another. The court held that thereby the vendor had dispensed with the performance of conditions precedent by the purchaser, and

that neither a demand of performance nor a tender of the consideration money was necessary. It was intimated by Mr. Justice Depue, in the opinion, that the defendant's refusal of performance, before the time for performance arrived, did not of itself amount to a breach of the contract so as to authorize a suit before the time for performance; but this was obiter dictum, for the suit was in fact brought after that time. In Vickers v. Electrozone Commercial Co., 67 N. J. Law 665, 671, 52 Atl. 467, 469, Judge Vredenburgh, speaking for the Court of Errors and Appeals, declared that "a party injured by the repudiation of a contract by the other party, also bound by it, has an election of remedies he may pursue, one of which is that he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing, and the contract would be continued in force for that purpose."

It must be conceded that the adoption of this rule was not necessary for the decision of the case, which was an action to recover damages for the past breach of a single covenant, and was not based upon a repudiation of the entire agreement. But as a pronouncement by our court of last resort, agreeing, as it does, with the English and most of the American decisions, the expression quoted is entitled to great weight in this court. Upon the whole, we are satisfied that the doctrine of Hochster v. De La Tour is well founded in principle as well as supported by authority. We are also clear that it applies to such a contract as the one in suit, and that the declaration sets forth a renunciation so clear and unequivocal as to give ground for an action, it being averred that the defendant has declared to the plaintiff that it will not perform the contract, and has refused to accept the monthly assessments tendered by the plaintiff in performance of conditions precedent on his part. * * *

The plaintiff is entitled to judgment.

GREENWAY v. GAITHER.

(United States Circuit Court, D. Maryland, 1853. Taney, 227, Fed. Cas. No. 5,788.)

TANEY, Circuit Justice. * * * I have been referred to an opinion delivered in the queen's bench, in the case of Hochster v. De La Tour, 20 Eng. Law & Eq. 157, 2 Ellis & Blackburn, 678. * * * The principle upon which that case was decided is loosely stated by Lord Campbell in the opinion delivered. In the first portion of it, the decision would seem to be placed upon the character of the contract, and the necessity the plaintiff was under of preparing himself for the service, before the day when he was to enter upon its actual performance. * * * But in the latter part of the opinion, Lord Campbell says, that a man who wrongfully renounces a contract, when is to do an act at a future day, may be sued immediately for a breach of it, without waiting for the time stipulated for its performance. His language, in this part of his opinion is general enough to apply to all cases where an act is to be done by the party on a future day, whether that act be to render service, or deliver goods, or pay money; and it is upon this part of the opinion that the plaintiff in this case relies to support his present application. * * *

The language of Lord Campbell, in this part of his opinion, is per-

haps broad enough to bear the construction which the plaintiff has put upon it. It is, however, but justice to him to restrict it to contracts of the character of which he was speaking; and so, I suppose, he intended it. For if he meant to say that a contract like this, by which the defendant engaged to pay a certain sum of money on certain days, would be broken, and might be sued on immediately, if the party gave notice that he would not comply with it, and intended to dispute it; if such was the doctrine he meant to announce in that opinion, it cannot be maintained either upon principle or the authority of adjudged cases. It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action, upon which he might sue before the time of payment arrived. * * *

WIGENT v. MARRS.

(Supreme Court of Michigan, 1902. 130 Mich. 609, 90 N. W. 423.)

Action by Gardner A. Wigent against Thomas Marrs, administrator of the estate of Chloe R. McClung, deceased. There was a judgment in favor of defendant, and plaintiff brings error.

HOOKER, C. J. Plaintiff recovered a verdict and judgment in an action of assumpsit before a justice of the peace, which was reversed in the circuit court on appeal. The declaration was upon the common counts. The facts were undisputed, and in substance are as follows: In May, 1901, defendant's intestate gave a written order to plaintiff's agents for a monument to be erected upon her lot in the cemetery at the agreed price of $100, the same to be completed between that date and June 30, 1901, unless unforeseen causes should prevent, and in that event as soon thereafter as practicable. It was to be set upon a foundation to be erected by her. The contract was approved by the plaintiff on May 14th, of which Mrs. McClung was notified, and at the same time the monument was ordered to be made at the quarry. The latter part of June the plaintiff notified her to get the foundation ready, in response to which she wrote him that he need not bring that monument, as it did not come according to agreement. On July 5th plaintiff replied, stating that the monument was well under way, and he could not allow her to countermand her order; that it would be delivered as soon as completed, and would be strictly according to contract, and she was requested to have her foundation built as soon as possible. In response to this she wrote: "You have not done according to agreement at all. You was to have it up by the 30th of June at the farthest. We are not obliged to wait your motion, so, if you bring it, you may take it back." The plaintiff had the monument completed and set up upon a foundation erected by himself. This action was brought to recover the contract price and $1.50 for the foundation, with interest from August 23, 1900.

It was shown that the delay was caused by unforeseen circumstances. No complaint was made of the workmanship, which was such that the monument could not be used for any other purpose. The defendant claims that the plaintiff, upon receipt of Mrs. McClung's letter, had no legal right to complete the contract, and recover the price; that his only remedy was to recover in damages for a breach of the contract. Plaintiff, on the other hand, claims that it was competent

to treat the contract as performed, and that he is entitled to recover the contract price upon the common counts. It is undisputed that defendant unqualifiedly renounced this contract before the monument was completed, and forbade its completion and erection upon her premises. Many authorities hold that she had the right to do this, and thereafter plaintiff's right of recovery would be limited to damages for the breach of the contract involved in the renunciation. In Mechem, Sales, § 1091, the author says: "The law is well settled that a party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by reason of having his performance checked at that stage in its progress." "The contract is not rescinded, but broken; and immediately the other party has the right to deem it in force for the purpose of the recovery of his damages, he is under no obligation for that purpose to tender complete performance, nor has he the right to unnecessarily enhance the damages by proceeding after the countermand to finish his undertaking." Id. § 1092.

This subject is discussed in the case of Hosmer v. Wilson, 7 Mich. at page 305, 74 Am. Dec. 716, where Mr. Justice Christiancy says: "And it is certainly very questionable whether the party thus notified has a right to go on after such notice to increase the amount of his own damages. In Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he choose, subjecting himself to the consequences of a breach of his contract; and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in Derby v. Johnson, 21 Vt. 21." Mr. Justice Christiancy adds that: "This would seem to be good sense, and therefore sound law; and it would seem that any other rule must tend to the injury, and in many cases to the ruin, of all parties." In the case of Danforth v. Walker, 37 Vt. 244, the court said of a similar case: "While a contract is executory, a party has the power to stop the performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such increased damages of the other party." * * *

We are cited by plaintiff's counsel to the case of Black v. Herbert, 111 Mich. 638, 70 N. W. 138, as a case on all fours with the present case, but we think it is readily distinguishable. In that case, after renunciation the parties met by appointment, and the plaintiff was permitted to alter and set up the monument. It became, therefore, a question for the jury whether or not the contract had been performed. Renunciation must be more than mere idle talk of nonperformance; it must be a distinct, unequivocal, and absolute refusal to receive performance or to perform on his own part. Mechem, Sales, § 1087. The party attempting to renounce may withdraw his renunciation and have the contract performed (Id. § 1090), and it would seem that the defendant in that case did so. There are only two theories upon which the common counts could be relied upon in this case: First, upon the

theory that the contract had been performed, and that the contract price was therefore recoverable; and, second, for the work and material used in the foundation built by the plaintiff. The undisputed facts show that the contract was not performed on receipt of the renunciation, and there could be no recovery for the erection of the foundation, because the plaintiff was never requested to build it, but, on the contrary, was prohibited from doing anything further in performance of the contract. The only redress that the plaintiff would be entitled to recover would be damages for the breach of the contract if renunciation should be found to be unwarranted, which does not appear.

It follows that the judgment must be affirmed.

SECTION 14.—RIGHT OF A PARTY MATERIALLY IN DEFAULT TO RECOVER FOR HIS INCOMPLETE PERFORMANCE

Suppose that A. has contracted to perform certain personal services for B., to extend over a prescribed period of time, and, before the work is completed, A., without justification quits work, may A. recover anything for the work he has performed? Or, to raise the same legal problem in other kinds of contracts, suppose that A. has contracted to erect a building for B., and, when the building is but partially constructed, or fully constructed but grossly defective in workmanship and materials used, A., without just cause, abandons the contract; is A. entitled to any proportionate payment of the contract price? Or, it may be that A. has contracted to sell goods of a certain kind and quality to B. and has delivered goods of an inferior quality to B., who has retained them. What, if anything, may A. recover from B.? In other words, our problem is to determine whether or not a party who has materially broken his contract, of whatever nature it may be, either by reason of his failure to perform within the time specified or at the proper place, or because the acts performed were not the acts promised, may recover anything for his defective performance. This question is essentially different from the series of problems discussed in the preceding sections. We have already noted several of the effects which a breach of contract by A. has upon B. We have seen that, in all cases, B. may sue A. for damages. Moreover, if A.'s breach was material, B. may not only sue A. for damages thus sustained by him, but also B. is justified in not performing his remaining duties under the contract, that is, the prior breach by A. is an excuse for the nonperformance by B. Also, we have seen that, in many instances, B. may rescind the contract. We are here not concerned with any of these rights and privileges of B. The new point is, does A., the party in default, have any rights against B.?

Assuming that there is such a right in A. against B., it may very well happen that the damages sustained by B. will more than equal the money value of the right of A. against B., so that the action brought either by A. against B. or by B. against A. would result

in a judgment in B.'s favor. But the amount of this judgment obviously will be cut down by allowing A. a right of recovery. As a practical matter, is it good public policy for the law to declare that, if parties break their contracts, they will be held liable in damages, but to permit such party in default to recover something from the other party; or, on the other hand, is it better policy for the law to provide for a double penalty upon defaulting contractors by making them liable to pay for all damages occasioned to the other party and by denying them the right of paying some portion of these damages by some valuation placed upon their defective work?

There is a good deal of conflict in the decisions on this question. In labor and construction contracts, the general rule is that the laborer or builder who has willfully broken his contract can recover nothing, but that, if his breach is not willful, he may recover.[2] Likewise where a buyer accepts a defective performance, the weight of authority is that the seller may recover the reasonable value of the goods. In the last case, it will be noticed that there is less occasion for resorting to the distinction between willful and nonwillful breach. In the ordinary case, the breach by the seller would not be willful.

The following cases discuss some phases of the general question and also the question as to the proper basis for ascertaining the amount of the recovery to be allowed the party in default:

BRITTON v. TURNER.

(Supreme Court of New Hampshire, 1834. 6 N. H. 481, 26 Am. Dec. 713.)

PARKER, J. It may be assumed that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count of quantum meruit. Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract, by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed, however much this has been considered the settled rule of law upon this subject. * * *

That such rule in its operation may be very unequal, not to say unjust, is apparent. A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without

[2] Williston on Contracts, §§ 1474, 1475, 1477.

any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such nonperformance, which in many instances may be trifling; whereas, a party who, in good faith, has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance, although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage, is in fact subjected to a loss of all which has been performed, in the nature of damages for the nonfulfillment of the remainder, upon the technical rule, that the contract must be fully performed, in order to a recovery of any part of the compensation. By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant, as found by the jury, is ninety-five dollars, if the defendant can succeed in this defense, he in fact receives nearly five-sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff, a sum not utterly disproportionate to any probable, not to say possible damage, which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfillment of his contract. * * * The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term.

If, under such circumstances, he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house. * * *

We hold, then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement, until the money is earned according to the terms of it; and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some further transaction between the parties.

In case of a failure to perform such special contract by the default

of the party contracting to do the service, if the money is not due by the terms of the special agreement, he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done or furnished, and upon the whole case derives a benefit from it. * * *

But if, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." 1 Dane Abr. 224.

If, on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing, the law cannot and ought not to raise an implied promise to pay. But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. * * * And the rule is the same, whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time, until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent.

In fact, we think the technical reasoning that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that the contract being entire, there can be no apportionment; and that there being an express contract no other can be implied, even upon the subsequent performance of service, is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary.

Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreement cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect. * * * It is easy, if the parties so choose,

to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretense for a recovery if he voluntarily deserts the service before the expiration of the time.

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth, or the amount of advantage he receives upon the whole transaction; * * * and in estimating the value of the labor, the contract price cannot be exceeded. * * * If a person makes a contract fairly, he is entitled to have it fully performed, and if this is not done, he is entitled to damages. He may maintain a suit to recover the amount of damages sustained by the nonperformance.

The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defense he is entitled so to do, and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the nonfulfillment of the contract. If, in such case, it be found that the damages are equal to, or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover. * * *

Judgment on the verdict [for plaintiff].

GILLIS et al. v. COBE et al.

(Supreme Judicial Court of Massachusetts. 1901. 177 Mass. 584, 59 N. E. 455.)

Action by Daniel B. Gillis and others against Mark H. Cobe and others. From a judgment in favor of defendants, plaintiffs appeal.

LORING, J. The first question submitted to the court by the referee is whether the defendants' act of putting in the tanks constituted an act of acceptance which dispensed with the necessity of the plaintiffs furnishing the architect's certificate. The plaintiffs contend that this question does not arise in this case, because it is nowhere provided in the contract that their right to recover the contract price depends upon their securing a certificate from the architect. Though the provisions of this contract are not as explicit as building contracts usually are in this respect, yet, on a fair construction of its terms, we think that the plaintiffs' right to recover does depend upon their producing a certificate from the architect. In the specifications, which are made part of the contract, there is this provision: "Payments only to be made upon a written order from the architect as the work progresses. No order will be considered an acceptance of the work on which it is given. Only an order for the final payment shall be considered as an acceptance of the work." This clause, taken in connection with the two following clauses of the contract, must be taken to make the payment of the contract price dependent upon the architect's giving his certificate: "Any disagreement between the owners and the contractor upon any matter arising from these specifications or drawings of the work required shall be decided by the engineers and architects, whose decision shall be final and binding on both parties."

"All payments shall be made upon written certificate of the engineers and architects."

We are therefore of opinion that this question does arise. Further, we are of opinion that the acts of the defendants in using the building when the plaintiffs stopped working on it were not an acceptance of it. By the express terms of the contract, "only an order for the final payment shall be considered as an acceptance of the work." The building became the defendants' property as it was affixed to their land. When the plaintiffs stopped working on it, and the architect refused to give a certificate that it was constructed in accordance with the requirements of the contract, the defendants were not bound to remove the building; nor were they bound, so long as the building stood on their land, to abstain from using what was their own. The use of the building, therefore, was not an acceptance of it, under the contract. * * *

The second question is whether a recovery can be had in this case on the common counts, without furnishing the architect's certificate. * * *

The plaintiffs further contend that they are entitled to the fair value of the structure, viewed with reference to the labor and materials which produced it. * * * But one who has done work under a special contract, and resorts to a recovery under the principle of Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 268, recovers on the ground, and only on the ground that the result of his work is of some benefit to the defendant. He comes into court admitting that he has not done what he agreed to do, and that he cannot hold the defendant on his promise to pay him the contract price. More than that, he admits that the part which he has failed to perform is one that so far goes to the essence of the contract that it is a condition precedent to a recovery by him on the contract; for, if the part which he agreed to perform and did not perform was of slight importance, it is not a condition precedent. He can recover the contract price without performing it, and the only advantage which the defendant can take of it is by way of recoupment, or by a cross action, in which the burden is on him (the defendant) to prove the damage he has suffered from its nonperformance. The only ground on which a plaintiff who resorts to a recovery under the principle of Hayward v. Leonard is entitled to recover anything is that, though so far as his contract rights are concerned, he is entirely out of court; yet it is not fair that the defendant should go out of the transaction as a whole with a profit at his (the plaintiff's) expense; and therefore if the structure, which, for the purpose of a recovery on this ground, he necessarily admits does not come up to the contract requirements in essential particulars, is nevertheless a thing of some value, the defendant ought to make him compensation therefor. That such is the ground on which a recovery can be had in such a case was laid down in the original case of Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 268, and has been repeated in the subsequent decisions. * * *

It had been held by this court 12 years before Hayward v. Leonard was decided that there could be no recovery on the doctrine afterwards stated at length in that case, if the result of the plaintiff's misdirected work was not a thing of value. * * *

The contention of the plaintiffs in this connection comes to this: While a plaintiff who has done work under a special contract, when suing on the contract, has the burden of proving that he has com-

plied with its requirements, yet on his failing to sustain that burden he can, by resorting to a count of quantum meruit, and by proving the value of the work done by him (which he failed to prove was a performance of what he agreed to perform), shift the burden of proof, and throw on the defendant the burden of proving that he committed a breach of the contract, and that in this way he can entitle himself to the value of that work to the same extent as he would have been entitled had that work been done in the manner in which the defendant requested to have it done, and to recover that value, unless the defendant goes forward and, by way of recoupment, cuts that amount down by proving that he (the plaintiff) committed a breach of the contract under which the work was done, and that he (the defendant) has suffered damages from that breach, and proves the amount of those damages.

There are no cases in which the amount of the compensation to which a plaintiff who resorts to a recovery under the principle of Hayward v. Leonard is entitled has received deliberate consideration. But if the sole ground of his being entitled to anything is that, were he not paid something, the defendant would profit at his expense, although his claim is without merit so far as rights under the contract are concerned, it is clear that the amount which should be paid the plaintiff is the amount by which, were no payment made, the defendant would profit at his expense; that is to say, the amount which represents the fair market value of the structure which, against the wishes of the defendant, has been put upon his land. * * *

The case at bar, then, is a case where the plaintiffs have not satisfied the architect that they did their work as required by the contract, as by the terms of the contract they had to do before they were entitled to be paid for it, and where it is expressly found by the referee that "there was no fraud or collusion between architect and defendants which caused him to withhold the certificate, and the retention by architect of certificate was, if wrong, from error of judgment." And it is a case where the plaintiffs have failed to prove that they have performed their contract in constructing the filling on which the floor rests which has given way, and where, by the finding of the referee, "the damages to defendants by reason of the sinking of the floor is in excess of the amount of plaintiff's claim." * * *

The finding of the referee that the work and materials furnished by the plaintiffs in the construction of the building "are of value $1,266," is not a finding to the effect that the building, as it is, is worth $1,266. * * *

The appeal from the judgment entered by the superior court for the defendant must be sustained.

SANDERS v. BROCK.

(Supreme Court of Pennsylvania, 1901. 230 Pa. 609, 79 Atl. 772, 35 L. R. A. [N. S.] 532.)

Action by Albert J. Sanders against Seldon J. M. Brock. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals.

MESTREZAT, J. * * * By an agreement in writing dated January 14, 1910, the defendant agreed to sell and convey to the plaintiff the premises at 1507 Walnut street, Philadelphia, for the consideration

of $104,000, of which $1,000 were to be paid at the signing of the agreement and the balance at the time of settlement on or before, February 1, 1910. The premises were to be conveyed clear of all incumbrances and easements, and the title was to be good and marketable and subject to no restrictions. It was agreed that, if the purchaser made an additional payment of $1,000 on the purchase money, the time of settlement should be extended for a further period of 30 days from February 1st. The agreement was executed by the parties as agents for undisclosed principals. The purchaser paid $1,000 at the signing of the agreement, and the additional sum of $1,000 on or about February 1st when the time of settlement was extended to March 2, 1910.

The statement, after setting forth the above facts, avers that on March 2, 1910, the plaintiff was ready and willing and offered to settle for the property according to the terms of the agreement, but the defendant was unable to convey the premises clear of incumbrances and easements and with no restrictions. * * *

The defendant filed an affidavit of defense in which he admits the execution of the contract and the payment of the $2,000 as averred in the statement. * * * The affidavit denies that plaintiff was ready to settle on March 2, 1910, as alleged in the statement, and avers that on said date the defendant "was prepared to give a good and marketable title to the said property and estate called for in the said agreement and in good faith tendered a proper conveyance thereof to the said plaintiff, who, without good reason or legal excuse, positively declined and refused to take the said title or to pay the balance of the purchase money reserved and stipulated in the said agreement."

The defendant admits that prior to the bringing of the suit he sold the property for a price in excess of $104,000, but avers that he did not sell "until after the plaintiff had without good cause or lawful excuse, himself violated his said agreement, and had positively refused to take title to the said property or to pay the purchase price therefor."

The plaintiff bases his right to recover back the $2,000 on the fact that, the defendant having resold the property for a sum in excess of the price agreed to be paid by the plaintiff, the defendant was not injured by the plaintiff's breach of the contract and must therefore return the sum paid on the purchase money.

We must deal with the case on the averments of fact in the statement and affidavit of defense. The defendant tendered the plaintiff a deed which conveyed a good and marketable title to the premises, and in every other respect he complied with the terms of the agreement. Without any just or legal excuse or cause, the plaintiff refused to accept the deed and declined to pay the unpaid purchase money. In other words, the plaintiff refused to complete the purchase, violated his contract, and compelled the defendant to retain the property. This action is assumpsit on an implied contract to compel the repayment of money had and received by the defendant for the plaintiff's use.

When a purchaser of real estate declines to comply with his agreement by paying the purchase money, the vendor may, in affirmance of the contract, bring an action to compel payment of the money, or he may treat the contract as rescinded and sue for damages for its breach. The vendor, however, is not required, on the breach of the contract

by the purchaser, to pursue him to enforce his rights by an action at law. What the vendor is required to do, under such circumstances, is to be ready and willing at the stipulated time to perform his part of the contract and convey the real estate to the purchaser in compliance with its provisions. So long as he occupies such a position, he is not in default and has not infringed or rescinded the agreement.

He, therefore, is not liable to a defaulting purchaser who has violated the contract by declining to fulfill its stipulations. "No rule in respect to the contract (for the sale of real estate) is better settled," says Nelson, J., in Hansbrough v. Peck, 72 U. S. (5 Wall.) 497, 506, 18 L. Ed. 520, "than this, That the party who has advanced money, or done an act in part performance of the agreement, and then stopped short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done." * * *

The plaintiff contends that the defendant, the vendor, by reselling the property rescinded the contract, and that ex æquo et bono he is entitled to have refunded the part of the purchase money which was paid on the agreement. It is upon this ground that he claims that an action for money had and received will lie. * * *

Could the defendant under the circumstances at any time sell the property without being liable to the plaintiff for the purchase money paid by him? Must he forever continue to hold the property to await the offer and convenience of the purchaser, giving the latter an opportunity to complete the purchase if the property advanced in price or refuse it if its value diminished, and in the meantime subject the vendor to the risk of a loss possibly imperiling his financial standing? The law imposes no such unreasonable requirement on a party who has in good faith kept and offered to perform the stipulations of his contract. He has done his duty, and the defaulting party is not in a position to make demands of him which might subject him to financial losses. Under such circumstances, the vendor has the right to accept as final the positive refusal of the purchaser to complete the sale and take the property. * * *

If the vendor still had the property, the purchaser could not demand a conveyance to him without first tendering the balance of the money due by the contract. * * * Is it reasonable or just that without such tender, after a positive refusal to pay and accept a deed at the date provided in the agreement, the vendor should be compelled to hold the property or be penalized for selling it at the demand of the other party who himself has violated the contract? This action is based on an implied contract to refund the money. The implication must arise from equitable considerations. Such action can be maintained if the vendor rescinds the agreement. He has no right in equity to refuse to carry out his part of the contract and at the same time require performance by the other party or retain what has been paid him under the terms of the contract. If he has received the purchase money, equity will compel him to refund if he declines to convey the premises. Here, however, the vendor did not rescind the agreement or refuse to convey the property, but tendered a deed and insisted upon the purchaser accepting the title which he has positively and at all times declined. The facts here, therefore, do not raise an equity in favor of the purchaser which will support an action.

The cases decided by this court and cited by the appellant do not conflict with the rule here announced. The action in those cases was sustained on the ground that there had been a rescission of the contract by the vendor or a mutual rescission by both parties, and that under the facts the purchaser was entitled ex æquo et bono to recover back the purchase money. In other jurisdictions, a recovery has not been permitted under facts similar to those in this case. * * * The language used in the opinion in the last case is especially applicable to the facts of the present case. It is there said, inter alia: "It would be an alarming doctrine to hold that the plaintiffs might violate the contract; and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have. The defendant's subsequent sale of the land does not alter the case; the plaintiffs had not only abandoned the possession, but expressly refused to proceed, and renounced the contract. To say that the subsequent sale of the land gives a right to the plaintiffs to recover back the money paid on the contract would, in effect, be saying that the defendant could never sell it without subjecting himself to an action by the plaintiffs. Why should he not sell? The plaintiffs renounced the contract, and peremptorily refused to fulfill it; it was in vain, therefore, to keep the land for them. The plaintiffs cannot, by their own wrongful act, impose upon the defendant the necessity of retaining property which his exigencies may require him to sell. This would be most unreasonable and unjust, and is not sanctioned by any principle of law."

The order discharging the rule for judgment is affirmed.

SECTION 15.—IMPOSSIBILITY OF PERFORMANCE AS A CONDITION

A. agrees to work for B. for a year, but his work is interrupted by a six months' jail sentence. Is A. liable? A. contracts with B. to run one hundred yards in eight seconds. A. fails; is he liable to B.? A. purchases a ticket for a baseball game. The game is called on account of rain in the first inning. May A. recover the price of his ticket? May A. hold the owners of the baseball clubs liable for breach of contract? A singer is taken seriously ill and cancels his engagements. Is he liable? A. contracts to manufacture an artillery piece that will fire a distance of two hundred miles. May he be held liable for nonperformance? A. has been out of work for many weeks on account of illness. He fails to pay his grocer, because he has no money. Is he liable?

Some of these questions are not altogether easy of solution. It will be noticed that the element of impossibility may be injected into the situation from various angles. The act or event which renders the fulfillment of the condition impossible or which makes the performance of the promise impossible is not always of the same kind. They have different origins. All of the cases mentioned may have substantially the same physical and economic effects, but

should the legal effect always be the same? Would it be a just rule of law to excuse every breach of contract if the party in default proves that, for any reason whatsoever, physical, economic or otherwise, he could not perform? Obviously not, because this would include the unreasonable proposition that supervening insolvency would always discharge a debt. On the other hand, if a person who has contracted to perform personal services, by reason of impossibility brought about by physical incapacity, fails to perform his contract, justice would seem to require that the employee should be relieved of liability.

It is clear, therefore, that impossibility of performance sometimes will be a defense, and also that the impossibility of the fulfillment of certain conditions will destroy a duty to perform a possible act, or will create a new right to recover what was parted with. The difficulty arises in the attempt to discover the real reasons for discharging a contract on account of impossibility—for impossibility alone will not have this effect. Only that kind of impossibility which arises in certain ways will so operate. The following cases concern themselves with this problem.

Before going to the cases, it may be well to examine the general situation under discussion, with a view to relating it to the subject-matter of the preceding sections. That is, may we make use of the terminology relating to conditions? It may be said that the continued absence of the physical facts constituting the impossibility is a condition precedent to the duty of performance, or, to employ an affirmative, instead of a negative statement, the occurrence of the physical facts which introduce the element of impossibility operate as a condition subsequent to an existing duty and thereby destroy it. The condition, whether regarded as precedent or subsequent, perhaps should be regarded as implied in law rather than as a condition implied in fact. It is possible, of course, to say that the condition is implied in fact, that is, based upon the intention of the parties. But, inasmuch as, in a great many cases, perhaps a majority of them, the situation which did develop, rendering performance impossible, never entered the minds of the parties, it would seem more logical to say that the law deems the condition present as a means of effecting justice between the parties.

There is this important distinction between the operation of this kind of condition and the effect of the conditions discussed in the preceding sections: When material promises are rendered impossible of performance, or when material conditions are rendered impossible of occurrence, there is not only an excuse for nonperformance; but the contract will be entirely discharged, leaving no causes of action upon the contract. If the impossibility affected only the performance of independent covenants the contract of which it was a part would not be discharged. Even where the entire contract is discharged there may be, of course, a recovery for that which has been parted with in reliance upon a performance which becomes impossible; but such recovery is upon the quasi

contractual obligation to prevent the defendant's unjust enrichment. The weight of authority permits such a recovery for money or property or services so rendered; but some courts, in certain kinds of cases, deny the right to recover. The problem is closely analogous to that heretofore discussed dealing with the right of a plaintiff in material default under an express contract, to recover for work done or materials furnished. Little, if any, distinction need be drawn between cases where the impossibility existed at the time the contract was made—so long as both parties did not know of it—and where the impossibility arose subsequent to the making of the contract. Where the parties, at the time they entered into the contract, were aware of the facts constituting the existing impossibility, the courts will sometimes be justified in holding that the agreement was so obviously impossible that the parties had no contractual intent. This would doubtless be true of an agreement whereby one of the parties undertook to shoot a cannon ball to the moon or to run one hundred yards in eight seconds. In other cases, even with knowledge of the facts constituting the impossibility, the court may find such a degree of uncertainty relating to the consequences of the facts which would call for the application of the same rules which govern subsequent impossibility.

ANDERSON v. MAY et al.

(Supreme Court of Minnesota, 1892. 50 Minn. 280. 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642.)

Action by G. W. Anderson against L. L. May & Co. on a certain contract. Fron a judgment for plaintiff, defendant appeals.

GILFILLAN, C. J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby the latter agreed to sell and deliver to the former, on or before November 15th, certain quantities of specified kinds of beans, and that he failed so to do except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should raise that year from his market gardening farm near Red Wing. Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow the beans on any particular land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cutivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds, and quality of beans specified—a contract in its nature possible of performance. As an excuse for not delivering the entire quantity contracted for, the plaintiff relies on proof of the fact that an early unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity. What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for nonperformance of a contract, is well settled in the decisions; the only

apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by, or within the control of, the party."

An application of this rule is furnished by Cowley v. Davidson, 13 Minn. 92 (Gil. 86). What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as, where it is for personal service, and the person dies, or it is for repairs upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specific chattel existing when the agreement is made would come under this exception. The exception was extended further than in any other case we have found in Howell v. Coupland, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land, and the entire crop was destroyed by blight. The court held the contract to be to deliver part of a specific thing, to-wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans. We have been cited to and found no case holding that, where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. * * * Where such causes may intervene to prevent a party performing, he should guard against them in his contract.

Order reversed.

PIAGGIO v. SOMERVILLE.

(Supreme Court of Mississippi, 1919. 119 Miss. 6, 80 South. 342.)

Action by J. W. Somerville against Henry Piaggio. Judgment for plaintiff, and defendant appeals.

SMITH, C. J. This is an action in assumpsit in which the appellee was the plaintiff and the appellant was the defendant in the court below, and they will be hereinafter so designated.

The declaration in substance alleges that a charter party was entered into between the owners of the American schooner Henry S. Little and the W. A. Powell Transport Company, by the terms of

which the vessel was to transport a cargo of lumber from the Gulf of Mexico to a port on the west coast of the United Kingdom, London, Lisbon, or the west coast of Italy; the W. A. Powell Transport Company, or its assigns, having the right to designate the port of loading and of destination; that this charter party was assigned by the W. A. Powell Transport Company to Hunter Benn & Co., who assigned it to the plaintiff; that on the 27th day of February, 1917, the plaintiff assigned this charter party to the defendant. * * *

The declaration further alleges that the owners of the vessel declined to permit it to sail to any of the ports designated in the charter party because of the increased perils of the sea due to the unrestricted submarine warfare then being conducted by Germany in disregard of the rights of neutrals, and in lieu thereof paid to the defendant the sum of $7,500 in full settlement of all claims he might have against them under the charter party, and prayed for a judgment against the defendant in the sum of $1,500, together with interest thereon, etc. * * *

The contention of the defendant is that the clearance of the schooner Henry S. Little at Mobile under the charter party is a condition precedent to any obligation on his part to pay the plaintiff the money sued for, to which the plaintiff replies that the performance of this condition, if such it is, was waived by the defendant when he accepted the $7,500, from the owners of the vessel, and released them from further liability to him under the charter party, to which defendant rejoins that his acceptance of the money and release of the owners of the vessel from further liability under the charter party cannot be construed to be a waiver of the condition precedent for the reason that he could not have enforced its performance had he tried to do so; the owners of the vessel having been released from the obligation of the charter party because of the danger of being sunk by a German submarine to which the vessel would have been subjected had it attempted to make the voyage.

The charter party contains no such qualification of the obligation. Consequently the owners of the vessel were bound to transport the cargo of lumber as provided therein, notwithstanding, the risk to the vessel of being sunk by a submarine, or pay damages for their failure so to do, for the rule is that when a party by his own contract creates a duty or charge upon himself he is bound to discharge it, although so to do should subsequently become unexpectedly burdensome or even impossible; the answer to the objection of hardship in all such cases being that it might have been guarded against by a proper stipulation. * * *

There are, however, certain classes of events the occurring of which are said to excuse from performance because "they are not within the contract," for the reason that it cannot reasonably be supposed that either party would have so intended had they contemplated their occurrence when the contract was entered into, so that the promisor cannot be said to have accepted specifically nor promised unconditionally in respect to them. * * * These three classes are: First, a subsequent change in the law, whereby performance becomes unlawful. * * * Second, the destruction, from no default of either party, of the specific thing, the continued existence of which is essential to the performance of the contract. * * * And, third, the death or inca-

pacitating illness of the promisor in a contract which has for its object the rendering by him of personal services. * * *

The case at bar cannot be referred to any of these classes, and, in order for it to be brought within the exception to the rule of absolute liability, it will be necessary for us to add thereto a fourth class, to wit, a subsequent foreign war or a subsequent change by one or more of the belligerents in the method of waging such a war which renders performance more burdensome to the promisor than when the contract was entered into, but so to do would be without the reason of the exception and contrary to the authorities. * * *

There are a few cases which cannot be referred to any of the three foregoing classes, such as Kinzer Construction Co. v. State (N. Y. Ct. Cl.) 125 N. Y. Supp. 46, and the Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960, which last-mentioned case is erroneously supposed by counsel for the defendant to sustain his contention. In that case a German-owned vessel sailed from New York to Bremerhaven via Plymouth, England, and Cherbourg, France, on the eve of the outbreak of the recent war, having on board, among other articles, a number of kegs of gold consigned to Plymouth and Cherbourg. In order to escape capture by the French or English, it turned back before reaching either of the last-named ports and returned the gold to the shippers, who instituted libels against it to recover the damages alleged to have been sustained by them because of its failure to deliver the gold. The probabilities of the vessel's capture, had it continued its voyage to either the French or the English port, were so great that the court held that it was justified in turning back, and that its owners were thereby excused from performing their contract to transport and deliver the gold, for the reason that the capture of the vessel was a risk "which, if it had been dealt with (when the contract of shipment was made), it cannot be believed that the contractee would have demanded or the contractor would have assumed." No such reason can be assigned here for the exclusion from the contract of the risk which the Henry S. Little would run by making the voyage to Italy demanded by the defendant when we remember that commerce was not suspended because of Germany's unrestricted submarine warfare; but, on the contrary, vessels owned by citizens of both neutral and belligerent countries sailed continuously in the waters in which that warfare was being waged. * * *

It follows from the foregoing views that the judgment rendered in the lower court is correct, even should it be conceded, which counsel for the plaintiff do not, that the clearance of the Henry S. Little at the port of Mobile under the charter party is a condition precedent to liability on the part of the defendant, that condition, if such it is, having been waived by the release by the defendant of the vessel's obligation to make the voyage; but we are of the opinion that the clearance of the vessel is not a condition precedent to liability, but is simply the time fixed for the payment of the money sued for, and consequently that the failure of the vessel to clear at the port under the charter party, for whatever reason, is immaterial, for the consideration of the defendant's promise to pay was the assignment to him of the charter party so that it constituted a present liability on his part, payment simply being postponed until the clearance of the vessel at Mobile, and, since that event did not happen, payment became due within a reasonable time. * * *

Affirmed.

MOORE & TIERNEY, INC., v. ROXFORD KNITTING CO.

(United States District Court, Northern District of New York, 1918. 250 Fed. 278.)

RAY, District Judge. At the time war was declared between the United States of America and the Imperial Government of Germany the plaintiff, engaged in manufacturing knit underwear, had a valid contract or contracts with the defendant, by the terms of which it was obligated to make and deliver to defendant certain qualities of woolen knit undershirts and drawers at agreed prices and at or within specified times. These contracts came into existence by way of accepted orders, which were subject to delays or nondelivery by strikes, accidents, or for any reason beyond the control of plaintiff. It was then engaged in the performance of such contracts, and intended in good faith to perform, but was prevented by the performance of certain government orders. The plaintiff is one of several manufacturers of such goods located at Cohoes, N. Y. Deliveries aggregating $14,090.08 were made and not paid for, and considerable quantities were not delivered. Defendant alleges $20,000 damages for nonperformance or alleged breach of contract.

May 22, 1917, one A. Frey, who was a member of a committee of the Advisory Board of National Defense, wrote each of these manufacturers at Cohoes, N. Y., including the plaintiff, informing them that the United States government was in need of and desirous of obtaining knit undershirts and drawers, inquiring as to the capacity of the mills of the manufacturers and the quantities they could furnish. * * *

July 2, 1917, Mr. Cromwell, signing as chairman, etc., wrote the plaintiff and the other manufacturers of knit goods mentioned as to the urgent wants and needs of the United States Navy Department for knit undershirts and drawers, and amongst other things wrote:

"The Knit Goods Committee (of the Council of National Defense) has received an emergency call for the Navy Department," etc.; and also, "It is absolutely necessary that this underwear should be obtained;" and also, "This underwear can be made by only a limited number of mills in the country. We have carefully apportioned it among the different mills, and know that we cannot secure the quantity needed unless we can receive from you 25,000 shirts and 25,000 drawers by October 1st and the same quantity additional by December 1st." * * *

To fill this order or contract with the Navy Department, and also the orders or contracts with the War Department, demanded and required the total capacity and output of the plaintiff's mill while filling same, and plaintiff was unable, if it filled the government orders or contracts, to make further deliveries to defendant under its contract with it at the times agreed, and defendant was so advised, whereupon it in substance and effect canceled the contract, refused to pay for the goods delivered, and claims damages for nonperformance. Two other contracts or orders were placed with the plaintiff by the government, one November 16, and one December 12, 1917, and from the acts of the parties and the correspondence it cannot be doubted that it was understood the plaintiff in accepting the work, was acting under the orders and demands of the government. The plaintiff does not contend that these government requirements released it from the contract with defendant and obligation to perform it, except in so far as it post-

poned performance on its part and gave preference to this government work. The defendant claims these were not orders under or within the meaning of the acts of Congress referred to, and that it was justified in acting as it did, and may counterclaim its damages.

If before or after war was declared a party, A., entered into a contract with another party, B., to make and deliver to him the goods, wares, and merchandise, stores and supplies such as the government requires for army and navy use, or both, and after the passage of the acts of Congress—Public No. 85, 64th Congress, approved June 3, 1916, "An act for making further and more effectual provision for the national defense, and for other purposes," and Public No. 391, 64th Congress, approved March 4, 1917, "An act making appropriation for the naval service for the fiscal year ending June 30th, 1918, and other purposes"—the United States government, being at war, came in and ordered or directed such party, A., to make goods, wares, and merchandise of the nature and kind referred to for it, and compliance with such order and requirement of the government demanded or required the entire output of the factory of such party thereafter, all it could reasonably produce, it was the duty of such party to comply with such government order or requirement, and if compliance therewith made it impossible for such party to fill or comply with or perform its contract with such other party, B., according to its terms and within the time specified, and such other party, on being notified of the inability to so perform, declared the contract ended, he cannot recover damages for nonperformance by A. The same rule applies in case of a contract made after the enactment of such statutes; a state of war existing.

In such case or cases it is clear that, under the provision of the acts of Congress referred to, performance by A. within the time required by the contract was made impossible by the act and requirement of the United States government. But if party A., thinking it more profitable or patriotic to work for the government than in the performance of its existing contract with B., voluntarily sought a contract with the government and offered its service for compensation in the manufacture of such goods as the government required, and voluntarily entered into such a contract sought by it with the United States, the performance of which demanded and required its entire output, all it reasonably could produce, and party A. thereupon voluntarily declined or refused to proceed further in the performance of his contract with party B., he is not excused, and party B. may recover or offset and counterclaim his damages, if any. In such case performance by A. is not prevented by the act of God, or vis major. Nonperformance is the result of his voluntary act or acts, not that of the government, and he acts under no compulsion whatever.

But section 120 of the National Defense Act, referred to, authorizes the President, through the head of any department, in addition to the present authorized methods of purchase or procurement, the methods before in use, to "place an order" with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature or kind usually produced or capable of being produced by such individual, firm, or corporation, and then further provides that, when such an order is placed, "compliance with all such orders for products or material shall be obligatory," and "shall take precedence over all other orders and contracts theretofore placed with such individual, firm, or

corporation." Refusal to comply is made a crime, and severe punishments may be inflicted, etc. * * *

The correspondence in evidence and the testimony of Paymaster Hancock shows that the plaintiff and the other manufacturers referred to were acting with and pursuant to the direction of these committees or councils appointed by the United States authorities and those of Mr. Cromwell, also acting for the Paymaster of the Navy. * * *

I do not doubt that Congress had power to place these burdens on the manufacturers, and on those with whom they had contracted or with whom they should contract. The war power is paramount, arises from necessity, and no government can endure without its exercise on occasion. * * *

The parties may come before me at some convenient time to settle findings of fact, and at such time the defendant can offer proof of its alleged damages, when I will rule on the question whether proof thereof should be taken. If proof thereof is now taken, and a finding made as to the amount thereof in case the Circuit Court of Appeals, on appeal, should reverse, and hold the defendant entitled to counterclaim and offset its damages, and have an affirmative judgment in case such damages exceed the sum plaintiff is entitled to recover for goods delivered and not paid for, a final judgment could be pronounced, without the expense and delay of a retrial. The further proceedings in this court can be determined on a settlement of findings. * * *

CARNEGIE STEEL CO. v. UNITED STATES.

(Supreme Court of the United States, 1916. 240 U. S. 156, 36 Sup. Ct. 342, 60 L. Ed. 576.)

McKENNA, J. Petition in the Court of Claims for the recovery of $8,595.35, alleged to be due claimant as a balance of the price of armor plate furnished the government under a contract between it and claimant.

The contract is an elaborate one and by it claimant engaged to manufacture for the Ordnance Department armor plates of a certain designated thickness in conformity with instructions, specifications and drawings attached to and made a part of the contract. And claimant agreed to provide certain of the 18-inch plates for the purpose of the ballistic test prescribed by the specifications, and that such plates when subjected to the ballistic test should fulfill certain requirements set forth in the specifications. * * *

It is alleged that claimant encountered difficulties which were unforeseen by both parties when the contract was made, and were then unforeseeable, and in consequence thereof the delivery of the armor and pertaining material was delayed unavoidably.

That prior to the manufacture of the armor no face-hardened armor 18 inches in thickness had been manufactured in this or any foreign country and no information with respect to the process or processes to be employed in its manufacture was obtainable.

That for the purpose of learning what manner of treatment or face-hardening process should be applied to the 18-inch plate, and in order that they might attain the highest degree of efficiency possible and meet all the requirements of the specifications, claimant completed one of the plates, applying to it a treatment or face-hardening process deduced from the formula which claimant and every other manufacturer

of armor plate in this and every foreign country had followed in the manufacture of armor plate and which was recognized by authorities on the subject as the one which would give the best results.

That upon its completion the plate was, on April 19, 1911, subjected to the ballistic test and it met the requirements of the specifications. Thereupon claimant proceeded to complete all of the plates, certain of which were selected for the purpose of the ballistic test and failed to fulfill the requirements of the specifications. Other plates were selected and failed. Thereupon claimant, with all due diligence and dispatch, made or caused to be made by metallurgical experts exhaustive tests and experiments and it was ascertained that in order to pass the test required by the Ordnance Department the plates must possess certain metallurgical qualities or conditions which, up to that time, were unknown to any one and the necessity for which was not foreseeable when the contract was made. In conducting the test it was necessary to use plates of full size and the tests were conducted with all due diligence and dispatch. From the plates thus tested the Ordnance Department selected a third plate which was tested January 19 and 24, 1912, and was found to fulfill the requirements of the specifications. Claimant in due course finished all of the plates which the contract called for and they were approved and delivered as in the manner prescribed.

It is alleged that by reason of the circumstances detailed there were delays in the delivery of the plates and that the delays were due to causes which were unavoidable within the meaning of the contract.

On account of the delays, however, the Ordnance Department proposed to deduct from the contract price of the armor and pertaining material the sum of $8,595.15 as liquidated damages on account of a portion of the delay. Claimant made protest, asserting that the delays were due to causes provided for in articles 4 and 8 of the contract.

By article 4 it was provided that in case of failure of claimant to deliver any or all of the armor contracted for there would be deducted from any payment to be made to claimant 1/30 of 1% of the contract price of all of the armor remaining undelivered for each and every day of delay in the completion of the contract; not, however, by way of penalty but as liquidated damages.

It was, however, provided in article 8 of the contract that the Chief of Ordnance in case of delay in the delivery of the armor as provided in article 1 of the contract, instead of completing the manufacture or delivery of the material at the expense of claimant, might waive the time limit and deduct from any payment due or to become due the liquidated damages, if any, provided for in article 4: "Provided, however, that in making final settlement based upon the date of completion of the delivery, the party of the first part [claimant] shall receive credit for such delays occurring during the performance of the contract as the Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor strikes, action of the United States, etc., and the date of completion shall be considered for the purposes of final settlement as the date of the actual completion of the delivery less the delays due to unavoidable causes; but none of the above causes shall constitute a basis for an action against the United States for damages."

It will be observed that the point in the case is a short one. It is whether the causes of delay alleged in the petition were unavoidable

or were of the character described in the contract, that is, "such as fires, storms, labor strikes, action of the United States," etc. The contention that the alleged causes can be assigned to such category creates some surprise. It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them. But claimant says its ignorance was not peculiar, that it was shared by the world and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. A successful process was therefore foreseeable and discoverable. And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition.

But even if this cannot be asserted, the case falls within The Harriman, 9 Wall. 161, 19 L. Ed. 629, where it is said that "the principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse performance." * * *

It was said, however, in The Harriman, 9 Wall. 161, 172, 19 L. Ed. 629, 633, that "the answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation," and such a stipulation is relied on in the case at bar. Ignorance of the scientific process necessary for face-hardening 18-inch armor plate is asserted to be an unavoidable cause of the character of the enumeration of article 8 of the contract, that is, "such as fires, storms, labor strikes, action of the United States, etc." The contention is that it is the same "genus or kind," because (1) it was not foreseeable when the contract was made; (2) was not the result of any act or neglect on the part of claimant; (3) was not a cause the company could prevent. What we have already said answers these contentions. Ability to perform a contract is of its very essence. It would have no sense or incentive, no assurance of fulfillment, otherwise; and a delay resulting from the absence of such ability is not of the same kind enumerated in the contract —is not a cause extraneous to it and independent of the engagements and exertions of the parties.

Judgment affirmed.

KINZER CONST. CO. v. STATE.

(Court of Claims of New York, 1910. 125 N. Y. Supp. 46.)

RODENBECK, J. The claimant made a contract with the state of New York to construct 3.76 miles of the improved Champlain Canal which is a part of the so-called Barge Canal system of the state now in progress of construction; and while the work was in progress, and claimant was excavating for one of the locks, an extensive cave-in occurred, which revealed the fact that for the balance of the contract the earth was of a "slippery, greasy clay," with not sufficient resistency to permit of the construction according to the contract, plans, and specifications of the lock and substantially the remainder of the work. The state issued a stop order while it was investigating and determining what to do under these unexpected conditions, and this order remained

in force for six months, when an alteration order which involved extensive changes in the construction of the remainder of the contract, was submitted by the state to the claimant for the completion of the contract. The claimant refused to accept these alterations, insisting that they constituted a fundamental change in the contract and amounted to a breach of the contract by the state, and thereupon the state proceeded to advertise for bids for the completion of the work, and let it to other contractors, and the claimant filed this claim for the work done and not paid for, and for damages including loss of profits on the portion of the work uncompleted, amounting, in all, to $370,525.41. The total amount of the contract, including previous alteration orders, was $968,296.11, and there was uncompleted at the time that the stop order was issued $521,954.42, and of this amount $398,612 was eliminated and new work was added, aggregating $153,584.50, so that the work to be done there was a reduction of $245,027.50 or a decrease of about 25 per cent. of the contract price, and upon these facts, and upon the terms of its contract, the claimant insists that the state violated its contract and justified its course in refusing to complete the contract; while the state claims that the construction of the work when the cave-in occurred revealed the fact that the subsoil was so treacherous that the lock could not be constructed in that section of claimant's contract at all, and made necessary the other changes in the plans and specifications, and also that the alterations were authorized by the contract, and that claimant was guilty of a breach of its contract in refusing to complete it as directed by the alteration order. * * *

When the excavation for the foundation of the lock had been carried to a depth of 10 or 12 feet, it was found that the underlying stratum was a greasy, slippery clay with no grit in it—"just like axle grease"—as one witness put it. Claimant's expert said that he had never seen any soil like it, and that it would not be good engineering to build a lock in such material at all. Under this condition of things, the case falls within that line of decisions where the contract is regarded as at an end and performance is excused because of the failure of conditions the existence of which are necessary to the performance of the contract. The early rule upon impossibility as an excuse for the performance of a contract was that inability to execute an absolute executory contract due to subsequent unforeseen accident or misfortune without the fault of either party will not excuse performance. Paradine v. Jane, Aleyn, 26. This rule which was promulgated in English Jurisprudence as early as the year 1178 was based upon the ground as stated in this case that: "Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." * * *

In England the rule prevailed in all its severity down to the middle of the last century (Hall v. Wright, E. B. & E. [1857]), but since then the courts both here and in England have modified it to a large extent upon the theory that the event which rendered the performance impossible should be implied as a matter of law as one of the conditions of the contract (Taylor v. Caldwell, 3 B. & S. 826 [1863]; Bailey v. De Crespigny, L. R. 4 Q. B. 185), thus carrying out the supposed intention of the parties. * * *

These exceptions have been growing so that now there are at least four well-recognized modifications of the early rule, while the courts

seem to be groping for a rule broad enough to include all of the exceptions. Three of these exceptions have long since been firmly established in the jurisprudence, not only of this country, but of England, and the fourth has been adopted in many cases of recent date in this state where the existing rules did not equitably meet the peculiar facts. The rule that performance is excused where legal impossibility arises from a change in the law or where the specific thing which is essential to performance is destroyed, or where there is an incapacity by sickness or death in the case of a contract for personal services, are of long standing, but quite recently a fourth and broader rule has grown up which is applicable to the case at bar.

One writer in the Columbia Law Review, in discussing the tendency toward a broader rule to meet cases of impossibility in the performance of contracts, says: "If the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused." Volume 1, p. 533.

Another writer in the Harvard Law Review, criticising the proposed rule, suggests another: "A proper rule, it is suggested, is that impossibility should be recognized as a defense wherever it seems reasonable that, had the contingency which renders performance impossible been contemplated by the parties, they would have both agreed that its introduction into the contract as a condition terminating the obligation would be just." Volume 15, p. 419.

A third writer in the same Review, after referring to the general rule and its exceptions, says: "The New York court, however, has of late been more liberal and in a somewhat indefinite way has laid down the doctrine that impossibility is an excuse when caused by the non-continuance either of the subject-matter of the contract or of the conditions essential to its performance." Volume 15, p. 63.

There is abundant warrant in the decided cases in this state for these attempts to state the broad rule that the courts are now following in relation to this subject and to justify the statement that the "modern tendency seems to be toward a more lenient construction. More regard is paid to what must have been the intention of the parties." American Law Register, 1909, p. 570.

In Stewart v. Stone, 127 N. Y. 500, 507, 28 N. E. 595, 596, 14 L. R. A. 215, the factory at which milk delivered by plaintiff and his assignor was to be manufactured into cheese and butter burned, and with it a quantity of butter and cheese and some milk which had not been converted into cheese and butter. Judge Bradley says in the course of his opinion: "It is true that, where an absolute executory contract is made, the contractor is not excused by inability to execute it caused by unforeseen accident or misfortune, but must perform or pay damages unless he has protected himself against such contingency by stipulation in his contract. * * * But there may be in the nature of a contract an implied condition by which he will be relieved from such unqualified obligation, and when, in such case, without his fault, performance is rendered impossible it may be excused. That is so when it inherently appears by it to have been known to the parties to the contract, and contemplated by them when it was made, that its fulfillment would be dependent upon the continuance or existence at the time for performance of certain things or conditions essential to its execu-

tion. Then in the event they cease, before default, to exist or continue, and thereby performance becomes impossible without his fault, the contractor is, by force of the implied condition to which his contract is subject relieved from liability for the consequences of his failure to perform. * * *"

In Lorillard v. Clyde, 142 N. Y. 456, 462, 37 N. E. 489, 491, 24 L. R. A. 113, the defendant was relieved from paying dividends, which he had agreed to do, because the corporation out of whose earnings they were to come had been involuntarily dissolved. Chief Judge Andrews says in his opinion: "* * * The contract in question was not with the corporation whose life was extinguished by judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven-year period. The liability which the defendant assumed was in consideration of the benefits which might accrue to them from the management of the transportation business of the corporation during that period. Upon the assumption that the death of the corporation was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If in the one case the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life?" * * *

In Herter v. Mullen, 159 N. Y. 28, 40, 53 N. E. 700, 704, 44 L. R. A. 703, 70 Am. St. Rep. 517, the defendant was relieved from liability for a year's rent by reason of holding over after the expiration of his term on account of the sickness of a member of his family. Judge O'Brien says: "Legal rules may sometimes be pushed to a point where they accomplish the grossest injustice, and it then becomes the duty of the courts to limit their application to cases that are within their true scope and fair meaning."

In Buffalo & Lancaster Land Co. v. Bellevue L. & I. Co., 165 N. Y. 247, 254, 59 N. E. 5, 7, 51 L. R. A. 951, the plaintiff failed to secure relief for an alleged breach of a contract for the construction of an electric road under which the defendant had agreed to operate cars certain hours each day, and was prevented from doing so on certain days in the winter by storms of unusual severity. * * *

In Labaree Co. v. Crossman, 100 App. Div. 499, 504, 92 N. Y. Supp. 565, 567, the impossibility of performance arose from an order of the board of health of the city of New York prohibiting the landing of a cargo of coffee. The court, adopting the opinion of the referee who tried the case, says: "In my opinion the doctrine of implied condition is applicable to the case, and the parties must be deemed to have contracted upon the condition that there would be no legal interference with the admission of the coffee to the storehouses of the city, or rather that, if performance was rendered impossible by the act of the law, the contract would be dissolved."

In Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. Rep. 363, 365, 118 N. Y. Supp. 338, 340, the impossibility of performance arose from drought and other climatic conditions which prevented the defendant from carrying out a contract to grow a certain number of acres of beets for a sugar company according to certain printed instructions. * * *

From these cases it will be seen that a fourth exception must be made to the general rule that accident or an unforeseen contingency arising without the fault of either party will not excuse performance of an absolute executory contract, and for the four exceptions may now be stated broadly as follows: First, where the legal impossibility arises from a change in the law; * * * second, where the specific thing which is essential to the performance of the contract is destroyed; * * * third, where by sickness or death personal services become impossible; * * * and fourth, where conditions essential to performance do not exist. * * * From these considerations the rule may be deduced fairly in the present case that where in the course of the construction of a canal natural conditions of soil unexpectedly appear which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract and substantially affect the work remaining under the contract, the law will read into the contract an implied condition when it was made that such a contingency will terminate the entire contract.

These terms are implied in the contract by force of the law itself, and not because the parties had them in mind. Whether we approve of their insertion upon the theory that had the attention of the parties been called to the conditions giving rise to the application of the rule, they would have omitted any reference to them because obviously covered by the law (1 Columbia Law Review, p. 533), or upon the theory that they would have regarded them as just provisions to have inserted (15 Harvard Law Review, p. 419).

In the eyes of the law being a part of the terms of the contract, the conditions that rendered performance impossible do not terminate the contract ab initio, and vitiate what has been done and what remains to be done that is capable of execution. The conditions may be of such an extent as to amount to a substantial abrogation of the entire contract, or they may relate to an insignificant part of the contract, but they excuse performance only to the extent to which performance is impossible, and leave what has been done valid, permitting a recovery therefor, and may not excuse performance of the remaining work. No general rule can be laid down which will apply to all cases, but each case must be decided upon its own facts, and that this course can be taken and justice done according to the facts in each case unhampered by written rules is due to the great flexibility of the common law, which is its chief merit.

Applying this rule to the case at bar, it will be seen to work out an equitable result. The state was not in a position to compel performance of an impossibility, and likewise the claimant could not ask the state to proceed with the contract. It would not have been fair of the state to insist upon the literal performance of its contract, and place the loss upon the claimant for the failure to perform, nor would it have been just for the claimant to insist that the state must carry out its contract as planned or suffer the penalty of paying damages, including prospective profits for the breach of the contract. It is better to regard the contract as at an end, and treat both parties as having been excused from further performance, allowing the claimant to recover for work done and for benefits received by the state under the contract down to the time of the discovery of the condi-

tions which rendered performance impossible, and for such damages as may have resulted to it from the stop order issued by the state. Both of the parties were in the same situation at the time that the conditions were discovered, and the rule applied leaves both of them to share the responsibilities for these conditions which were not anticipated when the contract was made, thus carrying out the spirit of the state Constitution, which provides that, if for any unforeseen cause the terms of any contract prove to be unjust and oppressive, the canal board may, upon the application of the contractor, cancel the contract. State Const. art. 7, § 9. The state, therefore, had the right to relet the completion of the work, but must bear the increased expense resulting therefrom, while the claimant is not entitled to recover for any prospective profits on the work remaining to be done. * * *

The claimant should have judgment for $70,679.25, with interest on $61,144.16 from December 15, 1908.

Judgment entered accordingly.

CARROLL v. BOWERSOCK.

(Supreme Court of Kansas, 1917. 100 Kan. 270, 164 Pac. 143, L. R. A. 1917D, 1006.)

BURCH, J. The action was one to recover for part performance of a contract to construct a reinforced concrete floor in a warehouse, which was destroyed by fire before the floor was completed. The plaintiff recovered, and the defendant appeals. * * *

The court permitted recovery for substantially what the plaintiff had done by way of performance of the contract before the fire.

The contract was to place the floor in a specific warehouse. Destruction of the warehouse without fault of either party put an end to construction of a floor in that warehouse. No warehouse except the one destroyed having been contemplated or contracted about, the defendant could not be charged with delinquency for not building another. To do so would be to charge him with breach of an obligation which he did not assume. If continued existence of the particular warehouse to which the contract related were not taken for granted by both parties, the plaintiff would be bound by his contract and could not recover at all; no concrete floor having been constructed. * * *

If a contractor should engage to furnish all labor and material and build a house, and the house should burn before completion, the loss falls on him. If a contractor should engage to refloor two rooms of a house already in existence, and should complete one room before the house burned, he ought to be paid something. So far the authorities are in substantial agreement.

The principle upon which the contractor may recover in a case of the character last instanced has been variously stated. Sometimes it is said that it was a material and substantive part of the contract on the owner's side that he would have the house in existence as long as might be necessary for the contractor to do the work. This statement of the principle arbitrarily attaches to the contract a warranty which the parties did not put there, and places the owner in default when he has been guilty of no wrong. Impossibility of performance because of destruction of the building was not contemplated by either party. Performance was prevented without fault of either party.

and the true rule is that neither party can be charged with delinquency because the contract cannot be fulfilled. * * *

The contractor cannot give and the owner cannot obtain that which they contracted about. Neither one can complain of the other on that account, and the law must deal with the new situation of the parties created by the fire. The owner cannot be called on to reimburse the contractor merely because the contractor has been to expense in taking steps tending to performance. A contractor may have purchased special material to be used in repairing a house, and may have had much millwork done upon it. If the material remain in the mill, and the house burn, there can be no recovery. If the milled material be delivered at the house ready for use, and the house burn, there can be no recovery. It takes something more to make the owner liable for what the contractor has done toward performance. The owner must be benefited. He should not be enriched at the expense of the contractor. That would be unjust, and to the extent that the owner has been benefited, the law may properly consider him as resting under a duty to pay. The benefit which the owner has received may or may not be equivalent to the detriment which the contractor has suffered. The only basis on which the law can raise an obligation on the part of the owner is the consideration he has received by way of benefit, advantage, or value to him.

The question whether or not the owner has been benefited frequently presents difficulties. Sometimes the question is answered by the owner's own conduct, as when by taking possession, or by insuring as his own property, or by other act, he evinces a purpose to appropriate the contractor's material and labor. Sometimes the circumstances are such that the owner is precluded from rejecting the fruits of the contractor's efforts if he would, as when one room is finished under a contract to refloor two. * * *

The test of benefit received has been variously stated. Sometimes it is said that benefit accrues whenever the contractor's material and labor, furnished and performed according to the contract, have become attached to the owner's realty. The facts of particular cases suggest different forms of expression. After considering all the authorities cited in the briefs, the court is inclined to approve, for the purposes of this case, the form adopted by the Supreme Court of Massachusetts, in the case of Young v. Chicopee, 186 Mass. 518, 72 N. E. 63, cited by the plaintiff. The action was one for labor and material furnished to repair a bridge destroyed by fire while the work was proceeding. The contract required at least half of the material to be "upon the job" before work commenced. The contractor complied with this condition, and distributed material "all along the bridge" and on the river bank A portion of the material thus distributed but not wrought into the structure was destroyed by fire. Liability for work done upon the material wrought into the structure was not disputed, but the contractor sought to make good his entire loss. The court said:

"In whatever way the principle may be stated, it would seem that the liability of the owner in a case like this should be measured by the amount of the contract work done which, at the time of the destruction of the structure, had become so far identified with it as that but for the destruction it would have inured to him as contemplated by the contract." 186 Mass. 520, 72 N. E. 64.

Applying the test stated to the facts of the present controversy, it is clear that the plaintiff should recover for the work done in cutting the old floor away from the wall and in removing such part of the old floor as was necessary. The warehouse was improved to that extent by labor, the benefit of which had inured to the defendant when the fire occurred. If the fire had not occurred, the undesirable floor would have been out of the way, precisely as the contract contemplated. Likewise, the contractor should recover for the completed concrete footings.

The contractor should not recover for material furnished or labor performed in the construction of either column or floor forms. They were temporary devices, employed to give form to the structure which was to be produced. They were not themselves wrought into the warehouse, were to be removed when the work was completed, and inured to nobody's benefit but that of the contractor.

The contractor should not recover for either upright or floor rods, or for the labor of putting them in place. While the rods were wired together, they were not attached to the building and would not have been wrought into the structure until the concrete was poured. If the fire had not occurred, the contractor could have removed the rods without dismembering or defacing the warehouse, and the defendant could not have held the rods as amalgamated into the fabric of his structure.

There could be no recovery for superintendence and use of tools, except as regards that part of the work done which had become identified with the warehouse itself. Other items sued for should be allowed or disallowed by application of the principle indicated.

The defendant says he had a right to a specific kind of completed floor which he could test and which would comply with a prescribed test, and that cutting away the old floor from the walls of the building, and concrete footings for a floor which was never laid, were of no value to him. The test is whether or not the work would have inured to his benefit as contemplated by the contract if the fire had not occurred. The cutting away of the old floor was done according to the contract, and the defendant had the benefit of that work as soon as it was finished. The evidence was that putting in the concrete footings was the next step in the construction of the concrete floor. Those footings would have inured to his benefit, in accordance with the contract, if the fire had not occurred. They became a part of his warehouse. Unless he could reject them for want of substantial compliance with the contract so far as they were concerned, he was benefited by them at the time of their incorporation into his structure. Test of a completed concrete floor was one of the things rendered impossible by the fire. * * *

The judgment of the district court is reversed, and the cause is remanded, with direction to take such additional evidence as may be necessary and determine the rights of the parties according to the views which have been expressed. * * *

JOHNSTON, C. J. (dissenting in part). I am of opinion that the upright rods set up and tied together were a part of the building, and a recovery for them should be allowed. * * *

CHAPTER IV

RIGHTS OF THIRD PARTIES IN CONTRACTS

Section

1. Introduction.
2. Contracts for the Benefit of a Donee of the Promisee.
3. Contracts for the Benefit of a Creditor of the Promisee.
4. Nature and Requisites of an Assignment.
5. Interests Capable of Assignment.
6. Nature and Extent of the Interest Acquired by the Assignee.

SECTION 1.—INTRODUCTION

Is it possible for a contract between A. and B. to create rights in C., C. not being otherwise a party to the contract, which may be enforced by C.? After a contract has been entered into by A. and B., is it then possible for either of them to transfer to C. rights or duties which arise out of the contract? Stated generally, these are the two questions with which this chapter deals. It will be noticed that these two questions have to do with situations which are alike in this respect: that a person is interested in a contract to which he is not a party. The two situations referred to differ in this respect: in the first case, the third party's rights, if he has any, arise by force of the terms of the contract itself; in the second case, the third party's rights, if they are to arise, come into existence, not by virtue of the terms of the original contract, but as the result of some independent transaction entered into by him with one of the parties to the contract subsequent to its execution.

SECTION 2.—CONTRACTS FOR THE BENEFIT OF A DONEE OF THE PROMISEE

Turning our attention to the first of these questions: Suppose that A. and B. enter into a contract by the terms of which A. is to transfer property to B. and B. is to pay the purchase price. A. desires to make a gift to C., and as a part of the contract B. promises to pay the amount of the purchase price to C.? If B. fails to perform, may C. sue B.? What difficulties are in the way? In order to make an irrevocable gift, the law usually requires delivery. If C., the beneficiary, were allowed to sue B., the promisor, would such result infringe upon the rule relating to the formalities for making a gift? Is it possible to regard B. as a trustee of any property for the use of the beneficiary, C.? Clearly A., the party to whom B. made the promise to pay C., being a party to the contract, may sue B. if B. fails to perform. How much may A. recover? Has A. sustained any damage? If A. recovered from B. the full amount, could C. recover this sum from A.?

These are some of the difficulties presented in attempting to give a person rights in a contract in which he is to be the sole party to be benefited. And yet it will readily be recognized that the situation described above is illustrated by the very common case of a life insurance policy taken out by A. upon his own life in favor of C. Is the life insurance case a special case and to be treated differently from similar cases? In other words, the question is: "What is the real basis for allowing C., a beneficiary in a contract between A. and B., to sue the promisor in the contract? May all beneficiaries sue, whatever their relations to B. and C., or may only some of them sue, depending upon the existence of certain circumstances. If the latter be true, what are these special circumstances?

KNIGHTS OF THE MODERN MACCABEES v. SHARP.

(Supreme Court of Michigan, 1910. 163 Mich. 449, 128 N. W. 786, 33 L. R. A. [N. S.] 780.)

Bill of Interpleader by Knights of the Modern Maccabees against Malinda Sharp and John L. Clink, guardian for Lena Sharp and others. Defendant Melinda Sharp appeals.

OSTRANDER, J. The issues raised by the answers to complainant's bill of interpleader are sufficiently indicated in the opinion of the learned trial judge, as follows:

"On July 23, 1896, Asa B. Sharp and his first wife, Minnie D. Sharp, lived in the village of Yale, St. Clair county, Mich. At that time he was 30 years of age and his wife 28. They had five small children. He was a laboring man, and his family was dependent on his earnings for support. Some time prior to the above-named date, the husband and wife entered into a contract by the terms of which he agreed he would take out a policy of insurance in complainant order in which his wife should be named as beneficiary and so remain during her life and his, and, in case his wife should die before he did, that their children should always remain the beneficiaries; the wife agreed she would take out a policy of insurance in the Ladies of the Maccabees, a woman's fraternal benefit association, in which her husband should be named as beneficiary, and so remain during his life and hers, and, in case her husband should die before she did, that their children should always remain the beneficiaries. The consideration for this agreement on the part of each was the promise made by the other. The object of this mutual agreement was the protection of the children. * * * On July 23, 1896, a policy for $1,000 was issued by complainant association to Asa B. Sharp, in which his wife was named as beneficiary, and on the same date a policy of like amount was issued by the Ladies of the Maccabees to Minnie D. Sharp in which her husband was named as beneficiary. * * * On January 1, 1902, Minnie D. Sharp deceased, and the proceeds of her policy in the Ladies of the Maccabees was paid to her husband, Asa B. Sharp, who had remained the beneficiary in her certificate since the time it was issued. On August 17, 1904, Asa B. Sharp married Melinda Sharp, now his widow. * * * On April 19, 1906, Asa B. Sharp signed a paper revoking his former designation of beneficiary in his policy, and designated Melinda Sharp, his wife, as the new beneficiary.

* * * Asa B. Sharp surrendered his first certificate, and on May 8, 1906, a new one was issued to him by complainant association in which claimant, Melinda Sharp, was named as beneficiary, and she remained as such designated beneficiary up to the time of her husband's death." * * *

Assuming the mutual promises never to change beneficiaries to have been made as is claimed, upon what theory may the children enforce the contract? No promise was made to them or any of them, no consideration for the promise moved from them. The agreement related to no fund in existence. No trust was created. I find no reason for thinking that the parties were not at liberty, at any time, to revoke their promises. It is true that after the death of the mother there could be no mutual revocation, but, unless some legal interest in the performance of the promise vested in the children when the promise of the father was made, such interest never vested.

It is the general rule in England that a third person cannot become entitled by the contract itself to demand the performance of any duty under the contract. Pollock, Prin. of Contracts (7th Ed.) 199. The rule, contracts creating trusts aside, is the same whether such enforcement is attempted at law or in equity. In this state the English rule has been followed when the attempted enforcement of the contract by a third person was at law. * * * There is a well-recognized exception to the rule in England as to the provisions contained in a settlement made upon and in consideration of marriage, for the benefit of children to be born of the marriage. * * * The contention of appellees is that the principle underlying the English exception to the rule should be extended, at least in equity, so as to support the enforcement by children of contracts made by their father or mother, with each other or with strangers, for their benefit, and Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454, is cited and relied upon. The courts of New York do not follow the English rule. * * *

The general rule in this state is regarded as settled. I see no reason for saying that it is not the same in proceedings at law and in equity. To what extent and under what circumstances an exception to the rule should be recognized in favor of the enforcement by children of contracts (other than those creating trusts), made for their direct or indirect benefit, by persons nearly related to them or by those sustaining the duty to provide for them, is a subject which needs to be considered no further than this, that the mutual promises of a father and mother, who each hold the certificate of a beneficial association in which the other is named as beneficiary, never to change the beneficiaries so named, create no legal or equitable interest of the children in the fund derived on the death of the surviving parent, although, if no such change had been made, they would have been the legal beneficiaries, and although the mutual promises of the parents contemplated that in such case they should be the legal beneficiaries.

The case presented is ruled precisely as it would be ruled if the children, in the lifetime of the father, were seeking specific performance of the alleged contract or an injunction to restrain a threatened change of beneficiaries. It may be added, although the suggestion relates rather to the facts than to the law, that the children, appellees, appear to have no particular claim, as against the appellant, to equitable consideration. It is not claimed that appellant knew of any ar-

rangement between her husband and his former wife about life insurance. His relation to her is a sufficient reason for insuring his life for her benefit. If, instead of pursuing the method of substituting one beneficiary for another, he had refused to pay assessments, thus permitting the original certificate to lapse, and procured one in which appellant was named as beneficiary, it is clear that her right to any fund derived therefrom and from his death, would be unassailable.

The decree below, except as to the provision for costs to complainant, is reversed, and a decree will be entered in this court for the payment of the fund to the appellant, who will recover of the appellees the costs of both courts.

SEAVER v. RANSOM et al.

(Court of Appeals of New York, 1918. 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187.)

Action by Seaver against Ransom and another, as executors, etc., of Samuel A. Beman, deceased. From a judgment for plaintiff, defendants appeal.

POUND, J. Judge Beman and his wife were advanced in years. Mrs. Beman was about to die. She had a small estate, consisting of a house and lot in Malone and little else. Judge Beman drew his wife's will according to her instructions. It gave $1,000 to plaintiff, $500 to one sister, plaintiff's mother, and $100 each to another sister and her son, the use of the house to her husband for life, and remainder to the American Society for the Prevention of Cruelty to Animals. She named her husband as residuary legatee and executor. Plaintiff was her niece, 34 years old, in ill health, sometimes a member of the Beman household. When the will was read to Mrs. Beman, she said that it was not as she wanted it. She wanted to leave the house to plaintiff. She had no other objection to the will, but her strength was waning, and although the judge offered to write another will for her, she said she was afraid she would not hold out long enough to enable her to sign it. So the judge said, if she would sign the will, he would leave plaintiff enough in his will to make up the difference. He avouched the promise by his uplifted hand with all solemnity and his wife then executed the will. When he came to die, it was found that his will made no provision for the plaintiff.

This action was brought, and plaintiff recovered judgment in the trial court, on the theory that Beman had obtained property from his wife and induced her to execute the will in the form prepared by him by his promise to give plaintiff $6,000, the value of the house, and that thereby equity impressed his property with a trust in favor of plaintiff. Where a legatee promises the testator that he will use property given him by the will for a particular purpose, a trust arises. * * * Beman received nothing under his wife's will but the use of the house in Malone for life. Equity compels the application of property thus obtained to the purpose of the testator, but equity cannot so impress a trust, except on property obtained by the promise. Beman was bound by his promise, but no property was bound by it; no trust in plaintiff's favor can be spelled out.

An action on the contract for damages, or to make the executors trustees for performance stands on different ground. * * * The Appellate Division properly passed to the consideration of the question whether the judgment could stand upon the promise made to the wife.

upon a valid consideration, for the sole benefit of plaintiff. The judgment of the trial court was affirmed by a return to the general doctrine laid down in the great case of Lawrence v. Fox, 20 N. Y. 268, which has since been limited as herein indicated.

Contracts for the benefit of third persons have been the prolific source of judicial and academic discussion. Williston, Contracts for the Benefit of a Third Person, 15 Harvard Law Review, 767; Corbin, Contracts for the Benefit of Third Persons, 27 Yale Law Journal, 1008. The general rule, both in law and equity (Phalen v. United States Trust Co., 186 N. Y. 178, 186, 78 N. E. 943, 7 L. R. A. [N. S.] 734, 9 Ann. Cas. 595), was that privity between a plaintiff and a defendant is necessary to the maintenance of an action on the contract. The consideration must be furnished by the party to whom the promise was made. The contract cannot be enforced against the third party, and therefore it cannot be enforced by him. On the other hand, the right of the beneficiary to sue on a contract made expressly for his benefit has been fully recognized in many American jurisdictions, either by judicial decision or by legislation, and is said to be "the prevailing rule in this country." Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; Lehow v. Simonton, 3 Colo. 346. It has been said that "the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety." Brantly on Contracts (2d Ed.) p. 253. The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay. Other jurisdictions still adhere to the present English rule (7 Halsbury's Laws of England, 342, 343; Jenks' Digest of English Civil Law, § 229) that a contract cannot be enforced by or against a person who is not a party. [Citing Massachusetts cases.]

In New York the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined: First, to cases where there is a pecuniary obligation running from the promisee to the beneficiary, "a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit." [Citing New York cases.] The natural and moral duty of the husband or parent to provide for the future of wife or child sustains the action on the contract made for their benefit. "This is the farthest the cases in this state have gone," says Cullen, J., in the marriage settlement case of Borland v. Welch, 162 N. Y. 104, 110, 56 N. E. 556.

The right of the third party is also upheld in, thirdly, the public contract cases. [Citing New York cases.] Cf. German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. [N. S.] 1000, where the municipality seeks to protect its inhabitants by covenants for their benefit; and, fourthly, the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration. [Citing New York cases.] It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle.

The desire of the childless aunt to make provision for a beloved and favorite niece differs imperceptibly in law or in equity from the moral duty of the parent to make testamentary provision for a child.

The contract was made for the plaintiff's benefit. She alone is substantially damaged by its breach. The representatives of the wife's estate have no interest in enforcing it specifically. It is said in Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454, that the common law imposes moral and legal obligations upon the husband and the parent not measured by the necessaries of life. It was, however, the love and affection or the moral sense of the husband and the parent that imposed such obligations in the cases cited, rather than any common-law duty of husband and parent to wife and child. If plaintiff had been a child of Mrs. Beman, legal obligation would have required no testamentary provision for her, yet the child could have enforced a covenant in her favor identical with the covenant of Judge Beman in this case. * * * The constraining power of conscience is not regulated by the degree of relationship alone. The dependent or faithful niece may have a stronger claim than the affluent or unworthy son. No sensible theory of moral obligation denies arbitrarily to the former what would be conceded to the latter. We might consistently either refuse or allow the claim of both, but I cannot reconcile a decision in favor of the wife in Buchanan v. Tilden, based on the moral obligations arising out of near relationship, with a decision against the niece here on the ground that the relationship is too remote for equity's ken. No controlling authority depends upon so absolute a rule. In Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116, the grandniece lost in a litigation with the aunt's estate, founded on a certificate of deposit payable to the aunt "or in case of her death to her niece" ; but what was said in that case of the relations of plaintiff's intestate and defendant does not control here, any more than what was said in Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49, on the relation of husband and wife, and the inadequacy of mere moral duty, as distinguished from legal or equitable obligation, controlled the decision in Buchanan v. Tilden. Bouton v. Welch, 170 N. Y. 554, 63 N. E. 539, deals only with the rights of volunteers under a marriage settlement not made for the benefit of collaterals. Kellogg, P. J., writing for the court below well said: "The doctrine of Lawrence v. Fox is progressive, not retrograde. The course of the late decisions is to enlarge, not to limit, the effect of that case."

The court in that leading case attempted to adopt the general doctrine that any third person, for whose direct benefit a contract was intended, could sue on it. The headnote thus states the rule. Finch, J., in Gifford v. Corrigan, 117 N. Y. 257, 262, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508, says that the case rests upon that broad proposition; Edward T. Bartlett, J., in Pond v. New Rochelle Water Co., 183 N. Y. 330, 337, 76 N. E. 211, 213, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504, calls it "the general principle" ; but Vrooman v. Turner, confined its application to the facts on which it was decided. "In every case in which an action has been sustained," says Allen, J., "there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." 69 N. Y. 285, 25 Am. Rep. 195. As late as Townsend v. Rackham, 143 N. Y. 516, 523, 38 N. E. 731, 733, we find Peckham, J., saying that, "to maintain the action by the third person, there must be this liability to him on the part of the promisee." Buchanan v. Tilden went further than any case since Lawrence v. Fox in a desire to do justice rather than to apply with

technical accuracy strict rules calling for a legal or equitable obligation. In Embler v. Hartford Steam Boiler Inspection & Ins. Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512, it may at least be said that a majority of the court did not avail themselves of the opportunity to concur with the views expressed by Gray, J., who wrote the dissenting opinion in Buchanan v. Tilden, to the effect that an employé could not maintain an action on an insurance policy issued to the employer, which covered injuries to employés.

In Wright v. Glen Telephone Co., 48 Misc. Rep. 192, 195, 95 N. Y. Supp. 101, the learned presiding justice who wrote the opinion in this case said at Trial Term: "The right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case." "The case at bar is decided upon its peculiar facts." Edward T. Bartlett, J., in Buchanan v. Tilden.

But, on principle, a sound conclusion may be reached. If Mrs. Beman had left her husband the house on condition that he pay the plaintiff $6,000, and he had accepted the devise, he would have become personally liable to pay the legacy, and plaintiff could have whatever the value of the house. * * * That would be because the testatrix had in substance bequeathed the promise to plaintiff, and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator for the benefit of a third party to pay a legacy and an unqualified promise on a valuable consideration to make provision for the third party by will is discernible. The tendency of American authority is to sustain the gift in all such cases and to permit the donee beneficiary to recover on the contract. Matter of Edmundson's Estate (1918, Pa.) 259 Pa. 429, 103 Atl. 277, 2 A. L. R. 1150. The equities are with the plaintiff, and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement.

The judgment should be affirmed, with costs. * * *

SECTION 3.—CONTRACTS FOR THE BENEFIT OF A CREDITOR OF THE PROMISEE

The second situation with which we have to deal in considering the rights of third party beneficiaries, may be stated as follows: Suppose that A., instead of desiring to make a gift to C., is indebted to C., and that, in a contract between A. and B., B. promises to pay C. the sum which otherwise he would have promised to pay A. A.'s object, here, is not to make a gift to C., but to pay his, A.'s, debt to C. C. is still called a beneficiary, but obviously he is a different kind of beneficiary from the beneficiary occupying the position of a donee. May C., under these circumstances, sue B.? May A. sue B.? A., being a party to the contract, it would certainly seem that he could sue. How much could A. recover from B.? Is A. damaged to the full amount? If C. is deemed to have the right to sue B., is there anything to prevent A. also from suing B.? Could it be said that there is but one right to sue, and that that right belongs to the beneficiary C., and that C. has in some way

obtained the right to sue B. which A. formerly had. If the law gave C. the right of A. to sue B., would this not involve a discharge of liability of A. to C., and is there anything in the situation tending to show that C. has given up his right to sue A., or that it is just to deprive him of such right? If we are able to say that, in some way, not yet explained, C. may sue B., when does C. obtain his right, at the time the contract is entered into, or upon notice to C., or upon C.'s giving his assent.

Finally, it may be asked: Are the rights of a beneficiary, C., a donee of A., the same in origin and extent as the rights of a beneficiary, C., a creditor of A., with respect to a contract between A. and B.?

MEECH v. ENSIGN.

(Supreme Court of Errors of Connecticut, 1881. 49 Conn. 191, 44 Am. Rep. 225.)

CARPENTER, J. The plaintiffs held a mortgage on real estate. The defendant purchased the equity of redemption, agreeing with the mortgagor to pay the mortgage debt. Subsequently the mortgage was foreclosed—the property then being worth less than the mortgage debt—leaving a balance unpaid. This action is brought to recover the balance. * * *

We now have the naked question whether the owner of a debt secured by a mortgage may maintain an action on the promise made by the purchaser of the equity of redemption to the mortgagor to pay the debt without an assignment of the right of action which that promise gives.

As a rule actions on contracts can be brought only by him with whom the contract was made and from whom the consideration moved. The legal title is deemed to be in him alone and strangers to the contract cannot sue. The rule is a salutary one and should not be departed from except for good reasons. There are, however, some exceptions to it. Actions of assumpsit may be maintained in some instances where there is no express contract with the plaintiff and where the consideration does not move from him. If A. receives money from B. to be paid to C., C. may maintain an action against A. These cases, however, are exceptions only in appearance. They in fact recognize the general rule and are really within it; for the action is not brought on the express promise by A. to B., but on an implied promise by A. to pay the money to C.

Another class of exceptions is where the contract has for its object a benefit to a third party and is made with that intent. Some early English cases in which promises were made to a father or uncle for the benefit of a child or nephew are instances of this class. There may also be cases in which a third party may have some peculiar equity in the subject-matter of a contract which will enable him to maintain a bill in equity to enforce it.

Does this case fall within any exception recognized by authority and supported by principle? Before alluding to decided cases let us examine the case with some care in the light of the circumstances, for the purpose of discovering just what the intention of the parties was and precisely what the defendant promised to do.

What was the transaction? It was not a sale of a piece of land for a fixed price, equal to the value of the land, so as to create a debt for that sum; but was simply a sale of the equity of redemption. The distinction between the land, unincumbered, and an equity of redemption, is obvious enough, and is an important one, as on it depend in a great degree the rights and obligations of the parties. The defendant purchased the equity of redemption. The finding is that the mortgagor "conveyed to the defendant said real estate subject to said mortgage." So that the only debt brought into existence by the transaction was the price agreed to be paid for the equity of redemption. The mere purchase raised no debt to the mortgagor which the defendant was to discharge by paying the incumbrance. By the contract of assumption he obliged himself to the mortgagor to pay the mortgage debt. Whether that raised any personal obligation to the mortgagee is the question in the case. If the probable intention of the parties is to govern it is difficult to find any such liability in the transaction. The mortgagee was not a party to it, no part of the consideration moved from him, and he was in no worse condition because of it. He still had the security of the land and the personal responsibility of the mortgagor, and that is all he contracted for or required. The parties contracted with reference to their own interests, not his; to benefit themselves, not him. He had no legal or equitable interest in the contract and there is no room for the presumption that it was intended for his benefit.

There was no agency, express or implied. The mortgagor would doubtless be surprised at the suggestion, should it be made, that he was acting as the agent of the mortgagee. There was no substitution or novation, for that requires three parties, and here were only two; besides the original debtor was not discharged.

It was not the object of the parties to give the mortgagee additional security; and to interpret it in that sense is to give it a force and meaning never contemplated by the parties, and is in effect making a contract for them. The only contract which they made was simply this, the defendant agreed that he would pay the mortgagor's debt. The promisee alone had the legal and equitable interest. It follows that he alone can enforce it unless he imparts that right to others. That he may sue will not be disputed. If the mortgagee has that right by force of the contract, then two persons wholly independent of each other have an equal right. If either may sue both may, and a suit by one will not abate or bar a suit by the other; and a discharge by one for any cause short of a fulfillment will not discharge the contract. Thus the promisor may be harassed with two suits at the same time on the same contract, and if he would compromise with the promisee he must obtain the consent of a stranger. If this is the law it is an anomaly, for another instance of this kind is hardly to be found in the whole range of jurisprudence.

We are aware that there are decisions from courts of the highest authority, and whose opinions are entitled to the highest respect, which hold that the creditor may sue on such contracts; perhaps it is not too much to say that the prevailing current of authority in this country is in that direction; but believing as we do that they are not founded in good reason or sound policy we cannot accept them as law. The question is an open one in this State, and principle, rather than precedents not founded in principle, should determine it.

We cannot undertake to examine in detail the cases alluded to; we can only refer in a general way to the reasoning by which they are supported. It is interesting to note the various grounds on which they stand, some of which are not only weak in themselves, but fail to strengthen the others. It is an argument of no little weight against the correctness of decisions that they seem to require disconnected and inharmonious reasons to sustain them.

Some of the cases seem to proceed "upon the broad principle that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on the promise;" and that without regard to the question whether the benefit of a third person was the principal thing intended or was a mere incident. Lawrence v. Fox, 20 N. Y. 268. * * *

In cases of this class the reasoning is not uniform. In some it is suggested that from the express promise to the promisee the law implies a promise to the third person. In others the principle of agency is invoked, and the mortgagor in making the contract is treated as the agent of the mortgagee. The difficulty with this last position is that it is contrary to the facts.

In Urquhart v. Brayton, 12 R. I. 169, Durfee, C. J., holds the defendant liable to a third person on the ground of a novation, while Potter, J., in the same case places the liability on the ground of money had and received. There seem to be several difficulties in treating it as a novation; first, it changes the nature of the contract; second, it requires a third party, and here are but two; and third, an essential element of a novation is wanting, the discharge of the original debtor.

In other cases the transaction is treated as a sale of the land irrespective of the mortgage and a retention by the purchaser of a portion of the purchase-money, to be paid to the mortgagee. * * * When the circumstances will warrant that view of the facts there is no difficulty. In such cases the debtor actually places or leaves the money in the hands of the promisor to be paid to the creditor, and the action for money had and received may be maintained, not on a promise to the debtor but on an implied promise to the creditor.

Other cases, and this class includes a large number, resort to the doctrine of suretyship. * * * We agree that that ground would be tenable, in equity at least, if that was the real contract between the parties; that is, if the parties really intended by the transaction to furnish additional security to the creditor. If not, it seems to us difficult to support the decisions upon that ground. In order to do so the court must assume without reason and contrary to the fact that such was the object and purpose of the contract. We have already endeavored to show that it was not. Let us examine the subject a little further. There is no express contract of suretyship. Whatever element of suretyship there is results by operation of law from the position in which the parties place themselves. The defendant agreed with the debtor that he would pay the debt. As between themselves he thereby became the principal debtor. The original debtor not being discharged he was also liable to the creditor. If compelled to pay he was a surety only in this, that he had a right to call on the defendant to indemnify him. But all this did not affect the creditor and he is not a party to it. What interest has he in the transaction? And in what consists his equity? To make that relationship available to him, it is necessary not only to bring him into contract relations with the

other parties, but also to reverse the positions of the principal and surety and make the purchaser the surety instead of the principal. Upon what principle can that be done? By what process of reasoning can it be vindicated? Again, there is no implication of suretyship as between the creditor and the other parties, as no such implication is necessary in order to give full effect to the intention of the parties.

We come now to a class of cases which constitutes an important exception to the rule we are considering, that suits must be brought by the party making the contract and from whom the consideration moved. We refer to those cases in which the parties confessedly contracted for the benefit of third persons, not incidentally but as the principal object. Some of the cases cited by the plaintiffs are cases of this description and are not applicable to the case at bar. There may be cases, however, in which this principle is invoked to sustain actions by the mortgagee against the purchaser of the equity of redemption.

The principle itself is best illustrated by a brief reference to a few of the leading cases. In Dutton v. Pool, 1 Vent. 318, the defendant promised the father to pay the daughter a sum of money as a marriage portion. It was held that the daughter might sue on the promise. The relation of the father to the daughter and his obligation to give her a marriage portion seem to be adopted as a substitute for privity of contract. Some of the decisions in the state of New York have taken a similar view and treat the obligation of the mortgagor to the mortgagee as a "substitute for privity," or "privity by substitution," to connect the mortgagee with the contract. Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195. * * * Dutton v. Pool, in modern times in this country, would be upheld on the ground that the promise was intended for the benefit of the daughter as its object.

In Felton v. Dickinson, 10 Mass. 287, the defendant promised the father of a minor son to pay the son a sum of money for his services. After performing the service it was held that the son might maintain an action in his own name. * * *

And yet this exception seems not now to be recognized in England. Tweddle v. Atkinson, 1 B. & S. 393. Even in Massachusetts the tendency is to narrow the exception and adhere more rigidly to the rule. Exchange Bank v. Rice, 107 Mass. 39, 9 Am. Rep. 1. It seems to us that the exception to the rule is a reasonable one and should prevail.

The question then recurs, is the case at bar within the exception? We have already expressed our views as to the nature of the contract and the real intent of the parties. If we are right it is clear that the question must be answered in the negative.

That the incidental advantage to the creditor (if it is an advantage to have his debt paid by one man rather than another) is not such a benefit as the exception contemplates, is apparent from a consideration of the possible and even probable consequences of holding it to be so. The case before us affords a good illustration. The debtor is insolvent, and the property mortgaged has largely depreciated, so that it fails to pay the debt. Now if the plaintiffs may recover the balance of the defendant, they have a security for their debt which they did not originally have, which they never contracted for, and which the contracting parties did not intend they should have. It in effect makes him the absolute guarantor of the debt.

Whatever doubt may have existed as to the state of the law in New York on this subject, it seems to be set at rest, for the present at least, by recent decisions. In Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440, which was an action like this, the court says, by Rapallo, J.: "I do not understand that the case of Lawrence v. Fox, 20 N. Y. 268, has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being neither privy to the contract nor to the consideration. To entitle him to an action the contract must have been made for his benefit. He must be the person intended to be benefited. * * * If such a contract could be enforced by the creditor who would be incidentally benefited by its performance, every agreement by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims are thus to be secured or paid. I do not understand any case to have gone this length." * * *

We advise the Superior Court to render judgment for the defendant.

Judgment accordingly.

THE HOME v. SELLING et al.

(Supreme Court of Oregon, 1919. 91 Or. 428, 179 Pac. 261.)

Action by The Home, a corporation, against Ben Selling and another, executors, and others. Judgment for plaintiff, and defendants appeal.

The plaintiff and the defendant Emanuel May Investment Company are corporations. Emanuel May, the individual, died during the progress of this litigation, and his personal representatives were substituted.

On November 21, 1910, George E. Jacobs and his wife gave their note to the plaintiff for $40,000, due ten years from date, with "interest thereon quarter yearly at the rate of six per cent. per annum from date until paid." They stipulated therein that, "in case suit is instituted to collect this note or any part thereof," they would pay a reasonable attorney's fee to be determined in the suit. At the same time they gave their mortgage to the plaintiff on certain real property in Portland, Ore., and "covenanted and agreed to pay all sums of money, the principal and interest, specified in said promissory note at the time therein designated." On February 25, 1913, they conveyed the premises to Emanuel May by deed duly executed, containing a statement to the effect that the property was subject to the mortgage mentioned, and that "the grantee herein in part consideration for this conveyance assumes payment of the $40,000 unpaid balance of the first of said mortgages and the interest accrued and to accrue thereon." Afterwards May conveyed to the investment company by deed which referred to the premises and the mortgage and contained the following words:

"And Emanuel May * * * does covenant to and with Emanuel May Investment Company, * * * that the above-named premises are free from all incumbrances except the following mortgages, which are as a part of the purchase price, assumed by Emanuel May Investment Company. * * * Mortgage of $40,000 in favor of The Home, a corporation. * * *"

This action was brought against Emanuel May, the grantee of Jacobs and his wife and against the investment company, May's grantee, to recover the interest on the note from November 21, 1915, to February 21, 1917, amounting to $3,000, and the plaintiff claims $300 as a reasonable attorney's fee.

BURNETT, J. One of the principal questions to be determined is whether or not the defendants contracted to pay the mortgage, and whether the mortgagee can maintain an action directly against them.

According to the decisions in this state, where one accepts a deed which not only recites the mortgage, but adds that the grantee assumes it he becomes personally liable to pay the mortgage. * * * It is plain, therefore, that the acceptance of the deeds mentioned, containing the clauses already quoted, made May and the investment company personally liable to pay the mortgage debt.

The original general rule was that one who is not a party to a contract cannot bring an action on it in a court of law, although he might be benefited by its fulfillment. * * * Oregon precedents are numerous to the effect that, on a contract properly made for the benefit of a third person, he can bring an action directly against the promisor. * * *

It is said in 13 C. J. 705, § 815: "In most of the states the English doctrine that where a person makes a promise to another for the benefit of a third person the latter cannot maintain an action on it is not recognized to the full extent, but it is held, subject to the qualifications hereafter stated, that the action may be maintained. This is now the prevailing doctrine in the United States"—citing a wealth of authorities.

But it is not every agreement to discharge an obligation to a third party that will support an action at law by the latter. The principle is thus stated by Mr. Chief Justice Bean in Washburn v. Interstate Investment Co., 26 Or. 436, 441, 38 Pac. 620, 621: "The prevailing doctrine in this country undoubtedly is that, where one person, as a consideration or part consideration for an executed contract, promises another, for a consideration moving from him, to pay or discharge some legal obligation or debt due from such other to a third person, the latter, although a stranger to the consideration, and not an immediate party to the contract, may maintain an action thereon, if it was made directly and primarily for his benefit."

In Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195, the following language was used, and approved in Kansas City Sewer Pipe Co. v. Thompson, 120 Mo. 218, 25 S. W. 522: "To give a third party who may derive a benefit from the performance of the promise an action, there must be: First, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."

The present case comes within the doctrine thus announced, which, we think, is well settled by the authorities. The stipulation to pay the mortgage was for the benefit of the holder thereof, directly. There was a privity between the mortgagor, who is the promisee, and the holder of the mortgage, resulting from that instrument. There was

an obligation from the original mortgagor to the mortgagee to pay; hence, when the mortgagor conveyed his property to May, who assumed the mortgage, at once an obligation arose which, under our precedents, considering the lex fori, could be enforced by an action at law. * * *

One reason given by the courts which refuse to enforce such an obligation except in equity, is that the immediate parties to the agreement could annul the same, but that matter is controlled by this doctrine, that such a contract cannot be rescinded by the parties thereto after it has been acted upon or accepted by the third party. * * *

Bringing an action by the mortgagee on the contract for his benefit is an acceptance thereof by him. * * * If the rescission of the contract by Jacobs had been mooted here, it is foreclosed by the institution of this action, which makes it impossible now to abrogate it without the consent of the plaintiff. * * *

The second defense, to the effect that neither May nor the investment company ever entered into any contract or agreement with the plaintiff to pay it any sum of money whatever, is sham, in the legal sense, because, as the record discloses, the acceptance of the deed drawn in the form stated amounts to a contract to pay the mortgage to the holder thereof. * * *

In assuming the payment of the mortgage the covenant therein as distinguished from the separate personal note was the measure of the grantee's duty. The obligation assumed by him must be construed according to its terms, and is not to be enlarged beyond them. The present grantees did not agree to respond directly to the conditions of the note, but only to the mortgage, which latter instrument does not directly bind them to pay more than the principal and interest on the note; hence the attorney's fee must be laid out of the case, although the note itself is quoted in the complaint. * * *

On the authority of Hicks v. Hamilton, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431, the contention is made that the investment company is a remote grantee, and as such is not liable here. In that case the mortgagor conveyed his land merely "subject to the mortgage," without requiring his grantee to assume or pay the incumbrance. The latter in turn deeded the tract to another by an indenture which required the grantee to "assume and pay the mortgage." Thus the continuity of personal liability was interrupted so that its chain did not unite the original mortgagee with the ultimate grantee, and for this reason it was held that the latter was directly liable to the former. The case at bar is different because the clause assuming and agreeing to pay the mortgage is common to both successive conveyances, which constitutes an unbroken sequence of personal liability from the original mortgagors down to the last grantee. Of course there can be but one satisfaction of the demand, although both grantees are liable.

The result is that the judgment is modified by allowing the plaintiff to recover from the defendants the sum of $3,000, without any attorney's fees.

SECTION 4.—NATURE AND REQUISITES OF AN ASSIGNMENT

From the preceding cases, it appears that, in many jurisdictions, it is possible for a third party to acquire rights in a contract between other persons and that such rights arise out of the express provisions of the contract. It is also possible for one to acquire interests in a contract between other persons by virtue of an act performed by one of the parties to the contract subsequent to its formation. Such an act is called an assignment. The party who executes it is called the assignor, and the party to whom the right is transferred is called the assignee. An assignment, therefore, is the manifestation, in some form prescribed by law, of the intention of the assignor to substitute the assignee in his place with respect to the right or other relation assigned. When tangible personal property is the subject of a transfer by an owner who is parting with his entire interest, we speak of such transaction as a sale. The parties are referred to as vendor and vendee, or, more commonly, as buyer and seller. When the subject of the transfer is land, the transferor is called the grantor, and the transferee, the grantee. When the subject of transfer is some right other than the rights and other relations constituting ownership of tangible property, it is common to speak of such an interest as a chose in action and to speak of its transfer as an assignment. Sales of tangible personal property, grants of land, and assignments of choses in action have many points in common. The sale of a horse, a grant of a farm, and the assignment of the right to demand payment of $100 from the assignor's debtor, all have this in common: Each transaction is for the purpose of placing the transferee in the same position with respect to the subject-matter of the transfer as the transferor occupied. But there are a great many differences in these transactions. A special body of rules has been developed which relate to the transfer of land. This branch of the law is not taken up in this volume. There is also a special body of rules pertaining to sales of personal property. This branch of law furnishes the subject-matter of Part IV of this volume. The cases following indicate some of the general problems which grow out of assignments of choses in action. In Part III of this volume, we take up, in some detail, the study of the methods of transfer, the rights and liabilities of parties with respect to that special type of chose in action known as a negotiable instrument. The expression "chose in action" includes claims which arise other than from contracts, but in the cases following we are chiefly concerned with questions relating to the assignment of rights arising out of contracts.

What are some of the more important problems pertaining to assignments? In the first place, it is necessary to ascertain what methods have been prescribed to effectuate a transfer of a chose in action. If A. owes B. $100, may B. give to C. the right to demand payment from A., or is consideration necessary for the trans-

fer? Are there any requirements as regards form? The next question to arise is: Are all kinds of rights assignable? A. may owe B. the duty of paying B. $100, or of refraining from doing certain things, or of transferring to B. certain interests in property. Are any or all of these rights of B. capable of assignment by B.? Again, the question may arise: Are duties assignable? This question has a double aspect. B. owes a certain duty to A. May B. assign or delegate this duty to C. in such a way as to relieve himself from all further duty to A., so that, even in the event that C. failed to perform, B. would not be liable to A. for non-performance? If this cannot be done, may B. at least delegate the duty to C., so that, if C. does perform, A. will be obliged to accept C.'s performance or tender of performance, just as if it were made by B. Finally, the question arises as to the nature of the interest acquired by the assignee. Does the assignee take the right, subject to all the defenses and claims of other parties, including prior assignees, to which it was subject in the hands of the assignor; or, will the assignee, if he is ignorant of these outstanding claims and defenses possessed by the assignor's obligor, take free from such claims of ownership and defenses?

ANNING v. ANNING et al.

(High Court of Australia, 1907. 4 C. L. R. 1049.)

GRIFFITH, C. J. The question for determination in this case is as to the effect to be given to an instrument under seal executed by William Anning a few days before his death, and alleged to have been made with a view to avoid payment of succession duty. The instrument, which was in form a deed poll, witnessed that Anning freely and voluntarily conveyed to his wife (the appellant) and his five infant children (the respondents) all his personal estate of whatsoever nature and wheresoever situate, including a station called Chudleigh Park, his share in another pastoral property called Mount Sturgeon, all cattle and horses thereon, and all moneys lying to his credit in three banks, to be equally divided between the donees. * * *

Cooper, C. J., * * * held that the deed was intended to operate as an immediate irrevocable gift. * * *

The whole law on the subject is contained in the judgment of Turner, L. J., in Milroy v. Lord, 4 De. G., F. & J. 264, 274: "I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to; for there is no equity in this court to perfect an imperfect gift." * * *

It seems clear to me that the testator intended to divest himself of his legal ownership. The question therefore arises, and must be answered with respect to each class of property described in the deed, whether the donor did everything which, according to the nature of the property, was necessary to be done in order to transfer the property and make the gift binding upon himself. * * *

With regard to some of the property no difficulty arises. The Chudleigh Park Station was held under lease from the Crown, which by law was transferable by an instrument duly executed and registered in the Lands Department. Anning did not execute any such instrument. The attempted gift of this leasehold was therefore ineffectual. The same consequences follow as to certain promissory notes payable to order, which the donor failed to endorse. With regard to the donor's share in the Mount Sturgeon property and the stock upon it, his interest, being equitable only, was effectually assigned by the deed.

With regard to his money in the banks, some of which was on fixed deposit and some at current account, a more difficult question arises. The donor's interests in all these funds were choses in action. In Fortescue v. Barnett, 3 Myl. & K. 36, Sir John Leach, M. R., held that a voluntary assignment by deed of a policy of life assurance was valid and complete without notice to the assurance company. He put the case on the same footing as an assignment of a bond, and seems to have thought that as all property is assignable in equity by some means or other, and as no other way of assigning a chose in action than by some writing can be suggested, an assignment by deed is sufficient. In Edwards v. Jones, 1 My. & C. 226, however, Lord Cottenham, C., said that the decision in Fortescue v. Barnett, supra, depended upon the relationship of trustee and cestui que trust having been completely created between the assignor and assignee. He did not elaborate his reasons for taking this view, but on consideration they will, I think, be found to be these: Although a legal chose in action was not assignable at law, a court of equity would give effect to it by allowing the assignee to sue the debtor in his own name. As between the assignee and the debtor the absence of consideration for the assignment was immaterial. But in such a suit the assignee was bound to join the assignor as a defendant. The foundation of the jurisdiction of the court of equity in such a case was that the assignor would not take the necessary action at law to enable the assignee to get the benefit of the assignment. But this assumes some breach of duty on the part of the assignor, against the consequences of which the court will relieve the assignee. In the absence of consideration for the assignment it is clear that there is no such breach of duty, unless the assignor has become a trustee for the assignee. Another way of arriving at the same result is to say that a suit by the assignee of a legal chose in action against the debtor was only an instance of the class of suits by a cestui que trust in respect of trust property when the trustee refuses to take the necessary steps for its protection.

Unless, therefore, this relation existed between the assignor and assignee the court would not interfere in the absence of valuable consideration for the assignment. * * *

In my opinion, * * * the donees are entitled to the benefit of the fund in question. Assuming that the gift, qua gift, fails, the deed, nevertheless, * * * operated as a covenant. The implied covenant is not to do anything which will have the effect of preventing the

donee from obtaining the benefit of this donation. A receipt of the debt by the donor or his executor before notice given by the donee to the debtor would be a breach of this obligation, for which an action at law would lie by the donee against the donor or his executor, in which action the amount of the debt, or so much of it as was received by the donor or his executor, could be recovered. * * *

For these reasons I am of opinion that the assignment was effectual as to the bank deposits. These considerations do not apply to the promissory notes, as to which the donees could not by any act on their part perfect their title without endorsement by the donor. * * *

With respect to the horses and cattle and other chattel property, capable of manual delivery comprised in the deed, the gift would be valid according to the law of England, which allows such property to be transferred either by delivery or by instrument under seal. But the law of Queensland is different. By the Bills of Sale Acts 1891 a deed purporting to transfer chattels is absolutely void, even as between the assignor and assignee, until registered as prescribed by that Act. * * *

[Dissenting opinion of HIGGINS, J., omitted.]

In re SMITH'S ESTATE.

Appeal of PENNSYLVANIA CO.

(Supreme Court of Pennsylvania, 1891. 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641.)

Accounting of the Pennsylvania Company for Insurance on Lives and Granting of Annuities, as executor of the estate of Thomas Smith, deceased. Henry S. Parmalee, as guardian of Thomas Smith Kelly, claimed and was awarded certain bonds left by testator, on the ground that testator held them in trust for said ward. The executor appeals.

CLARK, J. The appellant is the Pennsylvania Company for Insurance on Lives and Granting Annuities, trustee under the will of Thomas Smith, deceased; the appellee, Henry S. Parmalee, guardian of Thomas Smith Kelly, a minor. The proceeding was the adjudication of an account, filed by the trustee under the will of Thomas Smith, of the principal and income of $13,000 of Pensacola & Atlantic Railroad Company's coupon bonds, which the said trustees claimed were part of the estate of decedent, and passed to them under his will. The guardian of Thomas Smith Kelly, a minor, appeared before the auditing judge, and claimed that the bonds had been held by the testator in trust for said minor, and should be awarded to the latter's guardian. The auditing judge and the judges of the orphans' court sustained the guardian's claim, and awarded him the fund.

The owner of personal property, in order to make a voluntary disposition of it, may, by a proper transfer of the title, make a gift of it direct to the donee, or he may impress upon it a trust for the benefit of the donee. It is well settled, however, that whether a gift or a trust is intended, if the transaction still remains imperfect and executory, equity will not aid in its enforcement. The expression of a mere intention to create a trust, therefore, without more, is insufficient. Like a promise to give, it will not be enforced in equity. * * * Almost all trusts are in a certain sense executory. Ordinarily, a trust cannot be

executed except by conveyance. There is, in most cases, something to be done. But this is not the sense in which a trust is said to be executory. An executory trust, properly so-called, is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done in order to complete and perfect the trust, and to give it effect. When the limitations of a trust are fully and perfectly declared, the trust is regarded as an executed trust. * * * Nor in such case, if it appear that the intention of the donor was to adopt either one of these methods of disposition, will a court resort to the other for the purpose of carrying it into effect. What is clearly intended as a voluntary assignment or a gift, but is imperfect as such, cannot be treated as a declaration of trust. If this were not so, an expression of present gift would in all cases amount to a declaration of trust, and any imperfect gift might be made effectual simply by converting it into a trust.

There is no principle of equity which will perfect an imperfect gift, and a court of equity will not impute a trust where a trust was in contemplation. * * * Upon the same ground it has been held that a paper of a testamentary character, but invalid for want of proper execution, cannot be enlarged or converted into a declaration of trust. * * * In Richards v. Delbridge, L. R. 18 Eq. 11–13, it was held * * * that to create a trust there must be the expression of an intention not to create a present gift, but to become a trustee. * * * Although the cases may not be altogether consistent, the rule is now, we think, well settled in accordance with the doctrine declared in Richards v. Delbridge, supra, that, if the transaction is intended to be effected by gift, the court will not give it effect by construing it as a trust. It is well settled that nothing can take effect as an assignment or gift which does not manifest an intention to relinquish the right of dominion on one hand and to create it on the other. If the donor has perfected his gift as he intended, and has placed the subject beyond his power or dominion, the want of consideration is immaterial; the donee's right will be enforced. A gift can only be effectual after the intention to make it has been accompanied by delivery of possession or some equivalent act. If it is not, the transaction is not a gift, but a contract merely. If a trust is intended, it will be equally effectual whether the donor transfer the title to the trustee or declare that he himself holds the property for the purposes of the trust. "It is well settled that the owner of personal property may impress upon it a valid present trust, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third party upon certain specified trusts; in other words, he may constitute either himself or another person trustee. If he makes himself trustee, no transfer of the subject-matter is necessary; but if he selects a third party, the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title." * * * In Richards v. Delbridge, L. R. 18 Eq. 11–13, Sir George Jessel said: "A man may transfer his property without valuable consideration in one of two ways: He may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially or on trust as the case may be; or the legal owner of the property may, by one or other of the methods recognized as amounting to a valid declara-

tion of trust, constitute himself a trustee, and, without an actual transfer of the title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward in trust for the other person." * * *

If the donor makes a third party a trustee, he must transfer to him the subject of the trust in such mode as will be effectual to pass the title. The transaction, as in the case of a gift, to be effectual, must be accompanied by delivery of the subject of the trust, or by some act so strongly indicative of the donor's intention as to be tantamount to such a delivery; but where the donor makes himself the trustee, no transfer of the subject-matter is necessary. * * * In such cases no assignment of the legal title is required, for the nature and effect of the transaction is that the legal title remains in the donor for the benefit of the donee. It is conceded that, as the bonds of the Pensacola & Atlantic Railroad Company—the bonds in question—were not delivered to Thomas Smith Kelly by Thomas Smith, the transaction cannot be sustained as a gift. It is clear that a gift was not in contemplation, and the only question for our determination is whether or not a complete and valid trust was created, for a trust would seem to have been contemplated.

There is no certain form required in the creation of a trust. In the case of personal property or choses in action, trusts may be proved by parol. If the declaration be in writing, it is not essential, as a general rule, that it should be in any particular form. It may be couched in any language which is sufficiently expressive of the intention to create a trust. "Three things, it has been said, must concur to raise a trust—sufficient words to create, a definite subject, and a certain or ascertained object; and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared." Bisp. Eq. 65, citing Cruwys v. Colman, 9 Ves. 323. * * * The intention must be a complete one, and this requisite is especially applicable to trusts created by voluntary dispositions. "A mere inchoate and executory design is not enough, and, unless there is some distinct equity—as fraud, for example—it cannot be enforced." Bisp. Eq. 65. The intention must be plainly manifest, and not derived from loose and equivocal expressions of parties, made at different times, and upon different occasions; but any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing. It is not necessary that the terms "trust" or "trustee" should be used. The donor need not say in so many words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning, for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. * * * In Heartley v. Nicholson, L. R. 19 Eq. 233, Vice Chancellor Bacon says: "It is not necessary that the declaration of a trust should be in terms explicit, but what I take the law to require is that the donor should have evinced by his acts, which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right of it, if any, as he retained, was held in trust for the donee." * * *

In the case at bar the subject of the alleged trust is certain, the cestui que trust is particularly designated by name and identified, while

the terms are specific, and sufficiently shown. The contention is, however, that a trust upon these terms was not sufficiently declared; that the whole matter rested in the undeclared and unexecuted intention of the donor, and was, therefore, wholly without effect. Thomas Smith, although a married man, had no children. He was the owner of a large estate, the personalty alone aggregating about $1,000,000. Thomas Smith Kelly was his nephew, his godson and namesake, and, although his father and mother were both living, he lived with and was maintained and educated by his uncle from the age of 3 years until the time of the decedent's death, on the 20th of May, 1883, when he was about 13 years of age. His uncle admittedly stood in loco parentis, which would seem to furnish a sufficient motive for making this disposition of the bonds, and would have the like effect generally to that which attends the relation of parent and child. * * * The bonds were purchased 28th of January, 1882, and the death of the decedent occurred on the 20th of May, 1883. A year or more before his decease—which was presumably near the time when the bonds were purchased—Thomas Smith, in a conversation with John H. Kelly, the father of Thomas Smith Kelly, stated "he had laid by or appropriated some bonds for Tom." After his death, when his box in the trust company's vaults was opened, the bonds in question were found among his assets. The envelope in which they were contained was indorsed: "13 bonds, $1,000 each, held for Tom Smith Kelly. [Signed] T. S. Pensacola & Atlantic R. R. mortgage bonds." The envelope contained bonds of that description and amount. In the decedent's account-book was an entry in his own handwriting, as follows: "* * * $13,000 of these bonds I bought for, and are the property of, my nephew and godson, Thomas Smith Kelly, and belong to him. Thomas Smith. * * *"

In the absence of the precise terms "in trust," it is difficult to suggest words more expressive of a trust than the words thus employed. We are of opinion that the trust is fully established, and the decree of the orphans' court is affirmed, and the appeal dismissed, at the costs of the appellant.

SECTION 5.—INTERESTS CAPABLE OF ASSIGNMENT

RODIJKEIT v. ANDREWS.

(Supreme Court of Ohio, 1906. 74 Ohio St. 104, 77 N. E. 747, 5 L. R. A. [N. S.] 564, 6 Ann. Cas. 761.)

SUMMERS, J. * * * The question presented is the right of a person in the employ of another, in the absence of a contract for a definite time of employment, to assign future earnings from such employment. It is well settled that a mere expectancy or possibility is not assignable at law, consequently wages to be earned in the future, not under an existing engagement, but under engagements subsequently to be made, are not assignable. If there is an existing employment, under which it may reasonably be expected that the wages assigned will be earned, then the possibility is coupled with an interest, and the wages may be assigned. * * *

Some of the early cases were to the effect that the engagement must be for a time covering the wages assigned. * * * And later cases held that the assignment was valid although the engagement was subject to be terminated at any time. But in Kane v. Clough, 36 Mich. 436, 24 Am. Rep. 599, Cooley, C. J., states that he is unable to distinguish a case of existing employment merely, where there is no contract for a definite time, but only an employment, and an expectation of continuous work, from a case of an existing contract for a fixed time, but subject to the right to discharge at will, and, accordingly, it is there ruled that an assignment of wages to be earned in the future under an existing employment is valid. * * * "When a party has entered into a contract or arrangement, by the ordinary and legitimate and natural operation of which he will acquire property, his existing right thereunder is certainly not a mere naked hope; it is a possibility of acquiring property coupled with a legal interest in the contract. The cargo to be obtained or the freight to be earned by a ship on a voyage already contracted for, the wages to be earned under an existing employment, the payment to become due under an existing building contract, are familiar examples." Pom. Eq. Jur. § 1286. "An assignment of his wages by a laborer, executed when he is not engaged in, and not under contract for, the employment in which the wages are to be earned, is too vague and uncertain to be sustained as a valid assignment and transfer of property." Lehigh Valley R. Co. v. Woodring, 116 Pa. 513, 9 Atl. 58. But "an assignment of wages expected to be earned in the future in a specified employment, though not under an existing employment or contract, is valid in equity." Edwards v. Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207. The reason such an assignment is not good at law, but may be in equity, is tersely stated thus: "To make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But courts of equity support assignments not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only." * * *

BRITISH WAGGON CO. et al. v. LEA & CO.

(Queen's Bench Division, 1880. 5 Q. B. Div. 149.)

The Parkgate Waggon Company, one of the plaintiffs, let to defendants fifty railway waggons, for a term of seven years, lessor contracting to keep them in repair. Four years after the making of the contract, the Parkgate Waggon Company assigned the contract to the British Waggon Company, which agreed to do plaintiff's duties under the contract. Defendants assert that this assignment is a breach of the contract, and that they may treat the contract as being at an end. Plaintiffs bring suit for rental of the waggons.

COCKBURN, C. J. * * * The main contention on the part of the defendants * * * was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfill their obligation to keep the waggons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do

the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention was the case of Robson v. Drummond, 2 B. & Ad. 303, approved of by this court in Humble v. Hunter, 12 Q. B. 310. In Robson v. Drummond, supra, a carriage having been hired of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage was to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held that the defendant could not be sued on the contract—by Lord Tenterden, on the ground that "the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person" ; and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this Boulton v. Jones, 2 H. & N. 564, is a sufficient authority. The case of Robson v. Drummond, 2 B. & Ad. 303, comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in Robson v. Drummond, supra, rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the waggons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had en-

tered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in Robson v. Drummond, supra, went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is to be done by the immediate party to the contract, or by some one on his behalf. * * *

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.

PAIGE v. FAURE.

(Court of Appeals of New York, 1920. 229 N. Y. 114, 127 N. E. 898, 10 A. L. R. 649.)

Action by Paige against Faure. From judgment for plaintiff, defendant appeals.

McLAUGHLIN, J. On the 12th of December, 1914, the appellant, a dealer in automobile tires bearing his name, entered into a contract with the respondent and one Lindner, the material terms of which, so far as the question presented on the appeal is concerned, are as follows: Faure, for a period of one year, gave to Paige and Lindner the exclusive agency in the United States, except the cities of Boston and New York and certain territory adjacent thereto, to sell automobile tires manufactured by and for him and bearing his name. He agreed to sell the tires and make prompt delivery to Paige and Lindner at the prices charged him for their manufacture by the B. F. Goodrich Company, or any other manufacturer, plus $2 profit on each. He also agreed to immediately consign to them a maximum of 30 tires, title to which was to remain in him until sold; they agreeing to promptly inform him of sales made therefrom and to pay for all goods sold, whether from consigned stock or those purchased outright, on the 20th of the month following the date of sale. They also agreed, upon the execution of the contract, to purchase $1,000 worth of plaintiff's goods, and to thereafter, during the life of the contract or any renewals thereof, carry and sell his stock; he agreeing to renew the contract from year to year at their option, provided they sold, during the year immediately preceding the renewal, $10,000 worth of his goods and gave him 30 days' written notice before the expiration of the contract of an intention to renew. They purchased $1,000 worth of tires and entered upon and continued to carry out the provisions of the contract until some time in July following, when Lindner sold his interest in the contract to Paige. Paige thereafter continued to perform until some time in November ($10,000 worth of plaintiff's goods having in the meantime been sold), when he gave notice of his intention and requested a renewal of the contract for another year. Faure refused

to renew, and thereupon this action was brought to recover the damages alleged to have been sustained. Plaintiff had a verdict for $5,000, upon which judgment was entered, from which defendant appealed to the Appellate Division, where the same (one of the justices dissenting) was affirmed. He now appeals to this court.

There was no provision in the contract to the effect that Paige and Lindner were to devote their time and use their best endeavors to further the interest of Faure, or in fact to do anything except to purchase $1,000 worth of tires and pay him for goods sold by them whether from consigned stock or that purchased outright, on or before the 20th of the month following the date of sale. In view, however, of the credit and the exclusive agency given to them it is fairly to be implied that they were to devote their time and do whatever was reasonable and necessary to selling the plaintiff's product. The contract meant something. It was not a mere scrap of paper. The owner of a product would not give to another the exclusive agency, covering a wide territory, to sell the same unless he believed an effort would be made by the one to whom such right was given to sell; and one would not take, if acting in good faith, an exclusive agency to sell another's goods unless he expected and intended to use reasonable efforts to sell. * * *

This naturally leads to the only other question presented by the appeal and that is whether the contract was assignable without Faure's consent; in other words, did Lindner's assignment to Paige of all his interest in the contract justify Faure in refusing, at the request of Paige, to renew the contract for another year? I am of the opinion that it did. Faure entered into a contract, not with Paige, but with Paige and Lindner. He was to have the benefit of the services of both, not one, in the sale of his product. He agreed to give credit to both, not one, and it may very well be, except for Lindner, he would not have executed the contract at all.

The general rule is that rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relationship of personal credit and confidence. Nassau Hotel Co. v. Barnett & Barse Corp., 162 App. Div. 381, 147 N. Y. Supp. 283, affirmed, on opinion below, 212 N. Y. 568, 106 N. E. 1036; * * * Hardy Implement Co. v. South Bend Iron Works, 129 Mo. 222, 31 S. W. 599. * * *.

No bilateral contract for personal services can be assigned by either party to it, without the consent of the other. Williston on Contracts, § 421. But it is urged that this case does not fall within the general rule, because there is a provision in the contract that "This agreement shall bind and benefit the respective successors and assigns of the parties hereto." When the whole contract is considered, I am of the opinion this did not give Lindner the right, without Faure's consent, to assign his interest to Paige. The intention of parties to a contract must be ascertained, not from one provision, but from the entire instrument. * * * When this contract is thus considered, it is apparent that both Paige and Lindner were personally to devote their time to carrying out its terms. This necessarily follows from the language used, which shows that a personal trust and confidence were reposed in both of them. * * *

In Nassau Hotel Co. v. Barnett & Barse Corp., supra, the plaintiff owned a hotel and entered into an agreement with two men by the

names of Barnett and Barse to conduct it for a period of years. Thereafter they formed a corporation and assigned the contract to it. The court held that as the contract involved a relation of trust and confidence, and as a party has the right to the benefit contemplated from the character, credit, and substance of him with whom he contracts, the contract was not assignable, notwithstanding there was a provision in it that "this agreement shall inure to the benefit of and bind the respective parties hereto, their personal representatives, successors, and assigns."

An authority very much in point is Hardy Implement Co. v. South Bend Iron Works, supra. There defendant entered into a contract with a firm composed of two persons, Hardy and Mason, for the sale of plows manufactured by it, to which a credit was to be given and certain discount advantages offered. Mason withdrew from the firm and transferred his interest in the contract to the plaintiff. Defendant refused to ship to the plaintiff the goods called for by the contract. Action was brought to recover damages alleged to have been sustained. A demurrer was interposed to the complaint, which was sustained, the court stating that where an executory contract is made between two parties and one of them consists of two persons, composing a partnership, and one of those persons withdraws from the firm, which is thereby dissolved, it is for the party who contracted with the firm to say whether the contract shall proceed or not. The principle upon which the rule stated is predicated is that a party cannot be forced to accept a contract which he did not, in the first instance, make, and to which he did not subsequently assent. * * *

The judgments appealed from should therefore be reversed and the complaint dismissed, with costs in all courts.

SECTION 6.—NATURE AND EXTENT OF THE INTEREST ACQUIRED BY THE ASSIGNEE

In re PHILLIPS' ESTATE.

Appeal of MOSES.

(Supreme Court of Pennsylvania, 1903. 205 Pa. 515, 55 Atl. 213, 66 L. R. A. 760, 97 Am. St. Rep. 746.)

Appeal by one of the claimants of a fund in the hands of the executors of Henry M. Phillips, deceased, for the benefit of H. C. Moses under an alleged assignment of such fund from a decree of the orphans' court for Philadelphia county awarding the fund to another claimant.

BROWN, J. On July 2, 1895, H. Cleremont Moses, a nephew of Henry M. Phillips, assigned to his wife, Andrena Moses, $15,000 of his interest in his uncle's estate. On February 28, 1899, he and his brother, Altamont, executed a joint assignment of their interests in the estate to the United Security Life Insurance & Trust Company of Pennsylvania for $60,000. Notice of this second assignment was at once given to the accountants by the assignee, and to it the court below awarded the share of H. Cleremont Moses in decedent's estate, on the ground that, though the assignment to Mrs. Andrena Moses

was first in time, as she had not given the accountants any notice of it until July 23, 1901, it was postponed to that held by the appellee.

Whether, as between successive assignees of a fund in the hands of a third person, that assignee, without regard to the date of his assignment, who first gives the debtor notice of it, is entitled to be first paid, is a question upon which the American decisions cannot be reconciled. In England it is well settled that the claims of competing assignees of a fund rank, as between themselves, not in the order of the dates of assignments to them, but according to the dates when they respectively give notice to the debtor of their assignments. The Supreme Court of the United States seems to have adopted the same view. * * * To review the conflicting views entertained by the courts of our different states would needlessly consume pages. With us the question does not seem ever to have been definitely settled. The learned auditing judge, sustained by the court in banc, adopted the rule that the assignee who first gives notice has the first right to participate in the assigned fund. In adopting this as the better rule, he reasoned by analogy, saying, what all of us now approve: "The analogies with regard to sales of personal property in possession are certainly in favor of the view taken in the decisions last referred to, the vendee in such case being required, for the protection of subsequent purchasers, to take possession, to the exclusion of the vendor, where the property is capable of actual possession, or by assuming such open ownership as the case admits of, where it is not. Why should a different rule apply to purchasers of choses in action? Why should the purchaser not be required to do all that lies in his power to make it impossible for the assignor to commit a fraud, or to do an injury to subsequent purchasers, relying on his integrity, and having no means of knowing that he has ceased to be the owner, except by inquiry of the person in whose hands the fund is? The failure to give notice to such person puts it in the power of the assignor to do this wrong, and the consequences of the failure ought, therefore, to be upon him who commits it." * * *

"The maxim, 'Prior in tempore, potior in jure,' holds, it is true, wherever it has not been inverted by enactment, as it has been by the recording laws, so far as it regards conveyances of land, or where the benefit of it has not been lost by misconduct or imprudence; but it must not be allowed to protect a party who has neglected a requisite precaution to protect from imposition those who may come after him. * * *" [Gibson, C. J., in Fisher v. Knox, 13 Pa. 622, 53 Am. Dec. 503.]

Business transactions constantly require the assignments of choses in action. In many instances personal credit cannot be maintained in any other way, and for assignees who purchase in good faith there ought to be protection. None is found in the recording act, but a measure of it ought not on that account to be withheld, if it can be extended by courts of equity on equitable principles. The protection invoked by the appellee is against the latent equity of the appellant. If it had been informed of this prior assignment, it is not likely it would have taken the second one from the assignor, who failed to say anything about the first when he made the second. Protection can hardly be expected from an assignor who will sell twice what he knows he has a right to sell but once, for, if conscienceless enough to make a second sale, he will conceal the first in his scheme to cheat one

or the other of his assignees. Protection can only come from him who owes the money, and who, by notice to him, may be able to give protection. He is a mere stakeholder, and it is immaterial to him whom he pays. There is no reason why he should not be frank with a prospective purchaser of the whole or a portion of what he owes, or that, upon inquiry from such a one, he should conceal notice of any other prior purchase or assignment, if notice of it was given him. If it be understood that each assignee of a fund, or a portion of it, can protect himself against subsequent assignees only by giving immediate notice to the debtor, such notice will be given, and, when given, the instances will be very rare when subsequent assignees are imposed upon.

With the question now fairly before us, we adopt and announce, as the only safe rule, that, if an assignee fails to give notice to the person holding the fund assigned to him, a subsequent assignee, without notice of the former assignment, will, upon giving notice of his assignment, acquire priority. "By such notice the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it under the erroneous belief that it continues to belong to him absolutely, free from encumbrances, and that the trustees are still trustees for him and for no one else. That precaution is always taken by diligent purchasers and incumbrancers; if it is not taken, there is neglect." Dearle v. Hall, 3 Russ. Ch. 13. This rule is recognized and approved by the best text writers. Story, Eq. Jur. §§ 1035a, 1047; Beach, Modern Law of Eq. Jur. 344; Pom. Eq. Jur. § 965; Bispham, Eq. §§ 168, 169. In the last, the learned text writer says: "The decisions, in favor of the English rule, however, appear to be based upon the more correct view of the law." As the appellee is claiming under the assignment to it, and not under the attachment issued by it, the second question raised on the appeal need not be considered.

Appeal dismissed at appellant's costs, and as to her the decree is affirmed.

CULMER v. AMERICAN GROCERY CO.

(Supreme Court of New York, Appellate Division, 1897. 21 App. Div. 556. 48 N. Y. Supp. 431.)

O'BRIEN, J. * * * In 15 Am. & Eng. Enc. Law, p. 861, the rule prevailing in this state is given as follows: "The rule is not simply that the assignee takes subject to the equities between the original parties, but that the purchaser of a chose in action must always abide the case of the person from whom he buys. The true test is to inquire, what can the mortgagee do by way of enforcement of it against the property mortgaged? What he can do, the assignee can do, and no more. The reason of the rule is that the holder of a chose in action cannot alienate anything but the beneficial interest which he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by the rights of the assignor. In that state (New York), therefore, it is well settled that the assignee of a mortgage is no less bound by equities existing between the

mortgagee and third persons than by those existing against the mortgagee in favor of the mortgagor."

The general rule is that the assignee of a chose in action takes only the interest of his assignor, and while many of the cases from which the rule as stated above has been deduced relate to mortgages, the principle applicable to a policy of insurance would be in no respect different. In Owen v. Evans, 134 N. Y. 514, 31 N. E. 1000, that rule is thus stated: "Our courts recognize no distinction between equities existing in favor of the mortgagor and those in favor of a third person, but hold that, in the absence of an estoppel, an assignee of a mortgage takes only the interest of his assignor, and subject to any latent equity in favor of any person."

This is a reaffirmation of what was said in Schafer v. Reilly, 50 N. Y. 61, that: "One who takes an assignment of a mortgage takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons."

Judge Allen, in this case, says: "It is well settled that a seller or assignor of a chattel or chose in action can give not other or better title than he himself has, and that the purchaser or assignee must be content to stand in his place and to accept his title." * * *

CHAPTER V

DISCHARGE OF CONTRACTS

Section
1. Introduction.
2. Discharge by Agreement, Accord and Satisfaction, Account Stated, and Merger.
3. Discharge by Novation.
4. Discharge by Release, Cancellation, and Alteration.
5. Discharge in Bankruptcy Proceedings.
6. Effect of Statutes of Limitations.

SECTION 1.—INTRODUCTION

An offer and an acceptance upon consideration create, between the parties to the contractual agreement thus formed, certain legal relations which theretofore have not existed. The effect of such agreement, more specifically, is to confer certain rights, powers, and privileges, and to impose certain duties and liabilities upon the parties thereto. Each has a right that the other party shall perform his promise. Each may have the power and privilege of assigning some right arising out of the contract or of delegating the performance of some duty. The relations which bind the parties together will remain until there has been some act or series of acts constituting a discharge. The life history of a contract dates from the acceptance of an offer, there being consideration therefor; and it ceases upon the happening of an act constituting a discharge.

What acts will constitute a discharge? We have already considered certain matters pertaining to discharge. Obviously, complete performance on both sides will discharge a contract. Even tender of performance may work a discharge. Generally, of course, a tender of performance is not the equivalent of performance—a debt cannot be paid by a tender, though the running of interest on the debt will be stopped. But where the tendered act is of such a nature that it cannot be performed at a later time, a tender will result in a discharge of the duty to perform the tendered act. There remain to be considered several methods, other than those just enumerated, which bring about a discharge of contractual obligations.

SECTION 2.—DISCHARGE BY AGREEMENT, ACCORD AND SATISFACTION, ACCOUNT STATED, AND MERGER

A contract may be discharged by mutual agreement; that is, the parties enter into a second contract which has the effect of rescinding the first. The discharging agreement must be supported by consideration. In the case of bilateral contracts, for example, where neither party has performed, the consideration for the agreement to

rescind is found in the surrender of the rights created by the rescinded contract. If the first contract has been performed on one side, then some independent consideration is necessary to discharge the party who has not performed. Where this independent consideration is a promise, we have what is called an accord.

The term "accord" is employed to describe an executory bilateral contract, whereby one of the parties to a previously existing contract agrees to give and the other party to the same prior contract agrees to accept something different from that called for by the original contract. Such an executory contract generally does not discharge the pre-existing contract, for such former contract may still be sued upon, although such suit may involve the breach of the second contract called the accord. The defendant, when thus sued on the first contract, cannot successfully defend by proving the second contract, nor even by proving a tender of performance or of part performance. His only remedy is to sue for breach of the second contract called the accord.

The term "satisfaction" is used to describe the situation after full performance of the accord. Here we meet the question of consideration, which was treated in Chapter II. The satisfaction, to operate as a discharge of the former contract, must be on good consideration as that requisite has been interpreted in this class of cases.

There is one exception to this rule in the law of negotiable instruments, where it is held, and now codified in the Negotiable Instruments Law, that the holder of a negotiable instrument, may, by written renunciation, without consideration, discharge the instrument.

HARRISON v. HENDERSON.

(Supreme Court of Kansas, 1903. 67 Kan. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386.)

CUNNINGHAM, J. * * * An accord is an agreement, an adjustment, a settlement of former difficulty, and presupposes a difference, a disagreement, as to what is right. A satisfaction, in its legal significance in this connection, is a performance of the terms of the accord. If such terms required a payment of a sum of money, then that such payment has been made.

In this case there is no evidence of any disagreement between the parties prior to the sending of the account and remittance accompanying it. Plaintiff in error contends, however, that, because such remittance was denominated "a balance," its acceptance constituted an accord and satisfaction, and cites a number of authorities where courts have held that a remittance made as a balance, and the acceptance of the same, amounted to an accord and satisfaction. These cases have all been carefully examined, and in every one there appears to have been a prior disagreement, a contention as to what amount was due, so that a remittance, being denominated a balance, carried with it to the creditor, as a fair conclusion, that it was intended by the debtor to be in full of all demands. Without the requirement being made by the

debtor that if the creditor accepts and retains the proffered amount he must do so in full satisfaction of his demand, or without accompanying and surrounding circumstances fairly indicating that such was the purpose and object of the debtor in making the remittance, a creditor cannot be said to have so accepted a payment. * * *

An accord and satisfaction is the result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor. A simple tender of a balance, as shown by an account tendered by the debtor, does not carry with it an implication or conclusion that by such tender the debtor paid, or that the creditor agreed to receive, the same in full of the amount due, where there had been no prior disagreement or discussion as to what was actually due. Surely it cannot be claimed that such was the condition in the case at bar. It was shown in the evidence that the administrator had no knowledge of fees properly chargeable by attorneys in this state for services rendered, or that he even knew of the character and extent of the services which had been rendered. The sender of the check did not require its acceptance in full of all demands upon him as a condition precedent to its acceptance. The circumstances better warrant the conclusion that the sender was saying, "In my judgment these fees charged are correct, and a proper remuneration for the services which I have rendered, and, in accordance with this view, the amount sent you is the balance that is due. If, however, after you have investigated, you do not so conclude, we will hereafter have an adjustment of any difference that may then arise," rather than, "I will give you no opportunity whatever to inquire as to the correctness of the charges I have made, and, if you accept the draft, it must foreclose all question." The former view is most just to the plaintiff in error, and it is the position that an honorable and fair-minded attorney would take. * * * We are fully persuaded in this case there was no accord and satisfaction, and that the defendant in error is entitled to recover the amount found due by the referee.

The judgment of the district court will be affirmed.

An account stated is similar to an accord, but the transaction called to mind by the expression "account stated" is different from the transaction referred to by the word "accord." The word "accord" carries with it the notion that the parties who entered into such transaction thereby agreed to give and accept some performance in substitution for the performance due under an existing contract. An account stated does not suggest a substitution of the performance of one kind of an act for the performance of another kind of act, but, on the contrary, the account stated restates the very act of which the performance is called for by the existing contract. The meaning of the term "account stated" is further restricted and confined to an agreement to pay a certain specified sum of money.

The legal effect of an accord is also different from that of an account stated. An accord, while a binding contract, does not dis-

charge the former agreement; an account stated does discharge the former contract.

The transaction is a very common one. The submission of a monthly statement by a merchant to his customer, assented to by the latter, either expressly or impliedly, is an account stated. The balancing of a depositor's book by his bank, when agreed to by the depositor, is an account stated. In the event of a suit by the creditor, action would be brought upon the account stated, and not upon the series of contracts which makes up the account. The rule thus materially tends to simplify the situation by precluding inquiry, as a general rule, into the former transactions between the parties. There is some danger in it from the standpoint of the debtor who, sometimes, will be held to have assented to the account stated by his failure to protest against its incorrectness, or by other conduct, when perhaps, in fact, he held mental reservations on the subject and intended at some time to take the matter up with his creditor.

GARDNER v. WATSON.

(Supreme Court of California, 1915. 170 Cal. 570, 150 Pac. 994.)

HENSHAW, J. * * * Over what in law constitutes an account there was never any question in this state, and very little uncertainty exists in other states.

"It must appear [says this court in Baird v. Crank, 98 Cal. 297, 33 Pac. 65] that at the time of the accounting certain claims existed, of and concerning which an account was stated, that a balance was then struck and agreed upon, and that defendant expressly admitted that a certain sum was then due from him as a debt."

To like effect is Coffee v. Williams, 103 Cal. 556, 37 Pac. 506, where it is said: "An account stated is a document—a writing—which exhibits the state of account between parties and the balance owing from one to the other; and when assented to, either expressly or impliedly, it becomes a new contract. An action upon it is not founded upon the original items, but upon the balance agreed to by the parties. And the general rule is that when the stated account is admitted, it can be avoided only by averment and proof of fraud, mistake," etc.

The action upon an account stated is not upon the original dealings and transactions of the parties. Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement.

It is not at all necessary that there should be mutual or cross-accounts or demands between the parties. The acknowledgment of a debt, though it consists of but a single item, may form the basis of such a stated account. As has been said, the original transactions between the parties are not the subject of inquiry and may not be made the subject of inquiry except upon such equitable consideration as fraud, duress, or mistake. And if it be sought to avoid the legal effect of the account stated upon any of these grounds, they must be pleaded. Moreover, the writing constituting an account stated need not aver, or at all contain, the grounds and reasons for the conclusion and dec-

laration expressed. It is a complete account stated if it contains a signed and written acknowledgment of a present, unqualified indebtedness or liability with a promise to pay a named sum.

Reading the contract between these parties in the light of these principles, which are so well established that they may be said to be truisms of the law, we are unable to understand how the court reached the conclusion that the contract in question did not constitute an account stated between these parties litigant. "The said Watson hereby acknowledges himself indebted to the said Gardner in the sum of $3,000 in the manner above mentioned." The agreement, it is declared, was reduced to writing "to the end that in the event that he has not been able to meet the said obligation prior to the time of his death, the said Gardner shall then and at that time have a valid and subsisting claim against his estate for the payment of the said obligation." Indeed, we think it would be difficult to draw a paper which would more completely conform to the legal requirements of an account stated.

It is the general rule that the true consideration for a written instrument may always be shown. Among the cases constituting an apparent exception to this rule are those upon an account stated. It is open to a defendant, as has been pointed out, to repel the legal effect of the account stated by pleading and proof of its procurement through fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument. But it is not open to a defendant to attempt to defeat the legal effect of such a contract by showing a lack of consideration in any other way. Thus, it is not open to a defendant in such a case merely to show that the account stated was based upon a disputed claim of the plaintiff's, which claim subsequently proved to be invalid. Nor would it be open to a defendant to show that the amount justly due was very much less than the amount named in the account stated. All such evidence going to total or partial lack of consideration is forever debarred by the convention and agreement of the parties, for this is of the very essence of an account stated.

A result similar to that of an account stated arises from an arbitration and award. If the parties have agreed upon an arbitration and the arbitrators have fixed the amount due, this determination will be conclusive between the parties. Usually, any suit brought thereafter would be upon the award and not upon the original debt.

A contract may also be discharged by merging it in some other form of contract, as, for example, when a simple contract debt is converted into a negotiable instrument. The mere fact that a negotiable instrument has been given will not be conclusive that the original debt is discharged, for the instrument may have been given and received only in conditional payment. The presumption usually is that an instrument is given and received only in conditional and not in absolute payment of the debt.

Similarly a contract will be discharged by judgment obtained in an action upon the contract, the original cause of action thus being regarded as merged in the judgment.

SECTION 3.—DISCHARGE BY NOVATION

In a sense, discharges of contracts by mutual rescission, by accord and satisfaction, and by account stated, are forms of novation, but it is more common to employ the term novation to describe a transaction whereby a new party is, by agreement, substituted as an obligor in the place of the one upon whom the duty rested by the terms of the original contract. This aspect of a novation is presented in the following cases:

MARTIN v. LEEPER BROS. LUMBER CO.

(Supreme Court of Oklahoma, 1915. 48 Okl. 219, 149 Pac. 1140.)

Action by the Leeper Bros. Lumber Company, a corporation, against Swan Martin. Judgment for plaintiff, and defendant brings error.

DUDLEY, C. In May, 1912, Leeper Bros. Lumber Company, a corporation, defendant in error, hereinafter referred to as the lumber company, commenced this action in the county court of Oklahoma county against Swan Martin, plaintiff in error, hereinafter referred to as owner, to recover judgment for the balance due on account for lumber and building material used in making certain repairs upon his property. The lumber company recovered judgment for the amount sued for, and from this the owner has appealed, and the only question presented is whether or not the petition states a cause of action.

The petition, omitting the caption and the prayer, is as follows:

"* * * That on or about the ——— day of ———, 1910, the above-named defendant entered into a contract with one Oscar White, in and by the terms of which contract said Oscar White agreed to furnish material and do certain repair and construction work upon a building owned by defendant on East Eighth street, Oklahoma City, Okl., for which repair and construction work defendant agreed to pay said Oscar White the sum of $———. * * *

"That on or about the ——— day of May, 1910, plaintiff entered into an oral contract with said Oscar White in and by the terms of which contract plaintiff promised and agreed to furnish the material to be used by said Oscar White in making the repairs and construction work above mentioned; that in pursuance of said contract with said Oscar White plaintiff furnished and delivered to said Oscar White upon the premises where the above-mentioned repair and construction was being done material as shown by Exhibit A hereto attached and made a part hereof, for which said material said Oscar White agreed and promised to pay plaintiff $750.62.

"That after plaintiff had completed the delivery of the material as shown by Exhibit A upon the premises where the repair work and construction was being done, it was orally agreed by and between defendant and said Oscar White that defendant should take over the repair and construction work on the building, which said Oscar White had agreed and contracted to do for said defendant, as above set forth, and it was then expressly agreed and understood by and between said Oscar White and defendant herein that this defendant should assume and pay all bills for material on said job, including the amount due plaintiff for material furnished as hereinbefore set forth; that said Oscar White advised defendant the amount which was then due and owing

this plaintiff, and defendant fully understood the amount of indebtedness to this plaintiff which he, the defendant herein, was assuming.

"That the agreement and arrangement by and between said Oscar White and this defendant whereby defendant assumed and agreed to pay this plaintiff for the material furnished as above set forth was communicated to this plaintiff, and that this plaintiff accepted the offer and promise made by defendant to make payment of the said indebtedness for material, and then and there released said Oscar White from all further liability to make payment of said indebtedness.

"The defendant, on or about the 1st day of August, 1910, paid this plaintiff $450 on said indebtedness, and plaintiff allowed defendant a credit for material returned of $55.74, but that defendant always has neglected and now refuses to make payments of the balance of said indebtedness, the balance being $244.88." * * *

In 29 Cyc. 1134, in discussing the manner in which a novation may be effected it is said: "Novation may be effected in three ways: (1) By the substitution of a new obligation between the same parties, with intent to extinguish the old obligations; (2) by the substitution of a new debtor in the place of the old one, with intent to release the latter; (3) by the substitution of a new creditor in the place of the old one, with intent to transfer the rights of the latter to the former." The foregoing rule seems to be the general one. * * *

Measured by these rules, we think the petition sufficient on the theory of a novation. It pleads: (1) A contract between the owner and the contractor; and (2) a contract between the lumber company and the contractor. Under the contract between the lumber company and the contractor, the contractor is its debtor. The petition then pleads a release and extinction of the contract between the owner and the contractor, and the creation of a new contract by which the owner is to make the repairs, and pay for the labor and material, including the debt of the lumber company. The terms of this contract were made known to and accepted by the lumber company, and its debt against the contractor was released, and the owner accepted as its new debtor in discharge of the original debtor.

The petition fairly pleads a novation by the substitution of a new debtor, and comes squarely within the rule announced in 29 Cyc. 1136, which is as follows: "The most frequent novation is the substitution of a new debtor. To constitute this kind of a novation, there must be a mutual agreement among three parties, the creditor, his immediate debtor, and the intended new debtor, by which the liability of the last named is accepted in the place of the original debtor in discharge of the original debt." * * *

The petition sufficiently pleads a consideration under section 926, R. L. 1910, and is sufficient upon the theory of a novation. * * *

The judgment of the trial court should be affirmed.

KLINKOOSTEN v. MUNDT.

(Supreme Court of South Dakota. 1916. 36 S. D. 595, 156 N. W. 85, L. R. A. 1918B, 111.)

McCOY, J. Plaintiff, as assignee of the original payee, brought this suit against defendant to recover upon a negotiable promissory note for $25 executed and delivered by defendant to the Unitype Company. * * * In circuit court there was a verdict and judg-

ment in favor of defendant. At the close of all the evidence plaintiff moved the court for a directed verdict in favor of plaintiff. The motion was denied, to which ruling plaintiff excepted. * * *

Defendant admitted the execution of the note. The defendant pleaded as a defense that prior to the transfer of said note to plaintiff the Unitype Company released defendant from the payment of said note and agreed in writing to accept as payor in lieu of defendant the Messenger Publishing Company. It appears from the evidence that at the time of the execution of said note defendant was the proprietor of a printing and publishing business, and purchased certain printing machinery from the Unitype Company, and gave 46 notes, amounting to $1,450 in consideration of the purchase price of said machinery, the note in question being one of such notes. Under the contract for the purchase of said machinery it was provided that the title to such machinery should remain in the Unitype Company until the full payment of said notes. After the making of this contract, and before the maturity of said note, defendant sold and transferred his printing and publishing business and said machinery to the Messenger Publishing Company. About the time this sale and transfer were made to the Messenger Company, defendant wrote the Unitype Company that he had made such sale; that the Messenger Company had agreed to make new notes for those remaining unpaid for such machinery, and would assume the entire obligation of defendant, provided the Unitype Company would consent to take their notes. The Messenger Company also wrote the Unitype Company in substance as follows: We have purchased the interest of Mundt in his contract under which the Unitype typesetting machine was installed. We, therefore, assume the rights and obligations of Mundt in the contract, and agree to pay the unpaid notes given by him, and carry out all his obligations under the terms of the agreement. It is agreed between Mundt and the Messenger Company that on completion of the payment of the balance of these notes and the carrying out in full of the terms of the agreement, you are to issue a bill of sale for said machinery to the Messenger Publishing Company. This letter was signed by the Messenger Publishing Company by its president, and at the bottom thereof, over the signature of defendant, appeared the following:

"The Unitype Company is hereby authorized to issue a bill of sale to the Messenger Publishing Co. for the above-described machine when all the terms of the contract have been fully met and all the notes given under the same duly paid."

Also on the bottom of this letter appears the following: "Accepted. The Unitype Co., by E. J. Andrews, Treas."

The note in question was never paid. The Messenger Publishing Company never executed and delivered to the Unitype Company its notes in place of the notes given by defendant. In order to constitute novation, there must be either an express or implied agreement on the part of the creditor to substitute the new debtor in place of the original debtor, and also an express or implied agreement to release and discharge the original debtor. * * * All that the Unitype Company ever assented to as shown by the correspondence, was that the Messenger Publishing Company might assume the rights and obligations of defendant under the contract and make payment of the notes given by defendant, and when said notes had all been fully paid and satisfied, it would transfer title to the machinery to the Messenger Publishing

Company. There was no assent or agreement, either express or implied, to discharge or release defendant. In most of the adjudicated cases where it has been held that implied novation had occurred there were circumstances such as the delivery to the original debtor of his notes and new notes taken in place thereof, or other circumstances, indicating an intention on the part of the creditor to accept the new debtor in place of the old, and to release and discharge the obligation as against the original debtor. No circumstances of that character appear in this case. We are of the view that the court erred in overruling the motion to direct a verdict for plaintiff; no defense of release by novation having been shown.

The judgment and order appealed from are reversed, and the cause remanded.

SECTION 4.—DISCHARGE BY RELEASE, CANCELLATION, AND ALTERATION

A release is a declaration in writing by the releasor which manifests his intention to regard as extinguished an existing right which he had against the releasee. To constitute a release, the instrument must be under seal. In states where the common-law rules relating to sealed instruments obtain, such an instrument is effective without consideration; but, in many states, these rules have been altered by statute. Statutory changes must therefore be taken into consideration in determining, in a particular state, the requisites and legal effect of such instruments. In the absence of such changes, the legal effect of a release is to discharge the duty of the releasee referred to in the instrument. In one respect, the effect of a release may be regarded as somewhat extraordinary. Where A. and B. have assumed a joint duty, or a joint and several duty to C., a release of either A. or B. will have the effect of discharging the other, although there be in the instrument no language that manifests A.'s intention to release the other party. The theory apparently is that there is but one set of legal relations between the two or more parties on one side of the contract and that party or parties on the other, and, that, in order to release one of the parties, it is necessary to destroy these relations. Figures of speech in the law are dangerous, but perhaps the situation bears some figurative resemblance to a case where A. is raising B. and C. up a steep cliff by the aid of a single rope. A. decides to "release" C. and let him drop, but he wants to save B. A. cuts the rope and C. plunges to the bottom, and, despite A.'s prayers, B. does likewise. If the situation were regarded as a double set of relations, a release of one obligor would not have this effect; but the law does not so regard it. But parties to a contract, no matter how numerous on each side, are regarded as tied together by one rope, and not several. But, as usual, a harsh result is mitigated by the introduction of a fiction. A legal fiction, and fictions are legion, is much like a crutch; it assists one in reaching one's destination, but it is a poor method of transportation, when it is not needed. By a legal fiction there has been formulated the rule that, where a

party to a contract enters into a covenant not to sue one of several obligors, or where one of such obligors is released, the releasor reserving his rights against the other obligors, such other obligors will not be discharged.

Since, at common law, an instrument under seal gave rise to an obligation without consideration, one method of discharging a sealed instrument was to cancel it. An act of cancellation is accomplished by surrendering the instrument to the obligor thereon or by mutilating it, marking upon it, or destroying it, with the intent to put an end to the legal obligations which it has evidenced. Negotiable instruments, and perhaps some other types of written contracts may be discharged by cancellation.

Material alteration of the written evidence of a contract also has the effect of avoiding the contract. Where such alterations are innocently made, there may still be a recovery upon the original claim; but, where they are fraudulently made, the entire right of action is destroyed. Material alteration by a stranger does not avoid the instrument, though the contrary is the law in England, and, it seems that, in this country, under the Negotiable Instruments Law, a material alteration by a stranger will avoid the instrument, though there may be a recovery upon the original contract, if the holder was not a party to the alteration. The nature and effect of material alteration of negotiable instruments will be treated in more detail in Part III.

SECTION 5.—DISCHARGE IN BANKRUPTCY PROCEEDINGS

While it would be decidedly detrimental to the best interests of society and to the individuals directly concerned for the law to provide that insolvency should, of itself, under the doctrine of impossibility of performance, operate as a discharge of contractual obligations, nevertheless, experience shows, that within relatively narrow limits and under certain restrictions, the policy of granting a discharge of debts on account of insolvency may with propriety be adopted. This is one of the features of the Bankruptcy Act (U. S. Comp. St. §§ 9585–9656), but it is not its primary purpose. The principal aspect of a bankruptcy law is to provide the judicial and administrative machinery requisite for an economical and expeditious collection of the assets of a failing debtor and the equitable distribution thereof among his creditors. This feature of the bankruptcy act will be taken up in a later chapter. We are here interested only in those provisions of the act which authorize the court to grant a discharge of the debts of the bankrupt.

The present National Bankruptcy Act does not authorize the granting of a discharge from all kinds of obligations, nor does it provide that, under all circumstances, a bankrupt will be entitled to

a discharge. Sometimes a bankrupt is not entitled to a discharge of any obligation.

With respect to the kinds of debts for which a discharge may be granted section 17 of the National Bankruptcy Act provides: **A discharge in bankruptcy shall release a bankrupt from all of his provable debts.** The act then proceeds to declare certain exceptions to the rule that **all provable** debts may be discharged. These exceptions are as follows: **(1) A tax levied by the United States, the state, county, district, or municipality in which he (the bankrupt) resides; (2) liabilities for obtaining property by false pretenses or false representations, or for maintenance or support of wife or child or for seduction of an unmarried female, or for criminal conversation.** Some of these exceptions under clause 2 are inserted out of an abundance of legislative caution, because there is little likelihood that the courts would hold that some of the obligations therein mentioned would be provable debts. Unless the obligation is a provable debt, there is no necessity for providing for it in these express exceptions. Liabilities for obtaining property by false pretenses or false representations and liabilities for malicious injuries to property are provable debts. Were it not for this express exception, they would be subject to discharge. But liabilities for malicious injury to a person, for alimony, for maintenance of a wife or child, for seduction and for criminal conversation are probably not provable debts, and therefore could not be discharged even if this express exception were eliminated.

The third exception consists of **debts which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.** With reference to the scheduling of debts, it may be remarked in passing that this act consists in the preparation and filing by the bankrupt, in the bankruptcy court, of a detailed statement of his assets and liabilities. With reference to the schedules, section 7, clause 8, provides that, **the bankrupt shall prepare, make oath to and file in court within ten days, unless further time is granted, after the adjudication, of an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemption as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee and one for the trustee.** The time within which claims against a bankrupt may be proved is fixed in section 57n as follows: **Claims shall not be proved against a bankrupt subsequent to one year after the adjudication.** There are a few minor exceptions not necessary to be noted here, allowing proof of claims more than a year after the date of adjudication. The fourth and last exception to the rule that all

provable debts may be discharged, consists of **debts created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.**

Returning to the principal matter involved in this section, the question is: What kinds of debts are subject to discharge? Section 17, above quoted, provides, in legal effect, that, unless a debt is a provable debt, it will not be discharged. What is a provable debt? The following section of the act defines what shall constitute a provable debt, although it should here be stated that, in some respects, the section is not clear. There has been a great deal of litigation over this section and the resulting decisions of the courts have gone a long way toward removing the uncertainties, though, even yet, there remains some doubt as to certain types of claims. It may also be pointed out here, that while we are chiefly interested in the following section for the purpose of ascertaining what debts will be discharged in bankruptcy, the section and the discussion following may be looked upon purely from the standpoint of a creditor of a bankrupt who faces the question: "Do I have the privilege of filing this particular claim against my debtor, or not?" The creditor is affected in this way: If he holds a provable claim, he must prove if he expects to get anything at all from his bankrupt debtor, because the debt will be discharged. If his claim is not provable, the creditor can get nothing from the estate, but, since his claim will not be discharged, the creditor will be entitled to the full amount and may recover it in an ordinary action at law. Of course, the judgment will not be paid until the judgment debtor acquires property. Even so, that may be much better than participating with the other creditors in the bankruptcy proceedings, where the proportion of the debt paid by the estate through the trustee may be very small. Section 63 provides: **(a) Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.**

(b) Unliquidated claims against the bankrupt may, pursuant to

application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

It will not be necessary to go into a detailed discussion of the interpretation of this section, but merely to point out some of the more important features. It will be noted that only those debts due **at the time of the filing of the petition** against the bankrupt will be provable. As will be seen later in some cases these debts need be but contingently due. If the bankrupt buys goods subsequent to date of the filing of the petition, the claim is not provable nor dischargeable. The bankrupt remains liable therefor. The phrase "absolutely owing, whether then payable or not" has reference to transactions which may be illustrated by the ordinary case of a claim founded upon a note given for money loaned or property sold to the maker which is not by its terms payable until a date subsequent to the date of the filing of the petition. Clause 4 is the most inclusive, since it deals with contracts express or implied and is not limited to contracts in writing, as is clause 1. While clause 5 contemplates the possibility of claims reduced to judgment after the filing of the petition, it is to be noticed that this clause does not provide for the proving of any kind of a claim not provable under the preceding clauses, because the application of clause 5 is expressly limited to judgments founded upon provable debts. Clause 5 is relied upon as the basis for proving a claim which, at the date of the filing of the petition, was unliquidated, that is, where the amount of the claim had not then been determined. The procedure for reducing unliquidated claims to judgment is provided for in clause (b). This clause, like clause 5, does not enlarge the class of claims which are provable. Clause (b) makes provision for the liquidation only of those claims which are provable under the first four clauses.

The difficult questions arising out of the above section concern the interpretation of the term "fixed liability * * * absolutely owing," and the term "contract express or implied." Or, to approach the question through a different terminology: What is the status of contingent claims? To illustrate: It is held that a claim for future rent against a bankrupt tenant is not a provable debt. On the other hand, it has been held that the claim of the holder of commercial paper against a bankrupt indorser is provable, although, at the time of the filing of the petition, the party primarily liable on the instrument has not defaulted. It has also been held that the claim of a surety against a bankrupt principal debtor for reimbursement is a provable debt, although the surety did not pay the debt to the creditor until after the petition was filed against the principal debtor. This somewhat strained interpretation is probably brought about by the feeling that the bankrupt should be discharged from contingent claims as well as non-contingent claims. It is conceivable that a bankrupt might owe relatively few debts absolutely owing and many contingent debts. This would be true

where the bankrupt's business involves the discounting and sale of large quantities of commercial paper.

The question of the provability of contingent claims also arises over bilateral contracts. It has been held that where a bankrupt is under a contract to perform services, which contract has not yet been broken at the date of the filing of the petition, the fact of bankruptcy operates as an anticipatory breach of the contract, and the claim arising thereon is provable.[1] This will not always be the case. Bankruptcy will operate as an anticipatory breach only if there is a reasonable probability that the bankruptcy will in fact render performance by the bankrupt unlikely. If the bankrupt had contracted to perform future personal services for A., with all tools and materials to be furnished by A., bankruptcy would not be a breach of such a contract. Accordingly, this claim would not be provable nor dischargeable.

Tort claims, such as for assault, trespass to land, libel, slander, malicious prosecution, etc., are not provable claims. An apparent exception exists in the case of conversion of personal property. While this act is a tort, the obligation of the converter to make restitution is also treated as a contract obligation implied in law. The claim is therefore provable under clause 4.

It was stated above that a bankrupt would not always be entitled to a discharge. Section 14 of the act provides: **Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending. * * * The judge shall hear the application for discharge and such proofs and pleas as may be made in opposition thereto * * * and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: Provided, That a trustee shall not interpose objections to a bankrupt's dis-**

[1] Central Trust Co. of Illinois v. Chicago Auditorium Association, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580 (1916).

charge until he shall be authorized so to do at a meeting of creditors called for that purpose.

Section 15. The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

SECTION 6.—EFFECT OF STATUTES OF LIMITATIONS

Statutes of the states provide definite periods of time within which various actions must be brought. With respect to contracts, a period may vary from a year up to ten years; or even more is allowed, depending on the nature of the claim, whether a claim against an estate, upon an oral or written contract, negotiable or sealed instrument, etc. The statute begins to run from the date of breach, if the breach is material and the plaintiff elects to treat the contract as abandoned. Where the contract is to pay a sum of money, this rule would be expressed by saying that the period begins to run from the day payment is due. In the case of demand notes and bills of exchange, this would mean that the statute began to run from date of issue. But with respect to bank notes and certificates of deposit payable on demand, the statute does not begin to run until demand, In case of mutual accounts, the period begins to run from the date of the last entry. Where the plaintiff is under disability at the time the cause of action arises, it is commonly provided that the statute does not begin to run until the disability is removed. The general rule also is that the departure of the defendant from the jurisdiction stops the running of the statute and the term during which he resides outside the state will not be counted in determining whether the period has elapsed. The legal effect of the running of the statute is not, however, to discharge the debt. The debt in contemplation of law still exists, but no action can be maintained to recover it. This is shown by the fact that a right to sue may be barred in one state but not in another. If the claim is barred in state A. and the creditor obtains service of process upon his debtor in state B. on an action brought there, the statute of limitations of state B. will generally control, and not the statute of state A. The effect of the running of the statute as not constituting a discharge of the obligation is also shown by the rules that, although the debt is barred, the creditor may still resort to securities such as pledges, mortgages, and other liens to enforce payment. The circumstances may be such that the claim of a creditor against his debtor is barred when the claim against the surety is not barred. The surety, in such circumstances, remains liable.

CHAPTER VI

EFFECT OF MISTAKE, FRAUD, DURESS AND UNDUE INFLUENCE

Section
1. Introduction.
2. Mistake.
3. Fraud.
4. Duress.
5. Undue Influence.

SECTION 1.—INTRODUCTION

The preceding chapters have presented the problems which arise out of the formation, performance, and discharge of contracts. Every agreement worthy of the dignity of a contract will ultimately be discharged, either by performance or by some one of the other methods of discharge to which reference has been made. We have surveyed, therefore, the normal life history of a contract. In the four chapters following, we are to be concerned with a group of circumstances of a special nature. Specifically, we deal, in these chapters, with such questions as the following: What effect is brought about in the relations of the parties to a contract by the existence of mistake, fraud, duress, undue influence, or illegality? What is the status of the contracts of minors or of insane persons? Finally, what kinds of contracts must be in writing, and what is the legal effect of a failure to comply with such requirements?

It would be possible to classify these portions of the law of contracts under the topics heretofore treated. For example, a mistake may be of such a nature as to prevent the formation of a contract. This involves the application of the principles of law which fix the requisites of a contract. A mistake may not prevent the formation of a contract, but it may constitute such an important aspect of the transaction that justice would require that it be taken into account in fixing the rights and duties of the parties. In a sense, therefore, the mistake could be regarded as a condition, either implied in fact or in law, which would operate substantially like any other condition. This phase of the subject of mistake could therefore be treated under the head of conditions. So, also, the subject of fraud, duress, and undue influence may be examined, sometimes with a view of determining whether there was a contract, and sometimes from the standpoint of conditions. With respect to illegality, it is possible to say that one of the requisites to the existence of a contract is that it shall have a legal object. But, inasmuch as illegal contracts do produce some of the effects of a normal contract, it would seem desirable to regard an illegal contract as a real contract, and

then to treat the element of illegality as an independent matter, which affects materially the relations of the parties to the contract.

It is sometimes said that one of the requisites of a contract is that the parties must be competent, but this is hardly correct. Minors and other persons entitled to a larger measure of protection than normal persons do make contracts, but the law gives to them certain rights and privileges which are not possessed by other persons. The rules of law prescribing that certain kinds of contracts shall be in writing are founded upon considerations of public policy. Sometimes these rules prescribe an actual requisite to the existence of a contract, as in the case of negotiable contracts; but the rules discussed in Chapter IX, for instance, are not of this character. Failure to reduce such contracts to writing will have some effect, but this effect is not to prevent the formation of the contract.

In other words, the matters treated in the next four chapters are new chiefly in the sense that the operative facts themselves are new. After it has been determined what constitutes mistake, fraud, duress, illegality, etc., the legal effect follows more or less naturally as a result of the application of principles previously developed.

SECTION 2.—MISTAKE

The inquiry into the nature and effect of mistake opens up a broad field of study. Mistake may project itself into any of the varied phases of individual, social, business, or political life. One may do a great many things which one would not, if one were aware of all the facts relating, in one way and another, to his conduct. We are interested here in three aspects of mistake: (1) What is a mistake? (2) What kinds of mistake are taken cognizance of by the law; that is, what kinds of mistake will so operate as to create, alter, extinguish, or prevent the formation of legal relations—principally contractual relations? (3) What are the legal effects of the various kinds of mistake with which the law is concerned?

A mistake is a mental state, consisting in the erroneous assumption that a specified fact is presently existing or non-existing, or that, in the future, it will or will not exist. The mental state thus called mistake, instead of being an affirmative state of mind, may be a negative state of mind; that is, instead of erroneously assuming that fact X exists, one may simply fail to think about the existence or non-existence of fact X. Causes of mistake may be various. A mistake may arise as the result of careless mental habits, from the failure to follow a line of inquiry which would lead to a discovery of the truth, or from a belief induced by fraudulent representations of a third party. It is usual to treat that kind of mistake caused by the fraud of a third party under the general head of fraud, and it will be so treated here. With respect to the kinds of

mistake, it is possible for the mistake to concern the transaction between the parties in such a way as to prevent the formation of any contract. Some reference to this phase of the law relating to mistake was made in the chapter on Offer and Acceptance. Again, the mistake may not prevent the formation of a contract, but it may be nevertheless of so material a nature that the law will permit the rescission of the contract on the ground of mistake. Finally, there may be no misunderstanding in the making of the real contract, but, in the same case, some mistake may arise in giving the contract formal expression. In such a case, it may not be just to rescind the contract, but it may be reformed; that is, the formal expression may be made to conform to the contract actually entered into.

RIEGEL v. AMERICAN LIFE INS. CO.

(Supreme Court of Pennsylvania, 1893. 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166.)

Plaintiff's intestate, a creditor carrying a $6,000 policy of insurance upon the life of one Leisenring, her debtor, in order to be relieved of the burden of further premiums, surrendered the same for a paid-up policy for $2,500, under the rules of the company, subsequent to the death of the insured, both parties being ignorant of said death. Plaintiff brings a bill against the insurance company, asking the reinstatement of the surrendered policy. In the court below, a decree was rendered, sustaining a demurrer to the bill and dismissing it. Plaintiff appeals from the decree.

STERRETT, J. * * * [Quoting from a previous opinion in the same case:]

"The case presented on these facts was that of a contract entered into under the influence of a mutual mistake, and a claim for relief from such contract. The mistake was in relation to the fact of Leisenring's death. Both parties evidently supposed and acted on the supposition that he was alive, and that the annual premiums upon his life, which had become burdensome to Mrs. Riegel, must be continued indefinitely until his death should take place. As it had become difficult for her to pay these premiums, the only way in which she could be relieved from them was to surrender her policy, and accept a paid-up policy for such smaller sum as the premiums already paid would purchase. Rather than take the risk of losing the entire amount of the policy, by her inability to keep up the annual payments, she surrendered her policy for $6,000, and accepted in lieu of it a paid-up policy for $2,500. This was the contract she made while in ignorance of Leisenring's death. At the time she made it she was already relieved from the burdensome premiums, and the entire amount of the policy was honestly due her from the company. What was the effect of the mistake upon her? Simply to take from her the difference between the two policies, and give her absolutely nothing for it. She surrendered a policy for $6,000, on which the liability of the company was already fixed, and received one for $2,500, to secure relief from a burden already removed. The company parted with nothing. She secured nothing. The whole transaction was a mistake, and, if the decree of the court stands,

the result will be to take $3,500 from Mrs. Riegel and give it to the insurance company. These facts seem to us to present a clear and a strong case for equitable relief, so strong, indeed, that a mere statement of them is the only argument necessary for its support. The duty of a chancellor to relieve in cases of mutual mistake is so well settled that no citation of authorities can be needed. * * * The learned judge who heard this case in the court below, and who is thoroughly familiar with the principle to which we have referred, seems to have been misled in regard to the facts set up in the bill. * * *"

The general rule is that an act done or a contract made under a mistake of a material fact is voidable and relievable in equity. The fact must of course be material to the act or contract; for, though there may be an accidental mistake or ignorance of the fact, yet, if the act or contract is not materially affected by it, relief will not be granted. Thus, A. buys from B. an estate to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts unknown at the time to both parties, that B. has no title; as, if there be a nearer heir than B., who was supposed to be dead, but is in fact living. In such a case equity would relieve the purchaser and rescind the contract. But suppose A. buys from B. an estate the location of which was well known to each of them, and they mutually believed it contained 20 acres, when in fact it contained only 19¾ acres, and the difference would not have varied the purchase in the view of either party; in such a case the mistake would not be ground for rescission of the contract. * * * It makes no difference in application of the principle that the subject-matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately; for, if the contingency has, unknown to the parties, already happened, the contract will be avoided, as founded on a mutual mistake of a matter constituting the basis of the contract. * * *

The principle is illustrated by familiar examples, employed by text writers, thus: A. agrees to buy a certain horse from B. It turns out that the horse is dead at the time of the bargain, though neither party was then aware of the fact. The agreement is void. A. agrees to buy a house belonging to B. The house was previously destroyed by fire, but the parties dealt in ignorance of that fact. The contract not being for sale of the land on which the house stood, was not enforceable. So, too, A., being entitled to an estate for the life of B., agreed to sell it to C. B. was dead but both parties were ignorant of the fact. The agreement was avoided. For similar reasons, a life insurance cannot be revived by payment of a premium within the time allowed for that purpose by the original contract, but after the life had dropped, unknown to both insurer and assured, although it was in existence when the premium became due, and although the insurer has waived proof of the party's health, which, by the terms of the renewal, it might have required. The waiver applies to the proof of health, not to the fact of his being alive. * * * Mr. Pollock, in his excellent treatise on the Principles of Contract (page *441), states the general principle thus: "An agreement is void if it relates to a subject-matter (whether a material subject of ownership, or a particular title or right) contemplated by the parties as existing, but which in fact did not exist." * * *

It cannot be doubted that in exchanging the old for the new policy both parties acted on the basis that Leisenring was then alive. * * *

In view of the undisputed facts as to the acts of both parties, and everything connected with the transaction, it would be wholly unreasonable and unwarranted to hold that the parties treated upon the basis that the fact which was the subject of their agreement was doubtful, or that the contract was made "in view of doubtful facts, and because of the doubtful facts." * * *

It is therefore adjudged that the decree of the court of common pleas be reversed and set aside, and exceptions to master's report dismissed; and it is now adjudged and decreed that the contract under which said exchange of insurance policies was made be rescinded; that the paid-up policy for $2,500 be surrendered and canceled; and that the original policy of insurance be reinstated, as of date of its surrender; and it is further adjudged and decreed that the defendant company pay to the plaintiff the sum of $6,000, with interest from October 4, 1889, and also all the costs of this proceeding.

PAXSON, C. J. I dissent, and would affirm the decree, upon the clear and able opinion of the learned judge below.

MITCHELL, J. I concur with the chief justice in his dissent.

WOOD v. BOYNTON et al.

(Supreme Court of Wisconsin. 1885. 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.)

TAYLOR, J. This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of $1,000. The case was tried in the circuit court, and after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and after judgment was entered in favor of the defendants, appealed to this court. The defendants are partners in the jewelry business. On the trial it appeared that on and before the twenty-eighth of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about $700. After hearing this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified * * * as follows: * * * "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. * * *" She also testified that before this action was commenced she tendered the defendants $1.10, and demanded the return of the stone, which they refused. * * * The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. * * *

The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for re-

scinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold,—a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. * * * There is no pretense of any mistake as to the identity of the thing sold. * * * When this sale was made the value of the thing sold was open to the investigation of both parties, neither knowing its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. * * * However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

The judgment of the circuit court is affirmed.

NEWTON v. TOLLES.

(Supreme Court of New Hampshire, 1890. 66 N. H. 136, 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593.)

Plaintiff made a contract with defendant to purchase a farm, which defendant represented, and which both supposed, contained 200 acres, but which in fact contained only 135 acres. Plaintiff made partial payments, and took possession, but, discovering the mistake, refused to accept the deed, and immediately after its tender brought suit to rescind the contract, offering to account for rent and profits, and make allowance for such personal property sold with the farm as had been consumed in its management.

CARPENTER, J. There was a mutual mistake in the quantity of land. The defendant understood she was selling, and the plaintiff that he was buying, a farm of 200 acres. It in fact contains only 135 acres. The defendant, believing that the farm contained 200 acres, informed the plaintiff that it did contain that number. The plaintiff relied on her statement. Under the influence of the error common to both par-

ties, the transaction was consummated. The mistake was one of fact in a material point affecting the value of the property. * * * A material mistake in the quantity does not, in its effect upon the equitable rights of the parties, differ from a like mistake in the character, situation, or title of the bargained property. It is equivalent to a mistake in the existence of a material part of the subject of the contract. The case is as if before the contract was executed, and without the knowledge of either party, a parcel containing 65 acres of the 200 contracted for had sunk in the sea. * * * It is inequitable, in the highest degree, that the defendant, by reason of her negligent and erroneous, though not fraudulent, representation, should make a profit of the sum at which the parties valued 65 acres of land, and that the plaintiff, without fault on his part, should lose that sum. Equity will prevent such a result by rescinding the contract, or decreeing a specific performance with compensation in behalf of the injured party, at his election, or by refusing specific performance on the application of the other party. * * *

The details of the decree will be settled at the trial term. Decree for the plaintiff.

STEINMEYER et al. v. SCHROEPPEL.

(Supreme Court of Illinois, 1907. 226 Ill. 9, 80 N. E. 564, 10 L. R. A. [N. S.] 114, 117 Am. St. Rep. 224.)

Action by Henry Steinmeyer and others against John Schroeppel, which was consolidated with a suit by Schroeppel against Henry Steinmeyer and others. From a decree of the Appellate Court, reversing a decree, canceling a contract between the parties, Henry Steinmeyer and others appeal.

CARTWRIGHT, J. * * * The jurisdiction of equity to grant the remedy of cancellation because of a mistake of fact by one party to a contract is well recognized. Mutual consent is requisite to the creation of a contract, and if there is a mistake of fact by one of the parties going to the essence of the contract, no agreement is, in fact, made. * * * If there is apparently a valid contract in writing, but by reason of a mistake of fact by one of the parties, not due to his negligence, the contract is different with respect to the subject-matter or terms from what was intended, equity will give to such party a remedy by cancellation where the parties can be placed in statu quo. The ground for relief is, that by reason of the mistake there was no mutual assent to the terms of the contract. * * * The fact concerning which the mistake was made must be material to the transaction and affect its substance, and the mistake must not result from want of the care and diligence exercised by persons of reasonable prudence under the same circumstances. * * * In this case the mistake was in the addition of the figures set down by the bookkeeper. The price of each item was written correctly, but appellants claimed that one item of about $400 was placed somewhat to the right, and in adding the column the 4 was counted in the 10-column instead of the 100-column. If that was done, it does not account for the difference of $421. But if it did, it would only show a want of ordinary care and attention. If the figures were not exactly in line, the fact could hardly escape notice by a competent business man giving reasonable attention to what he was doing. There was no evidence tending to prove any special circumstances excusing the blunder.

The case of Board of School Com'rs v. Bender, 36 Ind. App. 164, 72 N. E. 154 (decided by the Appellate Court of Indiana, Division No. 2), relied on by appellants, differs from this in various respects, one of which is that Bender was excusable for the mistake. His complaint alleged that he was misinformed by the architect that his bid must be in at or before 4 o'clock, when, in fact, he was allowed until 8 o'clock; that in ignorance of the fact and for want of time he was hurried in submitting his bid, and had no opportunity for verification of his estimate, and that under those circumstances he turned two leaves of his estimate book by mistake and omitted an estimate on a large part of the work. The case involved the question whether the bidder had forfeited a sum deposited as a guaranty that he would enter into a contract, and when notified that his bid was accepted, having discovered his mistake, he informed the architect and immediately gave notice that he would not enter into the contract. By the terms of the bid it was intended that if the bid was accepted a contract would be made, but the bid was not the contract contemplated by the parties and the bidder never did enter into the contract. The court concluded that the minds of the parties never, in fact, met, because the bidder fell into the error without his fault. In the case of Harran v. Foley, 62 Wis. 584, 22 N. W. 837, there was no agreement, for the reason that the minds of the parties never met. The plaintiff claimed to have purchased of the defendant some cattle for $161.50, but the defendant intended to state the price at $261.50. When the defendant was informed that the plaintiff understood the price to be $161.50 he refused to deliver the cattle and tendered back $20 received on the purchase price. No agreement was, in fact, made, since the statement of the price by the seller was clearly a mistake.

A mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellants did not relate to the subject-matter of the contract, its location, identity, or amount, and there was neither belief in the existence of a fact which did not exist or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts, and we think the Appellate Court was right in concluding that the mistake was not of such a character as to entitle the appellants to the relief prayed for.

The judgment of the Appellate Court is affirmed.

BERRY, DEMOVILLE & CO. v. SOWELL.

(Supreme Court of Alabama, 1882. 72 Ala. 14.)

SOMERVILLE, J. It is a settled principle of equity jurisprudence that where, by mistake or fraud, a deed or other written contract fails to express any material term of the real agreement which the parties mutually intended to make, a court of equity will, on clear and satisfactory proof of such mistake or fraud, reform the instrument,

so as to make it conform to the intention of the parties, and embody the actual or true agreement. * * * The aim of the court, in such cases, is to place the parties, as nearly as possible, in the situation they would have occupied but for the mistake. * * * And this jurisdiction to reform or rectify written instruments may be exercised as well against creditors, and purchasers having actual or constructive notice of the mistake, as between the immediate parties themselves. * * * If, however, the parties cannot be placed in statu quo, or if the mistake cannot be rectified without impairing the vested rights of innocent third parties, having no notice of the mistake, the aid of equity will be withheld. * * *

TILLIS v. SMITH.

(Supreme Court of Alabama, 1895. 108 Ala. 264, 19 South. 374.)

HEAD, J. It is not denied that the instrument whose reformation is sought by the bill misdescribes the lands which the appellees agreed to convey to the appellant, and for the purpose of conveying which they went to his place of business, in the town of Geneva. It is admitted that * * * he was possessed of the corresponding subdivisions in section 25, but that he was possessed of the corresponding subdivisions in section 28, constituting his homestead, and upon which the appellant had a first mortgage. In his testimony, Smith says that he had previously mortgaged these lands to appellant, and that he intended to deed the same lands lying in section 28, instead of section 25. There is therefore no room for doubt or controversy that a mistake was made by the scrivener in respect of the description of the lands, and that, in its present form, the instrument does not express the true intention and meaning of the parties. The jurisdiction of a court of equity to correct such mistakes, when admitted or established by the necessary measure of proof, is too well settled, and has been too often successfully invoked in this state, to require a citation of the cases to be found in our reports upon this subject. And at this time it is no longer open to debate that reformation may be had of a conveyance designed to pass the husband's exempt homestead, but which, by mistake, fails to correctly describe it, provided the deed or mortgage is executed and acknowledged by him and wife, in conformity with the statute governing such cases. * * *

HEALY v. HEALY.

(Supreme Court of New Hampshire, 1912. 76 N. H. 504, 85 Atl. 156.)

Bill for specific performance by John F. Healy and others against Michael Healy and others. The bill was dismissed, and plaintiffs bring exceptions. The plaintiffs are sons and daughters of deceased uncles and aunts, and the defendants are two of the surviving uncles and aunts of John M. Harrington, who died in February, 1908, intestate. On the petition of the plaintiffs, one of the cousins was appointed administrator of Harrington's estate, notwithstanding the defendants objected and petitioned for the appointment of another qualified person. The appointment was made upon the erroneous assumption

that the cousins of the decedent, as well as the uncle and aunt, participated in the distribution of the estate. Acting on the same erroneous assumption, all the parties and another uncle subsequently joined in a power of attorney to the administrator, but in his individual capacity, authorizing him to sell the real estate, and erroneously describing the parties to the power as heirs of Harrington. This power was revoked April 6, 1909, by the defendants. At the date of revocation nothing had been done under the power except the employment of an auctioneer whose bill for services, amounting to $10, has been paid by one of the plaintiffs.

The plaintiffs claim that all the parties to the power of attorney assented to the mistaken view of the law upon which the administrator was appointed, and that his power was given to facilitate distribution of the estate among the parties. This the defendants deny, claiming that such was not the purpose of the power. This issue has not been tried, the court having ruled that, even if the defendants signed the power of attorney for that purpose, they are not concluded thereby since they acted under a mistaken apprehension of the law, and that they may now controvert it; that the signing of such power of attorney, under such misapprehension of their legal rights, does not conclude the real owners of the property from now insisting upon a distribution in accordance with the law. The court ordered that the bill be dismissed, and that the nieces and nephews who became parties to the power of attorney should be relieved of any obligation incident thereto. To the order of dismissal the plaintiffs excepted.

PEASLEE, J. The only exception taken is to the order that the bill be dismissed. This order was apparently based upon the ruling that the defendants were entitled to rescind their agreement, and the question relating to rescission is thus presented. * * *

That a rescission may be had for a mutual mistake as to the legal rights of the parties seems to be well settled. In some cases this has been put upon the ground that there was no consideration for the promise, in others that there was a mistake as to the subject-matter, but usually upon the broad principle that justice and equity require such a rule. The dividing line between cases where these considerations should control and those which should be governed by the maxim that ignorance of the law excuses no one has not always been clearly defined. Pomeroy describes it thus: "Whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property, or contract, or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous, if not identical with, a mistake of fact." Of this rule he says: "The number of decisions which support it, and which it explains, is very great." Pom. Eq. Jur. § 849. "Whenever the mistake of law is mutual, and the party jeopardized thereby can be relieved without substantial injustice to the other side, then equity will afford redress, especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him." Freichnecht v. Meyer, 39 N. J. Eq. 551, 561. * * * And in this jurisdiction the fact that

a mistake was one of law has not been considered as necessarily a bar to treating it as a ground for granting relief. * * *

Judged by any of the tests above suggested, these defendants were entitled to withdraw from their agreement. Assuming, as the plaintiffs claim, that the agreement covers a division of the estate with them, there was no consideration for the promise. The subject-matter—their interest in the estate—had no existence. And they are here seeking relief from a court of equity to the end that they may enforce an equitable bargain. It may be conceded, as the plaintiffs argue, that the rule as to rescission does not apply where the agreement was entered into to settle disputed or doubtful claims. The arrangement here made was not in any sense a settlement of a controversy. It was made because all the parties then supposed that the nephews and nieces were entitled to share in the distribution. There was no difference of opinion which was compromised, but simply a mutual mistake as to their rights in the premises. Believing that all were entitled to share in the estate, the parties made this agreement for the convenient disposal of the property. No action has been taken under the agreement, save the payment of $10 by one of the plaintiffs.

By the decree which was entered this is to be returned to him. The contract, if one was made, is still executory. Upon these facts, equity plainly requires the order which was made in the superior court. Exception overruled.

SECTION 3.—FRAUD

There are few topics of the law which more frequently engage the attention of the courts than that of fraud. Fraudulent practices protrude themselves into every kind of human relationships. The courts are called upon to define what constitutes fraud and to prescribe its legal effects.

Fraudulent practices are so infinitely varied that the framing of a definition is next to impossible. Under some circumstances a particular group of acts may constitute fraud, while under different circumstances the same acts would not be regarded as fraudulent. What constitutes fraud depends to a considerable extent upon the nature of the suit and the character of the relief sought. The subject of fraud may become involved in one of three ways: (1) As a defense to an action for breach of contract; (2) as a ground for affirmative relief by way of rescission of a contract or of a transfer of property; and (3) as the ground for affirmative relief for damages in a tort action of deceit. We are interested, primarily, in the subject of fraud as a defense to a contract or as ground for rescinding a contract.

Where fraud is relied upon as a defense to an action for breach of contract, we are concerned with a real contract; but the breach of the defendant is justified by proof that the defendant entered into the contract because of the fraud. Sometimes fraud is of such a character that the courts may fairly say that no contract resulted; but in the majority of instances the party knowingly entered into

the contract, but would not have done so, if the fraud had not been practiced upon him.

Where fraud is relied upon as a ground for seeking affirmative relief against the fraudulent party, the defrauded party is seeking one of two types of relief, and sometimes he seeks both: (1) The defrauded party may desire to have a decree of a court which declares that the particular contract is void; (2) or he may ask that the court grant him a decree which orders the fraudulent party to restore to the defrauded party what he has parted with. Where the defrauded party is asking for a decree that the contract be declared null and void because of fraud, the circumstances will be such that the mere fact that the defrauded party will have a good defense if the fraudulent party should sue him will not be an adequate remedy. Such situations frequently arise in connection with contracts for the sale of land or of deeds to land. Again, the defrauded party may have already parted with the consideration, in which case it is to his interest to rescind the contract; that is, to treat the contract as if it had never existed and ask for a return of the consideration.

Where the defrauded party brings a tort action against the fraudulent party, the contract is only indirectly involved. The gist of the action is the wrong done to the plaintiff, and for this wrong the plaintiff is asking for damages. Generally speaking, a stronger case of fraud must be made out in the tort action of fraud and deceit than is necessary where fraud is relied upon as a defense, or as a ground for a decree declaring the contract void or for a return of the consideration.

Fraud has five elements: (1) There must be a false representation of material facts. (2) There must be knowledge, by the party making the assertion, that the facts stated were untrue. (3) The party making the false statement must have had the intention to defraud; that is, he must have intended that the party to whom the untrue statements were made should act upon them as true. (4) The party to whom the false statements were made must have been ignorant of their falsity; that is, he must have relied upon them as true. (5) The party to whom the statements were made must have sustained damage by reason of his reliance upon the untrue statements.

At least these five elements are necessary in order to maintain the tort action for fraud and deceit. Where fraud is relied upon as a defense to a contract or as a ground for rescission, it is not necessary to prove that the defrauding party intended to defraud. The contract may be rescinded, or the defense of fraud will be successful, if it be proved that there were misrepresentations of material facts, although such misrepresentations were made innocently.

It is apparent that there may be every manner of controversy on the question whether a particular group of circumstances fulfills all of the requisites of fraud.

WILSON v. HUNDLEY.

(Supreme Court of Appeals of Virginia, 1898. 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837.)

Action by William Wilson, trustee of the Rivermont Company, for the benefit of creditors, against George J. Hundley, to recover unpaid stock subscriptions. Defendant was induced to subscribe for stock in the corporation on the fraudulent representation that a certain syndicate had subscribed for a large amount of the stock, and, when informed that the greater part of such subscription was merely optional, he affirmed the contract.

RIELY, J. * * * A contract induced by fraud is not void, but voidable at the option of the party injured by the fraud. Upon the discovery of the fraud, he has, as a general rule, the choice of two remedies: He may elect to rescind the contract, if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back the consideration he has paid or given, or, if he has not paid or given anything, repudiate the contract, and rely, when sued, upon the fraud as a complete defense; or he may elect to retain what he has received under the contract, and bring an action to recover damages for the injury he has sustained from the deceit. By adopting the latter course, he, in effect, affirms the contract, but not as made in good faith. He consents to be bound by its provisions, but does not thereby release or waive his claim for damages arising from the fraud collateral to the agreement. * * *

If, however, the party who has been defrauded elect, on the discovery of the fraud, to affirm the contract, his election is final and conclusive. He has but one election to rescind, and, having once elected to affirm the contract, he cannot thereafter disaffirm it, but must abide by the decision he has made. * * *

In Ormes v. Beadel (1861) 30 Law J. Eq. 1, Lord Campbell said: "No case can be found to establish the doctrine that if a voidable contract is voluntarily acted upon, with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he may still avoid it, when, after abiding the event, it has turned out to his disadvantage." * * *

[Judgment for defendant reversed.]

DAVIS v. BUTLER.

(Supreme Court of California, 1908. 154 Cal. 623, 98 Pac. 1047.)

Action by H. E. Davis against T. C. Butler. From an order denying a motion for a new trial, defendant appeals.

SLOSS, J. On November 7, 1905, the defendant sold to the plaintiff 250 shares of the capital stock of the Salinas Valley Bottling Company, a corporation. In January, 1906, the plaintiff, claiming that he had been induced to buy the stock by means of fraudulent misrepresentations made to him by the defendant, undertook to rescind the agreement of purchase and sale. The defendant refusing to restore the money and property received as the purchase price, the plaintiff brought this action, praying a decree that the agreement be rescinded, and that defendant be required to transfer to plaintiff the property received as the

purchase price of the stock upon plaintiff retransferring the 250 shares of stock. The plaintiff had judgment in the court below. The defendant now appeals from an order denying his motion for a new trial.

The Salinas Valley Bottling Company was engaged in the business of bottling and selling beer which it purchased in bulk. Four hundred and thirty shares of its stock, of the par value of $10 each, had been issued. The misrepresentations alleged by plaintiff to have been made by defendant had reference to three matters. The complaint averred that the defendant had stated that the indebtedness of the corporation, over and above the money it then had in bank and solvent credits due to it by its patrons, amounted to the sum of $1,530, and no more, whereas in fact such indebtedness amounted to the sum of $2,963.64. He had represented that the corporation was and had been marketing and selling two car loads of beer per month, whereas in fact it had not been and was not selling more than one car load per month. The third representation relied upon was that the corporation received a net profit of $6.15 per barrel on the beer bottled and marketed by it, when as a matter of fact said net profit did not exceed $3.35 per barrel. * * *

A single material misstatement, knowingly made, with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations. It will hardly be contended that a representation that the indebtedness of the corporation was only $1,530, when in fact it was $2,800, was not material. There are many corporations having assets and conducting a business of such magnitude that a difference, one way or the other, of a few thousand dollars of indebtedness would not appreciably affect the value of their stock. But the Salinas Valley Bottling Company had a total outstanding issue of only 430 shares, of the par value of $10 each. The sale to plaintiff embraced 250 shares at par. The difference between $1,530 and $2,800, if apportioned among the outstanding shares of stock, amounts to almost $3 for each of the 430 shares. Such a discrepancy, having a close relation to the value of the stock, would certainly be material in a transaction based on a selling price of $10 per share. * * *

The rule that a party may not complain of misrepresentations regarding matters which he has investigated, or, having the opportunity so to do, has begun to investigate for himself * * * has no application here. While the plaintiff, before purchasing, looked over the books of the corporation, the court finds * * * that defendant stated to plaintiff that neither he nor the corporation kept any books of account showing the corporate indebtedness. The plaintiff was fully justified in relying upon defendant's statements as to such indebtedness. * * * It is not essential to the right to rescind a contract for the purchase of property that the purchaser should be able to show that the property purchased was worth less than he paid for it. It is enough that he was induced, by false representations, to buy property which would, if the representations had been true, have been worth more than it actually was worth. * * *

The sale to plaintiff was made on November 7, 1905. The notice of rescission was given on January 11, 1906, and the complaint filed on January 18, 1906. The court found that plaintiff did not delay an unreasonable time in electing to rescind the contract after discovery of

the falsity of the defendant's representations. This finding cannot be said to be contrary to the evidence. * * *

The order is affirmed.

MILLER v. SUTLIFF et al.

(Supreme Court of Illinois, 1909. 241 Ill. 521, 89 N. E. 651, 24 L. R. A. [N. S.] 735.)

Suit by James B. Miller against Milton Sutliff and others. From a decree dismissing the bill for want of equity, on sustaining a demurrer thereto, complainant appeals.

CARTWRIGHT, J. James B. Miller filed his bill of complaint in the circuit court of Peoria county against Milton Sutliff, Dwight R. Chapman, Moses J. Richards and their unknown heirs, and Augustus E. Scott, praying the court to set aside a deed made by the complainant to Sutliff, Chapman, and Richards of the undivided one-half of the coal and mineral underlying the lands of the complainant, and a deed of the same made to said Augustus E. Scott, and to declare the same void and a cloud upon complainant's title. * * * The material facts alleged in the bill and admitted by the demurrer to be true are as follows:

On October 1, 1869, the complainant was the owner and in possession of 900 acres of land in Peoria county, under which there were deposits of coal. * * * On that day the complainant, with his wife, executed a deed to Milton Sutliff, Dwight R. Chapman, and Moses J. Richards, three of the defendants, conveying the undivided one-half of all the coal and other minerals under said lands. The deed recited a consideration of $400, and that it was made in pursuance of a contract subsisting by and between the complainant and Chapman and Phillips and by them performed. There was, in fact no consideration paid, but the complainant was induced to make the deed by representations and promises of said defendants made first at a meeting at the farm of one of his neighbors, and afterward at a meeting held at a public school house, and finally when the conveyance was made. The representations were that said defendants were the owners of large foundries, smelters, coke ovens, and iron mills near Youngstown, Ohio; that they were men of large means and resources; that the supply of coal such as was used in their industries had practically become exhausted at their present location, necessitating a removal of the industries; and that they would remove the industries to complainant's locality if they could find and obtain in sufficient quantities a suitable kind of coal. These representations were first made to secure the privilege of boring and prospecting for coal, and, after prospecting and making borings, said defendants stated that they had found suitable coal in sufficient quantities, and, if the complainant and his neighbors would convey to them the undivided one-half of the coal and other minerals underlying their lands, they would immediately remove their plants and industries to the locality, and would employ a great number of men and build a railroad giving facilities for transportation. They represented to the complainant that, if he would make the conveyance, they would locate one of their plants upon his premises and the remainder in the vicinity, and would proceed at once toward opening up mines on his land. * * * The complainant relied upon the representations and executed the deed, * * * but said defendants

did not perform any of their agreements. * * * The complainant has been in possession of the premises ever since, and neither said defendants, nor any one claiming under them, has ever been in possession of the subject-matter of the conveyance. * * *

In order to constitute fraud in law, a representation must be on affirmance of a fact, and not a mere promise or matter of intention. While a statement of a matter in the future, if affirmed as a fact, may amount to a fraudulent misrepresentation, it must amount to an assertion of a fact, and not an agreement to do something in the future. * * * If a promise is made to do something in the future and at the time it is not intended to perform the promise, that fact does not constitute a fraud in the law. * * * If an intention not to perform constituted fraud, every transaction might be avoided where the facts justified an inference that a party did not intend to pay the consideration or keep his agreement. A mere breach of a contract does not amount to a fraud, and neither a knowledge of inability to perform, nor an intention not to do so, would make the transaction fraudulent. The bill in this case states no representation as to any past or existing fact except that the kind of coal used in the plant near Youngstown, Ohio, had become exhausted, necessitating a removal of the plant to a locality where such coal could be found, and that the defendants had a steamer in the Ohio river loaded with iron and machinery for removal, and there is no averment that either of these representations was false. The other averments of the bill amount simply to charges that the defendants to whom the deed was made failed to perform their promises, which constituted the sole consideration for the deed. The averments of the bill are not sufficient to charge fraud in obtaining the deed. * * *

It is not to be inferred that the representations of the three defendants as to what they would do, and which constituted the sole consideration for the conveyance, gave rise to no right in the complainant or that the right would not be enforced or relief granted by a court of equity. * * * But the remedy that might be given is not the one sought by this bill. The court correctly decided that the facts alleged were not sufficient to establish the charge of fraud in obtaining the conveyance or to justify declaring the deed void and removing it as a cloud upon complainant's title. The decree is affirmed.

GLOBE MUTUAL LIFE INS. ASS'N v. WAGNER.

(Supreme Court of Illinois, 1900. 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169.)

Appellee, Dora Wagner, recovered a judgment of $250 in a suit in assumpsit in the superior court of Cook county against appellant, the Globe Mutual Life Insurance Association of Chicago, on a policy of insurance issued to her on the life of her son Richard Wagner. The association appealed to the appellate court, where the judgment of the superior court was affirmed, and now prosecutes this further appeal.

WILKIN, J. The chief ground urged by appellant for a reversal of the judgment of the appellate court is the falsity of the answer to one of the questions appearing in the medical examination of the insured. On the back of the application made by appellee, in what purports to be the medical examination of the insured, this question and

answer appear: "Q. How many brothers dead? Ans. None." * * * It appears from the evidence that a brother of the insured died in London, England, more than four years prior to the date of the application for insurance in this case, but there is no evidence tending to show that the insured ever knew of his brother's death. Appellant asserts, however, that, whether he knew of it or not, the statement that none of his brothers was dead is a warranty, and, being untrue, avoids the policy. Appellee contends that the statement, though false, is not a warranty, but a mere representation, which, unless material, would not avoid the policy.

In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured or the appellee took a life policy with the distinct understanding that it should be void if any statements made in the medical examination should be false, whether the insured was conscious of the falsity thereof or not. * * * Whether or not the deceased knew of the death of his brother at the time of the application for insurance was a question for the jury, and no evidence of such knowledge appears in the record. * * * We are satisfied the court below committed no reversible error, and the judgment of that court will be affirmed.

CROMPTON v. BEEDLE.

(Supreme Court of Vermont. 1910. 83 Vt. 287, 75 Atl. 331, 30 L. R. A. [N. S.] 748, Ann. Cas. 1912A, 399.)

Bill by Cora E. Crompton against Albert H. Beedle and another, praying for a reconveyance of land deeded to defendants. Complainant tendered defendants the purchase price.

HASELTON, J. The oratrix in this cause, a resident of Worcester, Mass., sets out in her bill as amended that, at a time named she was the owner in fee simple of a farm in Randolph in this state; that she purchased the farm for the use of a relative, and had herself never been in Randolph, and had never seen the farm and was ignorant of its true value; that there was and is an undeveloped and valuable granite quarry in and under the pasture of the farm, but that at the time named she had no knowledge of such quarry. She further sets out that at the time in question, which was October 22, 1908, the defendant Beedle, called upon her in Worcester, and stated that he desired to buy the pasture mentioned, and that she told him that she did not know the value of the pasture apart from the farm; that thereupon the defendant Beedle told her that the pasture was poor and of comparatively little value; that it adjoined some land that belonged to him, and that the only way of access to the pasture was over his land, and that it annoyed him and his family to have his land gone over for such access, and that that was the only reason why he desired to purchase the pasture. * * * The oratrix further alleges that the defendants knew of the existence of the granite quarry, and knew that she was ignorant of its existence, that the representations made as above stated were false, and were known to the defendants to be false, and were fraudulently made for the purpose of inducing her to sell the farm to the defendants at a price much less than its true value, and for the purpose of inducing her to forbear inquiry as to the existence and value of the granite quarry,

and as to the value of the farm as affected thereby; that the pasture was not, as represented, of little value, $400, but $15,000. * * *

In an early Pennsylvania case cited by the defendants it is said that "concealment on the part of the vendee is a novel objection." But the question presented has, in its various aspects, been discussed for many centuries. Cicero puts the case of one who buys for a trifle gold, which the seller, in his ignorance, supposed to be brass, and he moots similar questions regarding sales of personal property and of real estate as well. But we pass over the discussions of the ethical writers and the civilians, discussions which are in some cases luminous and in others obscure. It has long been settled in common-law jurisdictions that, in general, the mere failure of a buyer to disclose something extrinsic or intrinsic to the thing bought, known to him and not known to the seller, is not in legal sense fraud. * * * In Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214, it appeared that in February, 1815, the defendant got, through private sources, news of our Treaty of Peace with England, of which the plaintiffs were ignorant, and that, without disclosing the news, the defendant bought of the plaintiffs 111 hogsheads of tobacco, the price of which was greatly enhanced by news of the peace. It appeared that the plaintiffs inquired, in the course of the transaction, if there was any news calculated to enhance the value of tobacco, and that no reply was made to their inquiry. In the district court it was held, as matter of law, that there could be no recovery. Chief Justice Marshall in delivering the opinion of the Supreme Court said: "The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits where the means of intelligence are equally accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other." In accordance with these views the court held that in the circumstances disclosed it was a question of fact whether any imposition was practiced by the vendee upon the vendor, and so the judgment was reversed and the cause remanded. * * *

In a case decided a few years later than Laidlaw v. Organ, Lord Eldon, in a carefully considered case, gave expression to the law here applicable. He said: "If an estate is offered for sale, and I treat for it knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate." Turner v. Harvey, Jacob, 169, 178. In Walters v. Morgan, 3 De G. F. & J. 718, Lord Chancellor Campbell expressed his full concurrence in the doctrine of Turner v. Harvey, and said that, not only a single word, but "a nod or a wink or a shake of the head, or a smile from the purchaser, might defeat the application of the principle that mere reticence on the part of a purchaser does not in law amount to fraud." * * * In Mountain v. Day, 91 Minn. 249, 97 N. W. 883, the syllabus, by the court, is this: "An action will lie for fraudulent representations made by the prospective purchaser of land as to its value and condition; the land being at a distance from

the place of purchase, and the vendor being ignorant as to its condition and value, and relying upon the truthfulness of such representations." * * *

Unfairness and fraud may be collected from a variety of circumstances, and it is ordinarily enough to establish fraud that a vendee has actively attempted to ensnare, and has in fact ensnared, the vendor into the making of an unconscionable contract. Where concealment of an essential thing is effected by an industrious course of misleading and deceptive talk or conduct, there is fraud against which equity will relieve. The law distinguishes between passive concealment and active concealment. Where one has full information, and represents that he has, if he discloses a part of his information only, and by words or conduct leads the one with whom he contracts to believe that he has made a full disclosure, and does this with intent to deceive and overreach and to prevent investigation, he is guilty of fraud against which equity will relieve, if his words and conduct in consequence of reliance upon them bring about the result which he desires. The jurisdiction of courts of equity to relieve against active and effective fraud is so essential to the administration of justice therein that such courts, often indeed, to use the language of Chief Justice Crew, as reported by Sir William Jones, will "take hold of a twig or twine thread to uphold it." We have in this state several cases to the effect that, even where there is no confidential relation, one party to a sale may, without direct misrepresentation, be guilty of fraud by means of words or acts calculated and intended to produce a false impression, and which do in fact deceive and induce the sale. * * *

The result is that the decree sustaining the demurrer and adjudging the bill insufficient is reversed, and the case is remanded.

SECTION 4.—DURESS

Duress consists in compelling action through fear, as, for example, where A. says to B., "Sign this note, or I will shoot you." Duress implies coercion, the will of the actor being overcome or directed, not because of mistake or fraud or persuasion, but through fear of consequences of not acting as directed. Commonly the threats constituting duress are of physical injury to the person threatened, or of physical injury to some other person, or of injury to or deprivation of the property of the person threatened, or of instituting a criminal prosecution against the person threatened, or some other person. The nature and legal consequences of duress are illustrated in the following cases.

WILLIAMSON-HALSELL-FRAZIER CO. v. ACKERMAN et al.

(Supreme Court of Kansas, 1908. 77 Kan. 502, 94 Pac. 807, 20 L. R. A. [N. S.] 484.)

Action on three notes and mortgage given by defendant J. J. Ackerman and other defendants to secure the payment of a defalcation of Ackerman's son. Halsell, a representative of the plaintiff company, came to defendant J. J. Ackerman and informed him that his son John had embezzled about $4,000 of the company's money, that he

(Halsell) had in his pocket a warrant for John's arrest for embezzlement, and that there was a deputy sheriff waiting in an adjoining room to serve the warrant, and unless the notes and mortgages were signed the warrant would be served, and John would be convicted and sent to the penitentiary. Judgment below for defendants, and plaintiff brings error.

JOHNSTON, C. J. * * * The action was not one to determine the guilt or innocence of John; nor was the matter of his actual guilt an essential feature of the defense of duress. The point for decision was whether the threats of arrest and prosecution of John put the father in fear, and thus overcame his will, and rendered him incompetent to contract. If there was no free will in the execution of the notes and mortgage, there is no contract, nor any binding obligation. Under the modern theory, duress is to be tested, not by the nature of the acts or threats, but rather by the state of mind of the victim induced by such acts and threats. In Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, there is a full discussion of the subject and of the development of the law from the ancient doctrine that duress should be tested by the means used to overcome the person threatened to the later and better one of the condition of the mind induced by the threats. It was there said that: "The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and, if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is: Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained."

Following the same theory, neither the legality of the threatened arrest and prosecution, nor the guilt or innocence of John, was material to the determination of whether there was duress. The conduct of John, whatever it may have been, was no excuse or justification for intimidating and coercing the father to pay John's debt, or to give a mortgage on his home to secure the payment of such debt, or to relieve him from any liability. If it is assumed that John misappropriated the money of the plaintiff, and was therefore indebted to it for a large sum of money, it nevertheless gave its representatives no right to use, or threaten the use of, the criminal law to make the father pay or secure the debt. It is not an appropriate method for enforcing the payment of the debt by the debtor himself, much less to compel the securing of it by one who was in no sense liable for its payment. * * *

In Thompson v. Niggley, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803, the court repudiated the doctrine that duress could not be pred-

icated upon a threatened arrest and prosecution for an offense of which the party was in fact guilty, saying: "We are not inclined to encourage a resort to such pressure as was used in this instance to compel the settlement of private demands." * * *

In a very early case the Supreme Court of New Hampshire, in considering what amounted to duress, said: "Where there is an arrest for improper purposes, without just cause, or an arrest for a just cause, but without lawful authority, or an arrest for a just cause, and under lawful authority, for an improper purpose, and the person arrested pays money for his enlargement, he may be considered as having paid the money by duress of imprisonment, and may recover it back in an action for money had and received." Richardson v. Duncan, 3 N. H. 508. The Supreme Court of Alabama in a recent case ruled that threats of unlawful imprisonment were not necessary to constitute duress, and that, if there was a liability for arrest and imprisonment, and such liability was used to overcome the will and compel the making of a contract, which would otherwise not have been made, it would amount to duress. * * *

The important consideration in cases like this one is not whether there was ground for the arrest or imprisonment threatened, but it is rather whether the free will of the party making the contract was constrained by the threats of the other. * * * There is no lack of testimony to show threats of the arrest and prosecution of John, nor that the notes and mortgage were procured through the fear excited by the threats. Joseph J. Ackerman was subject to duress because of the threats directed against a member of his family as much as if they had been directed against himself. * * *

Finding no error in the record, the judgment will be affirmed.

FOUNTAIN v. BIGHAM.

(Supreme Court of Pennsylvania. 1912. 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913D, 1185.)

Action of assumpsit on a bond by Fountain against Mrs. Bigham. From a judgment for plaintiff, defendant appeals.

Dunn, son-in-law of Mrs. Bigham, defendant, forged the indorsement of Fountain, plaintiff, on a check, indorsed his own name, and deposited the check and received credit for the amount in his bank account. Dunn was arrested on two informations by Fountain, charging him with obtaining money under false pretenses. Mrs. Bigham, after the arrest of Dunn, signed as surety a bond with warrant of attorney to confess judgment, conditioned for the payment of $2,500 in one day after date. Dunn was later acquitted. Judgment was entered on the bond next day. After two installments of interest had been paid on the judgment and default as to the third installment, execution was issued. Mrs. Bigham presented her petition to the court below and obtained a rule to stay the writ and opened up the judgment. Among the defenses set up was the defense that the bond was executed under the influence of threats and coercion.

MESTREZAT, J. * * * That a contract obtained by duress or acts of coercion or intimidation may be invalidated is well settled. * * * But, where one has a just claim against another for money

obtained by the commission of a crime, it is not unlawful for the creditor to threaten to prosecute if the claim is not paid; and a contract cannot be avoided which the debtor enters into to secure payment of the claim, unless the creditor attempts by such threat to accomplish an unlawful purpose. In other words, a threat of lawful imprisonment is not duress, unless it is made for an unlawful purpose, such, for instance, as compelling the satisfaction of a debt by payment in money, or by the execution of an obligation to secure it. If, in connection with the threat, it appears that the creditor declared he would prosecute if the claim was not paid, with other evidence showing that his intention was to use the criminal process to collect the debt, or to accomplish any unlawful purpose, a jury might well find that such was the purpose of the creditor in making the threat; and that therefore it was duress. * * *

It is, therefore, immaterial whether Fountain, when he made the alleged threat, knew or did not know that he had a criminal case against Dunn, as he could not lawfully compel the execution of the bond by threats to prosecute, made for such a purpose. In this case, however, Dunn is not contesting the validity of the bond; but the present appeal was taken by Mrs. Bigham, his mother-in-law, the surety on the bond. Can she avoid the obligation on the ground of duress exercised on Dunn? The general rule undoubtedly is that the defense of duress is open only to the party upon whom it is imposed, and that a third party, who has become surety for the payment of the claim, cannot avail himself of the plea, unless he signed the obligation without knowledge of the duress.

There are certain exceptions to the rule as well established as the rule itself. These exceptions include husband and wife and parent and child, and either may avoid his contract made to relieve the other from duress. The exceptions have been extended to grandmother and grandson, * * * aunt and nephew, * * * sister and brother, * * * father-in-law and son-in-law, * * * and brother and brother. * * * The reason for avoiding a contract on the ground of duress, as appears above, is that the condition of mind of the party upon whom the duress is imposed is such as to deprive him of the exercise of his free will. Whatever influence produces such a condition of mind will invalidate a contract executed while the influence prevails. The relations between parent and child and husband and wife are so close and tender that the law recognizes that threats to imprison one will have substantially the same effect on the mind of the other; and what will deprive the one of the free exercise of his will or judgment will have a like effect on the other. The reason of the rule will extend it to the case of a mother-in-law and son-in-law, where the latter is living amicably with his wife, and the two families are on the usual terms of intimacy and friendship. * * *

We think the learned court below should have submitted to the jury, with proper instructions, whether, owing to the relationship of the parties and the circumstances disclosed by the testimony, the bond was Mrs. Bigham's voluntary act, or was executed under threats of prosecution of her son-in-law, which deprived her of the exercise of her free will. * * * The judgment is reversed, with a venire de novo.

SECTION 5.—UNDUE INFLUENCE

DU BOSE v. KELL.

(Supreme Court of South Carolina, 1911. 90 S. C. 196, 71 S. E. 371.)

Action to set aside a deed.

MOORE, Special Judge (trial court). * * * The principles of law applicable to the question of undue influence are well settled, and may be thus stated in general terms: Where a deed is procured by undue influence exerted upon the grantor, it will be set aside by a court of equity upon a proper and timely application on the part of the person injured or aggrieved thereby; but, in order to avoid the deed upon this ground, there must be shown such an influence exerted upon the grantor as to overbear her will and to make the act of execution not the carrying out of a real purpose or intention of the grantor, but the mere mechanical performance by her of the wish and design of some other person. Neither fair argument, nor mere suggestion, nor even persuasion, unaccompanied by other circumstances to show a substitution of the will or purpose of some other person for that of the grantor, will amount to undue influence. In order to make it undue, it must appear that the influence exerted was such as to overcome or destroy the free will of the grantor and to make the deed as executed the expression not of his purpose, but that of some other person. * * * Put "the line between due and undue influence, when drawn, must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude and of benevolence, as well as the claims of kindred, and when not hindered by personal incapacity, or particular regulations, to dispose of his own property according to his own free choice." Wallace v. Harris, 32 Mich. 380.

It is further an established principle of equity, well founded in right reason, that the acts and contracts of persons who are of weak understanding and who are thereby liable to imposition, and also all contracts or gifts between persons standing in confidential relations towards each other, will be closely scrutinized by the courts to discover whether or not any undue influence was exerted, or any confidence was betrayed to the prejudice of the weaker party or of the one reposing such trust and confidence. * * *

Undue influence may be said to consist in any influence which is so far operative as to destroy free agency, so as to compel the person doing the act in question to do the same against his will. It is not material how such control was exerted, whether by physical force, threats, importunities, or any other species of mental or physical coercion, provided only it was so exerted as to destroy free agency and to make the act done not a true expression of the will of the person doing it, but in truth a carrying out of the purposes of some other person against that will. But the undue influence is to be proved and not to be presumed, unless the relation in which the parties stood with reference to each other is such as to raise a presumption of its existence. Yet, even where such a presumption arises, it is rebutted by evidence showing that everything between the parties was fair, open, voluntary, and well understood. * * *

Applying the principles stated to the evidence in the case at bar, we find that the grantor in the deed here under consideration was a feeble old lady, past her four-score years of life, her mind and memory to some extent weakened and impaired by the troubles and afflictions of her previous life, and by the burdens of the years resting upon her, entertaining at times delusive momentary beliefs as to the continuing existence in her life of her long-dead parents and temporary beliefs at variance with facts as to then existing weather conditions and as to locality of places. It appears that she had none then standing towards her in the relation of her kindred or dear friends, excepting only the grantee in this deed, who was not her blood, but had long been holding the place of a devoted son, having laid aside a promising career in life in order to bestow upon her the skilled attention which his knowledge as a physician enabled him to give. It is shown by the evidence that the grantor was weak in body and doubtless to some extent enfeebled in her general mental powers, but that at the very moment of the execution of the deed she was not laboring under any delusion of mind, and was in fact engaged in the carrying out of a long-cherished purpose to dispose of her property as to insure its devolution upon her grantee. It is true that at or about the time of the signing of the paper in question she expressed sentiments of confidence in the belief that the grantee would continue to care for her during the remainder of her life, and it cannot be doubted that she executed the deed in the faith that he would not permit her to suffer by reason of her act. If he had failed to give her support, aid, and maintenance, the circumstances and relations of the parties were such as would well have warranted a court of equity in imposing upon the grantee the duty of providing for her support and comfort during the remainder of her life, at her instance and upon her application. But it does not appear that there was any abuse of that trust and confidence nor is there any evidence of a failure by him to discharge any duty in that particular.

The testimony of the subscribing witnesses and of those present at the time of the signing by the donor is unanimous to the effect that she was then compos mentis; that she appreciated and understood the force and effect of her act; that she was not hoodwinked or deceived as to the nature of the instrument; and that she acted entirely of her own volition, although upon the suggestion of the grantee in the execution of the instrument. The voluminous mass of the evidence in this case has been searched in vain to discover any testimony of undue influence exerted by the grantee or by any other person, either before or at the time of the execution of this deed, in order to induce the making thereof. There is not the slightest evidence of even argument or persuasion employed to that end, and the testimony tends to show, and in my opinion does establish, the fact that the grantor therein had long entertained a fixed purpose to bestow the lands in question upon the grantee as ultimate owner.

If it be the fact, as I think it is, that the relation of the parties to this transaction and the mental weakness and dependence of the grantor upon the grantee were such as to impose upon those claiming under the latter the burden of showing that no fraud was practiced nor undue influence exerted by or on behalf of the beneficiary under this gift, that there was no suppressio veri nor suggestio falsi operating as an inducement thereto, it is my opinion, after a careful examination

of the entire record, that this has been affirmatively shown, and that it appears from the evidence that the conveyance was the voluntary act and deed of Susan C. Kell, was willingly executed by her in pursuance of a long-cherished intention, was not induced by any suppression or misrepresentation of facts, and that there was no fraud upon the part of the grantee thereof nor abuse of the confidential relations existing between the said grantor and grantee.

The evidence shows that the act of signing was performed not only understandingly and without reluctance, but also with a desire and purpose on the part of the donor to dispose of her property to the donee named in the deed and for his own ultimate benefit. When the effect of her act was mentioned to her subsequently to such execution of the deed, she expressed satisfaction with her act in so disposing of her property and a continued understanding of the purpose and effect of what she had done. She lived for nearly two months thereafter, and so far as the evidence discloses, although the fact of her having so disposed of practically her entire property was mentioned in her presence and in the absence of the donee, she never at any time, so far as appears, gave expression to any other feeling than that of satisfaction with the deed as effectuating her voluntary purpose and intention. If the transaction had been regarded at the time by the grantor as a business transaction, whereby she was conveying the property to the grantee in consideration of past services alone, or if there were evidence going to show that she viewed it in the light of a commercial transaction, then the question sought to be made as to the adequacy of the consideration mentioned in the deed would be a matter of serious importance. But as it was evidently understood by her as being a deed of gift, with but slight, if any, reference to pecuniary obligations existing between the parties, the transaction is to be considered as purely a matter of gift, and not of bargain and sale. So considering it, I am of the opinion that the validity of this deed must be sustained, and it is accordingly so adjudged. * * *

GARY, J. * * * We are satisfied with the circuit judge's findings of fact, and the reasons assigned by him for his conclusions of law. Affirmed.

CHAPTER VII

ILLEGALITY

Section
1. Introduction.
2. Contracts in Restraint of Trade.
3. Contracts Limiting the Liability of Bailees and Other Persons.
4. Gambling Contracts.
5. Other Illustrations of Illegal Contracts.
6. Effect of Illegality.
7. Sunday Contracts.

SECTION 1.—INTRODUCTION

Society, through its legislative and judicial organization, adopts various methods in its endeavor to repress wrong and in its attempt to compel the observance of high principles of personal and business ethics. Sometimes an act may be such an atrocious invasion of personal or property rights that it calls for the imposition of the most severe penalties. In such a case, the law regards the act as criminal, and, in addition to the liability to respond in damages to the person primarily injured thereby, the law prescribes the punishment of the offender by fine or imprisonment. The commission of a tort imposes upon the wrongdoer the duty of making restitution and of paying damages to the person wronged. A breach of contract creates a duty to respond in damages to the injured party and also operates as an excuse to the injured party for his non-performance. The wrong attempted by two or more persons in entering into an illegal contract is sufficiently different from a tort or breach of contract as to call for a somewhat special treatment. Generally it cannot be treated as a tort, for there may have been no invasion of the personal or property rights of another. Performance of the illegal contract may, of course, result in the commission of a tort, or of a crime, or both, but the execution of the contract itself will not usually constitute a tort or a crime.

The problem that is most frequently presented concerns the right of one of the parties to the illegal contract to hold the other liable for his breach, or to recover what he has parted with in performance of the illegal contract; that is, generally speaking, there can be no recovery for breach of an illegal contract, nor may one of the parties thereto, who has performed, compel restitution of the consideration with which he has parted. However the action may arise, the defendant usually wins, not because of any superior virtue in himself, but because of the general policy of the law not to enforce illegal contracts, nor to attempt to undo what has been done under them. The loss, if any, falls where the acts of the parties themselves place it. Of course, this policy does not prevent the making of illegal contracts. Still the knowledge that the aid of the court cannot be invoked to aid a party who has sustained a loss arising

out of the breach of an illegal contract has some tendency to prevent the formation of such contracts. For the more serious kinds of illegal contracts, the law, in addition to its withdrawal of all legal remedies, makes the act of entering into the contract or the performance of it, a criminal offense punishable by fine or imprisonment.

The above comment concerns the legal effect of illegal contracts. The question remains: What kinds of contracts are illegal? Transactions of this character are of so varied a nature that a definition is scarcely possible. In the last analysis, the question depends upon the probable effect of the contract upon society. If it be one which is directed against the maintenance of public authority, against public morals, or against the economic welfare of society, the contract may be treated as illegal because of its harmful effects. The circumstances under which a contract will be regarded as illegal, and the legal effects thereof, are illustrated in the following cases.

SECTION 2.—CONTRACTS IN RESTRAINT OF TRADE

UNITED STATES v. ADDYSTONE PIPE & STEEL CO. et al.

(United States Circuit Court of Appeals, Sixth Circuit, 1898. 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122.)

This was a proceeding in equity, begun by petition filed by the Attorney General, on behalf of the United States, against six corporations engaged in the manufacture of cast-iron pipe, charging them with a combination and conspiracy in unlawful restraint of interstate commerce in such pipe, in violation of the so-called "Anti-Trust Law," passed by Congress July 2, 1890. The petition prayed that all pipe sold and transported from one state to another, under the combination and conspiracy described therein, be forfeited to the petitioner, and be seized and confiscated in the manner provided by law, and that a decree be entered dissolving the unlawful conspiracy of defendants, and perpetually enjoining them from operating under the same, and from selling said cast-iron pipe in accordance therewith to be transported from one state into another. Judge Clark, who presided in the Circuit Court, dismissed the petition on the merits.

TAFT, Circuit Judge. The first section of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," passed July 2, 1890, 26 Stat. 209 (U. S. Comp. St. §§ 8820–8823, 8827–8830), declares illegal "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The second section makes it a misdemeanor for any person to monopolize, or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. * * *

It is certain that, if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of trade, it is within the inhibition of the statute if the trade it restrains was interstate. Contracts that were in unreasonable

restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. * * * The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints. * * *

From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. * * *

The reasons were stated * * * in Alger v. Thacher, 19 Pick. (Mass.) 51, 54, 31 Am. Dec. 119, in which the Supreme Judicial Court of Massachusetts said: "The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by the law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

The changed conditions under which men have ceased to be so entirely dependent for a livelihood on pursuing one trade, have rendered the first and second considerations stated above less important to the community than they were in the seventeenth and eighteenth centuries, but the disposition to use every means to reduce competition and create monopolies has grown so much of late that the fourth and fifth considerations mentioned in Alger v. Thacher have certainly lost nothing in weight in the present day, if we may judge from the statute here under consideration and similar legislation by the states. * * *

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his

time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business. * * *

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. * * *

Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose have been somewhat modified by modern authorities. * * * Recently the limitation that the restraint could not be general or unlimited as to space has been modified in some cases by holding that, if the protection necessary to the covenantee reasonably requires a covenant unrestricted as to space, it will be upheld as valid. * * *

We have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go as far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States, and significantly called by the associates "pay territory." Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the pay territory was 170,500 tons. Of this, 45,000 tons was the capacity of

mills in Texas, Colorado, and Oregon, so far removed from that part of the pay territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in pay territory and outside of the combination, one was at Columbus, Ohio, two in Northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the pay territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga, and South Pittsburgh, and Anniston, and Bessemer, were grouped much nearer to the center of the pay territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to deliver pipe in pay territory, the defendants, by controlling two-thirds of the output in pay territory, were practically able to fix prices. The competition of the Ohio and Michigan mills, of course, somewhat affected their power in this respect in the northern part of the pay territory; but, the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limit already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices, and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true; but, within that limit, they could fix prices as they chose. The most cogent evidence that they had this power is the fact, everywhere apparent in the record, that they exercised it. * * * The defendants were, by their combination, therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been, if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by their committee, and by allowing the highest bidder at the secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. * * *

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts

with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants, and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed $15 a ton. It could have been delivered at Atlanta at $17 to $18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was $24.25. The same thing was true all through pay territory to a greater or less degree, and especially at "reserved cities."

Another aspect of this contract of association brings it within the term used in the statute, "a conspiracy in restraint of trade." A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means. In the answer of the defendants, it is averred that the chief way in which cast-iron pipe is sold is by contracts let after competitive bidding invited by the intending purchaser. It would have much interfered with the smooth working of defendants' association had its existence and purposes become known to the public. A part of the plan was a deliberate attempt to create in the minds of the members of the public inviting bids the belief that competition existed between the defendants. Several of the defendants were required to bid at every letting, and to make their bids at such prices that the one already selected to obtain the contract should have the lowest bid. It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside. * * *

For the reasons given, the decree of the circuit court dismissing the bill must be reversed, with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast-iron pipe described in the bill, and substantially admitted in the answer, and from doing any business thereunder.[1]

STRAUS et al. v. VICTOR TALKING MACHINE CO.

(Supreme Court of the United States, 1917. 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917F, 1196, Ann. Cas. 1918A, 955.)

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which, on a second appeal, reversed a decree of the District Court of the United States for the Southern District of New York, dismissing the bill in a suit charging the violation of a license restriction made by the owner of a patent.

CLARKE, J. * * * The plaintiff in its bill alleges: That it is a corporation of New Jersey; that for many years it has been manufacturing sound-reproducing machines embodying various features

[1] Modified: Addystone Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136 (1899).

covered by patents of which it is the owner, and that, for the purpose of marketing these machines to the best advantage, about August 1, 1913, it adopted a form of contract which it calls a "license contract" and a form of notice called a "license notice," under which it alleges all of its machines have, since that date, been furnished to dealers and to the public.

This "license notice," which is attached to each machine and is set out in full in the bill, declares that the machine to which it is attached is manufactured under patents, is licensed for the term of the patent under which it is licensed having the longest time to run, and may be used only with sound records, sound boxes, and needles manufactured by the plaintiff; that only the right to use the machine "for demonstrating purposes is granted to "distributors" (wholesale dealers), but that these "distributors" may assign a like right "to the public" or to "regularly licensed Victor dealers" (retailers) "at the dealer's regular discount royalty"; that the "dealers" may convey the "license to use the machine" only when a "royalty" of not less than $200 shall have been paid, and upon the "consideration" that all of the conditions of the "license" shall have been observed; that the title to the machine shall remain in the plaintiff, which shall have the right to repossess it upon breach of any of the conditions of the notice, by paying to the user the amount paid by him, less 5 per cent. for each year that the machine has been used. The notice in terms reserves the right to the plaintiff to inspect, test, and repair the machine at all times and to instruct the user in its use, "but it assumes no obligation to do so"; it provides that "any excessive use or violation of the conditions shall be an infringement of plaintiff's patent," and that any erasure or removal of the notice will be considered a violation of the license. Finally, it provides that at the expiration of the patent "under which it is licensed" having the longest time to run the machine shall become the property of the licensee provided all the conditions recited in the notice shall have been complied with, and the acceptance of the machine is declared to be "an acceptance of these conditions."

The contract between the plaintiff and its dealers is not set out in full in the bill, but it is alleged that since August 1st, 1913, the plaintiff has had with each of its 7,000 licensed dealers a written contract in which all the terms of the "license notice" are in substance repeated, and in addition it is alleged that each dealer, "if he has signed the assent thereto," is authorized to dispose of any machines received from "the plaintiff directly or through a paramount distributing dealer," but subject to all of the conditions expressed in the "license notice." It is alleged that this contract contains the provision that "a breach of any of the conditions on the part of a distributor will render him liable, not only for an infringement of the patent, but to an action on the contract or other proper remedy."

As to the defendants, the bill alleges that they conduct a large mercantile business in New York city; that with full knowledge of the terms of the contract, as described, between the plaintiff and its distributors, and of the "license notice" attached to each machine, the defendants, "being members of the general unlicensed public," and having no contract relation with the plaintiff or with any of its licensed distributors or licensed dealers, induced "covertly and on various pretenses," one or more of plaintiff's licensed distributors or dealers to violate his or their contracts with the plaintiff, providing that no ma-

chines should be delivered to any unlicensed member of the general public until "the full license price" stated in the "license notice" affixed to each machine was paid, and thereby obtained possession of a large number of such machines at much less than the prices stated in the "license notice"; that under the terms of the said license agreement and notice, they have no title to the same, and that they have sold large numbers thereof to the public, and are proposing and threatening to dispose of the remainder of those which they have acquired to "the unlicensed general public," at much less than the price stated in the notice affixed to each machine.

The prayer is for an injunction restraining the defendants from selling any of the machines, possession of which they have acquired, from other and further violation of plaintiff's rights under its letters patent, and for the usual accounting and for damages.

The District Court regarded the transaction described in the "license notice" as in substance a sale which exhausted the interest of the plaintiff in the machine, except as to the right to have it used with records and needles as provided for therein, and this right not being involved in this case, dismissed the bill. * * *

On appeal, the Circuit Court of Appeals affirmed this judgment and remanded the case, but with instructions to allow the plaintiff to amend its bill "if it be so advised." * * *

The bill was thereafter so amended as to allege that the defendants had in their possession a large number of machines which they had obtained from plaintiff's distributors and dealers at much less in each case than the price stated in the "license notice," and that they were proposing to dispose of these machines to the "unlicensed general public" at less than the prices stated in the "license notice," in disregard of plaintiff's rights.

Again, the District Court, on the same ground as before, sustained a motion to dismiss the bill, but the Circuit Court of Appeals reversed this holding, and the case is here for review on certiorari.

The abstract of the bill which we have given makes it plain: That whatever rights the plaintiff has against the defendants must be derived from the "license notice" attached to each machine, for no contract rights existed between them, the defendants being only "members of the unlicensed general public"; and that the sole act of infringement charged against the defendants is that they exceeded the terms of the license notice by obtaining machines from the plaintiff's wholesale or retail agents, and by selling them at less than the price fixed by the plaintiff.

It is apparent from the foregoing statement that we are called upon to determine whether the system adopted by the plaintiff was selected as a means of securing to the owner of the patent that exclusive right to use its invention which is granted through the patent law, or whether, under color of such a purpose, it is a device unlawfully resorted to in an effort to profitably extend the scope of its patent at the expense of the general public. Is it the fact, as is claimed, that this "license notice" of the plaintiff is a means or agency designed in candor and good faith to enable the plaintiff to make only that full, reasonable, and exclusive use of its invention which is contemplated by the patent law, or is it a disguised attempt to control the prices of its machines after they have been sold and paid for?

First of all, it is plainly apparent that this plan of marketing, adopted by the plaintiff, is, in substance, the one dealt with by this court in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, and in Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, adroitly modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and, on the other hand, to evade certain supposed effects of them.

If we look through the words and forms with which the plaintiff has most elaborately enveloped its purpose, to the substance and realities of the transaction contemplated, we shall discover several notable and significant features. First, while, as if looking to the future, the notice, in terms, imposes various restrictions as to the "use" of the machines by plaintiff's agents, wholesale and retail, and by the "unlicensed members of the public," for itself, the plaintiff makes sure that the future shall have no risks, for it requires that all that it asks or expects at any time to receive for each machine must be paid in full before it parts with the possession of it.

Second, while in terms the "use" of each machine is restricted, and forfeiture for failure to strictly comply with the many conditions and requirements of the notice is provided for, this system, elaborate to the extent of confusion, fails utterly to provide for entering any evidence of a qualified title in any public office or in any public record, and no requirement is found in it for reporting by users or licensees, who may remove from one place to another, taking the machine with them, as would very certainly be required if the plaintiff intended to enforce the rights so elaborately asserted in this notice—if the system were really a genuine provision designed to protect through many years to come the restricted right to "use" and the seemingly qualified title which it purports to grant to dealers and to the public, from being exceeded or departed from.

Third. The fact that under this system "at different times" "large numbers" of machines, as is alleged in the plaintiff's bill, have been "covertly" sold to the defendants by the plaintiff's wholesale and retail agents at less than the price fixed for them, is persuasive evidence that the transaction is not what it purports on its face to be. If it were a reasonably guarded plan, really intended to keep the plaintiff in touch with each of its machines until the expiration of the patent of latest date, for the purpose of insisting upon its being used in the manner provided for in the "license notice," the plaintiff's prompt and sufficient remedy for such an invasion of its right as is claimed in this case would be found in its sales department, or rather in its "license" department, and not in the courts. That the plaintiff comes into court with a bill to enjoin the defendants from reselling machines secretly sold to them in large numbers by the plaintiff's agents indicates very clearly that at least until the exigency out of which this case grew arose, the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit in terrorem over the ignorant and the timid.

And finally, while the notice permits the use of the machines, which have been fully paid for, by the "unlicensed members of the general public," significantly called in the bill "the ultimate users," until "the expiration of the patent having the longest term to run" (which, under the copy of the notice set out in the bill, would be July 22, 1930), it

provides that if the licensee shall not have failed to observe the conditions of the license, and the Victor Company shall not have previously taken possession of the machine, as in the notice provided, then, perhaps sixteen years or more after he has paid for it, and in all probability long after it has been worn out or become obsolete and worthless, "it shall become the property of the licensee."

It thus becomes clear that this "license notice" is not intended as a security for any further payment upon the machine, for the full price, called a "royalty," was paid before the plaintiff parted with the possession of it; that it is not to be used as a basis for tracing and keeping the plaintiff informed as to the condition or use of the machine, for no report of any character is required from the "ultimate user" after he has paid the stipulated price; that, notwithstanding its apparently studied avoidance of the use of the word "sale," and its frequent reference to the word "use," the mose obvious requirements for securing a bona fide enforcement of the restrictions of the notice as to "use" are omitted; and that, even by its own terms, the title to the machines ultimately vests in the "ultimate users," without further payment or action on their part, except patiently waiting for patents to expire on inventions which, so far as this notice shows, may or may not be incorporated in the machine. There remains for this "license notice," so far as we can discover, the function only of fixing and maintaining the price of plaintiff's machines to its agents and to the public, and this, we cannot doubt, is the purpose for which it really was designed.

Courts would be perversely blind if they failed to look through such an attempt as this "license notice" thus plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that not one in a greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose. It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff's machines a "license to use the invention." Bauer v. O'Donnell, supra.

Convinced, as we are, that the purpose and effect of this "license notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly-concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of Adams v. Burks, 17 Wall. 453, 456, 21 L. Ed. 700, 703; and of Bauer v. O'Donnell, supra; that it is, therefore, invalid, and that the District Court properly held that the bill must fail for want of equity.

SECTION 3.—CONTRACTS LIMITING THE LIABILITY OF BAILEES AND OTHER PERSONS

INLAND COMPRESS CO. v. SIMMONS.

(Supreme Court of Oklahoma, 1916. 59 Okl. 287, 159 Pac. 262.)

HOOKER, C. * * * About the only question presented by this appeal is whether the cotton tickets executed by the company and delivered to the plaintiff at the time the cotton was delivered by him to the company * * * is a legal contract and enforceable in the courts of this state, it being contended by the plaintiff in error that the cotton tickets did constitute a contract, and that under the terms of the contract it is not liable for loss by damage, fire, flood, or other agencies unless by the willful act or gross negligence. The facts in the instant case show that the plaintiff in error received this cotton for the purpose of compressing the same, for which it received compensation, and that the storage of the cotton was an incident of the business in which it was engaged of compressing the same. * * *

In the case of Union Compress Co. v. Nunnally, 67 Ark. 284, 54 S. W. 872, the Supreme Court of that state said: * * * "When a bailment is reciprocally beneficial to each party, the bailee is answerable for want of ordinary care."

Applying the rule to the evidence in the instant case, we are of the opinion that the plaintiff in error was a bailee for hire of the cotton in question, and, as such, was subject to the same responsibility and duties; and, for the failure to exercise that degree of care of the property in its possession that the law requires of a bailee for hire, it is responsible for whatever damages that said property suffers as the proximate result caused by the failure of the company to exercise such care. That being true, it must have been the duty of the compress company in this case to have exercised reasonable care in the storing of the property of the defendant in error, and for its failure so to do it must be held liable, unless the provision of the cotton tickets, which sought to limit its liability to injuries caused by the willful act or gross negligence of the company, should prevail.

Section 1109 of the Revised Laws of 1910 provides: "A bailee for hire must use at least ordinary care for the preservation of the thing bailed." The writers on bailments seem to agree that the parties to a bailment contract may regulate the responsibilities of the bailee by special contract, but it is also universally agreed that the terms which public policy and legislation of the state impose are not to be overleaped by contractual relations and, if so, the contract will be disregarded and declared void, and the bailee held in the same manner and to the same extent as if such contract never existed.

The public policy of a state must be determined by reference to its Constitution, the acts of its Legislature, and the judicial decisions of its courts. It is universally agreed and acceded to in this state that common carriers, on account of the relation that they occupy towards the public and the duty that they owe to the public generally, are prohibited by law from contracting against their own negligence. The reason for this requirement is apparent, and it would seem that the same cause which prohibits contracts of this character from being

made by a common carrier would likewise prohibit contracts of like nature from being made by other enterprises which serve the public, and which conduct and carry on such a large and important part of the public business, which business is so essential to the commercial life of the people of the state. The Legislature of this state, by the provision of our statute above quoted, has provided that a bailee for hire must use at least ordinary care for the preservation of the thing bailed, and while this provision of the statute may be considered as a declaration of the general law on the subject of bailment, yet it also indicates the fixed, definite, and declared policy of the state with reference to the degree of care that all bailees for hire must use towards property intrusted to its care.

In this state cotton occupies such an important relation to the business life of the people of the state, and cotton compresses perform such an important duty to the general public, that it may be said that courts take judicial knowledge of the fact that compresses are in their nature, or rather in a sense, quasi public institutions. In fact the business of compressing cotton, by reason of its nature, the extent and the necessity therefor, is such that the public must use it, and it is of such public consequence, and affects the community at large to such an extent, that it is a public business, and as such should not be permitted to relieve itself from liability by contracts of the kind involved here. It will not suffice to say that this contract was a voluntary contract, and that the defendant in error was compelled to have his cotton compressed, for the same objection could be urged with the relation of the public to the railroads, the express companies and to other public utilities. It is said in volume 6, Corpus Juris, p. 1112, § 44: "The parties to a bailment may diminish the liability of the bailee by special contract, the principle being that the bailee may impose whatever terms he chooses if he gives the bailor notice that there are special terms and the means of knowing what they are; and, if the bailor chooses to make the bailment, he is bound by them, provided the contract is not in violation of law or of public policy, and that it stops short of protection in case of fraud or negligence of the bailee."

While it cannot be contended that the plaintiff in error is a public warehouseman within the provisions of our statute, yet, as a circumstance indicating the public policy of this state, it might not be amiss to notice section 8302 of the Revised Laws of 1909, which prohibits public warehousemen from inserting in the receipt any language limiting or modifying the liability or responsibility as imposed by the law of the state. Third volume, Enc. of Law (2d Ed.) p. 750, states the rule as follows: "To what extent a bailee may limit his liability by special contract is not clear. It has been said by good authority that the bailee might contract not to be liable for any degree of negligence not amounting to gross neglect, for, the latter being regarded as equivalent of fraud, the law will not tolerate such an indecency, as that a man may contract to be safely dishonest. But negligence in any degree being a wrong, the distinction is not apparent, and the better doctrine supported by authority would seem to be that a bailee cannot stipulate against liability for his own negligence." Lancaster County Nat. Bank v. Smith, 62 Pa. 47. * * *

'We conclude that it would be against public policy in this state to permit the defendant in this case as a bailee for hire to contract in such manner as to relieve it of any responsibility for its own negligence,

and that, the provision of the receipt issued to the plaintiff in error attempting to relieve the company from any liability on account of damage, the result of its negligence is void as against public policy. Therefore the court did not err in instructing the jury to the effect that such provision of the contract would not protect the defendant against its own negligence.

The judgment of the lower court is affirmed.

WELD et al. v. POSTAL TELEGRAPH CABLE CO.

(Court of Appeals of New York, 1910. 199 N. Y. 88, 92 N. E. 415.)

Action by Stephen M. Weld and others against the Postal Telegraph Cable Company, for damages for loss occasioned by error in the transmission of a telegraph message.

In submitting the case to the jury the learned trial court held as matter of law that the conditions printed upon the defendant's blank used in sending the message were reasonable, and created a contract which bound the plaintiffs and exempted the defendant from liability for loss occasioned by its slight or ordinary negligence, but that it did not exempt the defendant from the consequences of its gross negligence. The court then defined to the jury the legal meaning of gross negligence as distinguished from ordinary negligence, and left it to the jury to say, as a matter of fact, whether, under the evidence adduced, the defendant was guilty of gross negligence. The jury rendered a verdict in favor of the plaintiffs for $10,000, and the judgment entered thereon having been unanimously affirmed by the Appellate Division, the defendant has appealed to this court.

WERNER, J. * * * The action is brought * * * to charge the defendant with the damages sustained by the plaintiffs through the alleged negligence of the former in transmitting a telegraphic message sent by the latter from New York to New Orleans. The message as written by the plaintiffs was: "Ellis N. O. Sell 20 thousand Mch. 12.70. Weld"—and as received by the New Orleans representative of the plaintiffs it had been so changed and transposed as to read: "Sell twenty thousand March 1207. Well." The import of the message as sent was well understood by the plaintiffs, their correspondents, and the operators of the defendant. It contained a direction to sell twenty thousand bales of cotton for March delivery at 12.70 cents per pound, which was understood by all concerned to mean a sale at 12.70 cents or more. The message as received was quite as clearly understood to mean a sale of twenty thousand bales of cotton for March delivery at 12.07 cents or more. The New Orleans representative of the plaintiffs followed the instructions set forth in the message as received, sold the designated number of bales at various prices below 12.70 cents and when the error was discovered by the plaintiffs they directed their representatives to purchase at once 20,000 bales of cotton for March delivery at the best price obtainable. This was done in the New Orleans market at prices below 12.70 but above the prices at which the plaintiffs' representatives had previously sold, and the net result was a loss to the plaintiffs of $27,565.

As the original message was not "repeated" the learned trial court charged the jury that the conditions printed on the blank or form

upon which it was sent were binding upon the plaintiffs, and absolved the defendant from liability for damages unless they were occasioned by the defendant's gross negligence. Under the unanimous affirmance of the Appellate Division of the judgment recovered by the plaintiffs, the defendant's gross negligence must be deemed to have been conclusively established, and the only question in that behalf which we have power to consider is whether the rule of liability given to the jury by the trial judge correctly states the law.

The liability of telegraph companies in respect of the business which they carry on is regulated by two things: (1) By contract. (2) By the nature of their quasi public employment. In the absence of any special contract limiting or regulating their liability, they do not insure the safe and accurate transmission of messages, but they are bound to transmit them with a degree of care and diligence adequate to the business which they undertake. The liability which a telegraph company assumes under this general rule, may, however, be limited by special contract, and that is today the universal practice. As it is a business requiring employés of peculiar skill, so it is also subject to atmospheric and physical disturbances which may set at naught the greatest care and skill. It is, therefore, but right that telegraph companies should have the power to limit their liability in cases where mistakes occur through no fault on their part, or for such mistakes of their employés as will occur through ordinary negligence in spite of the most stringent regulations or the most vigilant general oversight. But manifestly this power cannot be extended further without placing the public absolutely at the mercy of those engaged in transmitting telegraphic messages. This is the reason of the rule, long since established in this state, that individuals and corporations engaged in this quasi public business cannot contract to absolve themselves from liability for their own willful misconduct or gross negligence. They may protect themselves by contractual limitations that are reasonable, but beyond that they may not go. That is the law as laid down by this court in a number of cases. * * * The cases * * * hold that a regulation limiting the liability of a telegraph company for a mistake in an "unrepeated" message to the price paid for sending it is reasonable, but that it does not relieve such a company against the consequences of its gross negligence. The charge of the trial court in this respect was, therefore, clearly correct. * * *

We now turn to a series of requests made by defendant's counsel which we think should have been charged. Defendant's counsel asked the court to charge: "That, if the jury find as a fact that when plaintiffs sent the message to Ellis & Co. to sell 20,000 bales, March cotton, the plaintiffs did not intend to deliver cotton, and that it was the plaintiffs' intention that one party to the sale was to pay to the other only the difference between the prices named and the market price of the cotton at the date fixed for executing the contract, then the whole contract constituted nothing more than a wager, and the plaintiffs are entitled to a verdict for only sixty cents." * * *

As bearing upon the nature of the transactions between the plaintiffs and those who dealt with them through Henican, one of the plaintiffs' New Orleans correspondents, Henican testified that there was no delivery of cotton, and that the transactions consisted entirely of a "settlement of differences." This testimony was supplemented by an account of sales, from which the jury might have drawn the

inference that it was not the intention of the parties to these contracts to sell and deliver actual cotton, but simply to record the market fluctuations upon the basis of which settlements were to be made between the parties. This testimony, although meager and perhaps inconclusive, was hostile to the legal presumption that the transactions were lawful, and was sufficient to create an issue of fact upon which the defendant had the right to a charge embodying the substance of the requests above quoted. If the transactions between the plaintiffs and their clients or customers were mere wagering contracts, they are void under the statutes of this state and the general law of the land. The generally accepted rule upon this subject can be very simply stated. A man may lawfully sell goods or stocks for future delivery, even though he has none in his possession, if he really intends and agrees to deliver them at the appointed time. Such a transaction constitutes a valid contract, which is enforceable in the courts. But a man may not, under the guise of such a contract, enter into a naked speculation upon the rise or fall of prices, in which there is to be no delivery of property, and no payment except such as may be necessary to provide for differences arising purely from market fluctuations. Such a transaction is a mere wager, which is condemned alike by statute and public policy. * * *

For the failure of the learned trial court to charge in substance as requested upon this branch of the case, the judgment herein must be reversed and a new trial granted, with costs to abide the event. * * *

SECTION 4.—GAMBLING CONTRACTS

WELD et al. v. POSTAL TELEGRAPH CABLE CO.

(Court of Appeals of New York, 1910. 199 N. Y. 88, 92 N. E. 415.)

See ante, p. 326, for a report of the case.

OLSON v. SAWYER-GOODMAN CO.

(Supreme Court of Wisconsin, 1901. 110 Wis. 149, 85 N. W. 640, 53 L. R. A. 648.)

BARDEEN, J. It is admitted that the plaintiff worked 166 days for the defendant at $1 per day. It is also admitted by plaintiff that during that time he personally received goods and supplies from the company amounting to $12.53, and that the defendant paid his railroad fare home, and for other expenses amounting to $3.35. The defendant claims to be entitled to an additional credit of $65.40, arising out of the following circumstances: The defendant kept a supply department in its camp, under the charge of one Riley, who was also defendant's timekeeper and bookkeeper. A number of the men amused themselves playing poker. A banker kept account of the game, and at the end of each game he would report who had lost and won, and the amount. There was no money in the camp with which these balances could be liquidated, so it was agreed between the players that the debts should be paid from the camp store; that is, the winner could go to

the store and get goods to the amount he had won, and have it charged to the loser. Instead of drawing goods at the end of each game and squaring accounts, the banker, in the presence of each player, would report the debts and credits to Riley, who kept a private memorandum thereof. If at any time a party who had credit on this account wanted anything, Riley would give it to him from the company's goods, and charge it to some person against whom there was a debt; and, if the amount drawn was greater than the debit against any one loser, it would be distributed among several, and would then be entered on the company's books as goods obtained by the several losers. This arrangement was made between the men and Riley before the games commenced in the fall, and was also known to the foreman of the camp. During the winter there was charged against plaintiff on store account $81.38. Of this amount, $12.53 was taken by plaintiff for his personal use, and $7.40 was delivered to winners on the personal order of plaintiff. The remainder was for goods turned over to the various winners pursuant to the original agreement at various times during the winter, and without any express direction from plaintiff. Riley was one of the gamblers, and, as agent for the defendant, assented to the arrangements before stated. The effect of this agreement was that defendant, by Riley, stood as banker for each man to the amount of wages earned, and agreed to turn the same over, or such portion as was lost, to the winners at the games. This was to be done pursuant to the arrangement made between the men and Riley before the games were commenced.

The trial court held that this agreement was illegal and void, as being promotive of gambling, and gave no authority to Riley to deliver goods to winners and charge them to the loser; that, when the men were present and got the goods themselves, they were properly chargeable to them, regardless of what they did with them. Upon this theory the plaintiff was held chargeable with the goods to the amount of $7.40, which were turned over to winners in his presence and under his direction. The decision of the trial court seems to have been founded upon a correct appreciation of our statutes condemning gambling, and all agreements and transactions based thereon or growing out of the same. * * * The whole scheme was illegal, void, and contrary to the statutes and to public policy as well. The plan of operations was known to defendant's foreman, and carried on with his knowledge and acquiescence. Except for the agreement as to delivery of goods and the plan of shifting credits, it is not at all likely that the games would have been continued. We are entirely satisfied with the conclusion of the trial court, and must therefore affirm the judgment. The court found that plaintiff's wages amounted to $166, and that his total debts were $23.33, and directed judgment for $136.67,—a mistake of $6 against plaintiff. Judgment was entered as directed, and the mistake, not being prejudicial to defendant, affords no ground for complaint on its part. The judgment is affirmed.

SECTION 5.—OTHER ILLUSTRATIONS OF ILLEGAL CONTRACTS

DUNTON v. WESTCHESTER FIRE INS. CO.

(Supreme Judicial Court of Maine, 1908. 104 Me. 372, 71 Atl. 1037, 20 L. R. A. [N. S.] 1058.)

Action by Dunton against an insurance company on a fire insurance policy, which provided for arbitration as to amount due, as a condition precedent to the right to maintain an action on the policy. Verdict for plaintiff. Defendant excepts.

WHITEHOUSE, J. * * * It has been long established by authority both in this country and in England that if parties stipulate in contracts of insurance and other similar contracts to submit to arbitration the question of the amount of damage or any similar matters that do not go to the root of the action, it is entirely competent for them to make such an agreement a condition precedent to the right of action; and if it appears from the express terms of the contract, or from necessary implication, that such was the intention, it will be upheld by the courts, and no action can be maintained upon the contract without proof on the part of the plaintiff that he has fulfilled the stipulation in the contract or made all reasonable effort to fulfill it. The effect of such an agreement is not to refer a cause of action, but to provide that a cause of action shall arise as soon as the amount to be paid has been determined, and not before. It does not deprive the courts of their jurisdiction, but simply provides a reasonable method of estimating and ascertaining the amount of the loss, and leaves the general question of liability to be determined by the judicial courts. * * * Exceptions overruled.

LIVINGSTON v. PAGE.

(Supreme Court of Vermont, 1902. 74 Vt. 356, 52 Atl. 965, 59 L. R. A. 336, 93 Am. St. Rep. 901.)

Action of assumpsit by James H. Livingston against Carrol S. Page. From a judgment for the defendant, the plaintiff brings exceptions.

MUNSON, J. At the close of the plaintiff's evidence the defendant moved that a verdict be directed in his favor, on the ground that the contract claimed by the plaintiff was void, as against public policy. The court held the contract void for the reason assigned, and directed a verdict accordingly. The case is here upon the plaintiff's exception to this holding.

The plaintiff called the defendant as a witness. The evidence consisted of certain correspondence had by the parties; and the testimony of the parties as to the circumstances in which the letters were written, the meaning that was attached to the language used, the matters inclosed for publication by one party and the services rendered by the other, and subsequent transactions bearing upon their understanding of the relations they had sustained. The defendant claimed that no contract with the plaintiff was in fact consummated, and that the only contract ever contemplated was one for the publication of extracts from other papers at a legitimate charge for the space actually taken.

The plaintiff did not claim to recover on this ground, but claimed to recover a reasonable compensation for the support and influence of his paper and his services as its editor. The plaintiff was a Democrat, publishing a Democratic paper of independent proclivities. The defendant was a Republican, seeking a nomination to congress from a Republican convention. It appeared from the plaintiff's testimony that he considered defendant's proposal an application for the use and influence of his paper in the nature of a retainer; that he accepted it with the understanding that his paper and his services as editor would be at the command of the defendant during the campaign, to be settled for at its close; that he was to do all he could to influence the choice of delegates and secure the defendant's nomination; that original matter was within the scope of his contract, and that his editorials were written in that view; that he supported defendant because of this contract and the money he was to get out of it; that he expected to receive a larger compensation if defendant was nominated than he otherwise would; that he tried to conceal his relations with the defendant from the public, and understood that the defendant was trying to do the same; that he took this course because it would make his efforts in influencing voters in defendant's behalf more successful. * * *

In Strasburger v. Burk, 13 Am. Law Reg. (N. S.) 607, decided by the city court of Baltimore, the defendant was the keeper of a lager beer saloon, and agreed to give his political influence and furnish beer and cigars to secure a caucus nomination for the plaintiff's father. The gratuitous furnishing of food or liquor to secure votes at an election was prohibited by the Code, but the only statutory recognition of primary elections was a provision for the preservation of order. The court considered that in applying the principles of public policy no distinction could be made between voluntary meetings of this character and elections ordained by law. Mr. McCrary adopts the conclusions of this opinion in his work on Elections, and applies the doctrine to the sale of influence, as well as the sale of votes. Mr. Redfield, in commenting upon the same opinion in 13 Am. Law Reg. (N. S.) at page 610, says that the invalidity of contracts designed to control the freedom of elections results from the principles of common law, and that those relating to caucuses cannot be made an exception on the ground that such meetings are not recognized by the statute. We cannot doubt the correctness of this conclusion. The rule would largely fail of its purpose if not so applied. When the voters are unevenly divided into two parties, the nomination of the stronger organization is usually equivalent to an election. And when party action is less decisive the subsequent efforts of the voters are ordinarily confined to a selection from the candidates regularly presented. The individual voter of a large electorate can seldom give an effective expression to a choice that is not in line with the action of some party convention. To secure a free and exact expression of the sovereign will, there must be a proper selection of candidates, as well as an honest election. If the choice of delegates and the action of the nominating convention are improperly determined, the election ballots will fail to express the real judgment of the voters.

It is not claimed in argument, and no ground occurs to us upon which it could be claimed, that this contract was any the less obnoxious to the law because the purchased influence was to be exerted through the

columns of the plaintiff's paper. A newspaper is understood to present the views of some one connected with its management or views deemed consistent with some settled policy, and has a patronage and influence which are due to that understanding. As long as the editorial column is relied upon as a public teacher and adviser, there can be no more dangerous deception than that resulting from the secret purchase of its favor. We hold that the contract testified to and relied upon by the plaintiff is contrary to public policy, and therefore void.

Judgment affirmed.

HARBISON v. SHIRLEY et al.

(Supreme Court of Iowa, 1908. 139 Iowa, 605, 117 N. W. 963, 19 L. R. A. [N. S.] 662.)

EVANS, J. * * * The authorities are not altogether in harmony as to the rule which renders a contract void when it is entered into by one of the parties with the intent to violate the law, and where such intent is known or suspected by the other party. The great weight of authority, however, in our opinion is that mere knowledge or suspicion on the part of the lessor that the lessee intends to violate the law upon the property will not of itself render a contract void. In order to defeat a recovery for rent by the lessor, it must be shown that he participated in some degree, however slight, in the wrongful purpose and intent that the property should be so used. Mere indifference on his part as to the intended use of the property is not sufficient. If the lessor in any way aids the lessee in his unlawful design, such participation will render the contract void. His relation to the unlawful purpose must be in some degree active, rather than merely passive or indifferent. If he does any act in aid of the unlawful purpose, however slight, it is sufficient participation on his part to defeat recovery. But, until there be some degree of connivance shown, a contract will not be avoided. * * * The law finds itself in close quarters at this point, and is confronted with danger at either side. On the one hand, it must needs withhold its sanction from contracts entered into for criminal purposes; and, on the other hand, it ought not to go so far as to offer undue inducement to beneficiaries of contracts to taint them with criminality for the very purpose of avoiding liability thereon after receiving the benefits of performance by the other party, lest the latter evil become greater than the first. While, therefore, it is true that the line of distinction drawn in the authorities above cited is somewhat fine, it is also true that it requires a thin blade to divide the "joints and marrow" of one evil to be checked and another to be avoided. This court has not heretofore passed directly upon this question. * * *

Under the evidence in this case, the most that can be said is that the plaintiff feared or suspected that intoxicating liquors might be sold upon the premises. There is no testimony indicating any connivance on his part. The lease expressly forbade the use of the premises for any unlawful purpose. It is urged in argument that this was a mere pretense to cover up the real purpose; but the evidence does not warrant such contention. The defendant Shirley testified to his conversation with the plaintiff as follows: "Mr. Harbison said that he did not want anything sold in there that would cause a nuisance. He

said 'You want it for restaurant purpose. All right, take for restaurant purposes.'" This oral statement is in harmony with the prohibition of the lease, and indicates no ulterior purpose on the part of the plaintiff. There was no other evidence on the question. The burden was upon the defendants to prove their affirmative defense. They have wholly failed to do so. The trial court directed a verdict for the plaintiff and entered judgment for the amount claimed.

The judgment is right, and is affirmed.

ROGERS v. BLUENSTEIN.

(Supreme Court of Georgia, 1905. 124 Ga. 501, 52 S. E. 617 3 L. R. A. [N. S.] 213.)

Action by Laura B. Rogers against S. Bluenstein. Judgment for defendant and plaintiff brings error.

Laura B. Rogers brought an action against S. Bluenstein to recover a diamond ring and setting and a diamond pendant and setting. The evidence showed that on June 18, 1902, the plaintiff executed an instrument in writing by which she conveyed the diamonds to one Carroll D. Judson for the sum of $400. He executed to her on the same day a paper whereby he agreed to sell the diamonds to her on or before October 15th for the sum of $408.

LUMPKIN, J. It is legally possible for one person to buy property from another and agree to resell it to the vendor at a higher price payable in future. If such be the actual transaction, the law will enforce it. The difficulty frequently arising is to determine whether in a given instance the parties intended a sale or a mortgage. * * * If Bluenstein in fact bought the diamonds from Judson with the assent of Mrs. Rogers, and agreed to sell them to her at an advanced price payable in the future, there would be nothing unlawful about it. If in fact the transaction was one by which Bluenstein loaned Mrs. Rogers a sum of money at a usurious rate of interest, it was illegal, and the title so obtained was tainted with usury. The transaction, being on its face apparently lawful, might, nevertheless, be shown to be a device for concealing usury. But the burden of proving this rested on the party asserting it. * * *

There was a considerable amount of evidence tending to show that in fact the title of the defendant was tainted with usury, but it was not free from conflict. In addition to what appeared on the face of the papers, when asked in regard to a loan to the plaintiff, defendant testified: "There was no loan with her. * * * As to how much money I let Mrs. Rogers have, I never had a contract with Mrs. Rogers. The bill of sale shows what I paid Judson. I don't remember exactly—$413, or something. * * * And I gave an option to purchase back on the 14th of February, 1903." If the jury based their verdict on the belief that this was in fact a sale with an agreement to resell, we cannot say that they were without evidence authorizing them to do so.

The plaintiff in error alleges that the court erred in charging that if the diamonds were conveyed to the defendant as a security for a debt which was tainted with usury, and not in fact as a sale with the right to repurchase, and if she tendered the defendant the amount of money due upon her contract with him, and it was refused, she would be entitled to recover the difference between the amount of her debt at the

time of the tender and the highest proved value of the property since the date of such payment. It is contended that, if the diamonds were pledged as a security for a loan, the pledgor would be entitled to redeem the property pledged, regardless of the question of usury. If this be conceded, there was, nevertheless, no harmful error in the charge. If what transpired between the parties amounted to a pledging of the diamonds to secure a debt, the amount fixed for their return or reconveyance was, without any controversy, greater than the amount advanced with legal interest. The plaintiff contended that there was usury, and in making the tender her attorney calculated the rate which he alleged had been previously charged. We think the charge of the court, if erroneous, could not have injured the plaintiff.

Judgment affirmed. All the Justices concuring.

GRIGSBY v. RUSSELL.

(Supreme Court of the United States, 1911. 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. [N. S.] 642, Ann. Cas. 1913B, 863.)

HOLMES, J. This is a bill of interpleader brought by an insurance company to determine whether a policy of insurance issued to John C. Burchard, now deceased, upon his life, shall be paid to his administrators or to an assignee, the company having turned the amount into court. The material facts are that after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy and sold it to him in consideration of one hundred dollars and Grigsby's undertaking to pay the premiums due or to become due; and that Grigsby had no interest in the life of the assured. The Circuit Court of Appeals in deference to some intimations of this court held the assignment valid only to the extent of the money actually given for it and the premiums subsequently paid. * * *

Of course the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (Janus Weathercock), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue and so one that is opposed to crime. And, what perhaps is more important, the existence of such an interest makes a roughly selected class of persons who by their general relations with the person whose life is insured are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment it is assumed that the objection to the insurance as a wager is out of the case. In the present instance the policy was perfectly good. There was a faint suggestion in argument that it had become void by the failure of Burchard to pay the third premium ad diem, and that when Grigsby paid he was making a new contract. But a condition in a policy that it shall be

void if premiums are not paid when due, means only that it shall be voidable at the option of the company. * * * The company waived the breach, if there was one, and the original contract with Burchard remained on foot. No question as to the character of that contract is before us. It has been performed and the money is in court. But this being so, not only does the objection to wagers disappear, but also the principle of public policy referred to, at least in its most convincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in Shelley's Case, 1 Coke, 104. Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder but the fact that such wagers came to be regarded as a mischievous kind of gaming. * * *

On the other hand, life insurance has become in our days one of the best recognized forms of investments and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the Bankruptcy Law, § 70 (U. S. Comp. St. § 9654), which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. The collateral difficulty that arose from regarding life insurance as a contract of indemnity only, * * * long has disappeared. * * * And cases in which a person having an interest lends himself to one without any as a cloak to what is in its inception a wager have no similarity to those where an honest contract is sold in good faith.

Coming to the authorities in this court, it is true that there are intimations in favor of the result come to by the Circuit Court of Appeals. But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. * * * On the other hand, it has been decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself. * * * It is at least satisfactory to learn from the decision below that in Tennessee, where this assignment was made, although there has been much division of opinion, the Supreme Court of that State came to the conclusion that we adopt, in an unreported case, Lewis v. Edwards, December 14, 1903. The law in England and the preponderance of decisions in our state courts are on the same side. * * *

Decree reversed.

ROHRBACH v. GERMANIA FIRE INS. CO.

(Court of Appeals of New York, 1875. 62 N. Y. 47, 20 Am. Rep. 451.)

FOLGER, J. * * * The general definitions of the phrase "insurable interest," as given in the text-books, are quite vague and not always concordant. See * * * May, Ins. § 76. The last cited author says that an insurable interest sometimes exists where there is not any present property, any jus in re, or jus ad rem, and such a connection must be established between the subject-matter insured, and the party in whose behalf the insurance has been effected, as may be sufficient for deducing the existence of a loss to him, from the occurrence of an injury to it, and that the tendency of modern decisions is to admit to the protection of the contract, whatever act, event or property, bears such relation to the person seeking insurance, as that it can be said with a reasonable degree of probability, to have a bearing upon his prospective pecuniary condition. While on the other hand, the statement is, that the interest must be founded on some legal or equitable title; and if it be inconsistent with the only title which the law can recognize, it will not be deemed an insurable interest. Marsh, Ins., 115.

But the result of a comparison of the text-writers above cited [eleven writers on insurance] is, that there need not be a legal or equitable title to the property insured. If there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. Thus a mortgagee of real estate, though he hold also the bond of the mortgagor, has an insurable interest in the buildings; while a judgment creditor of the same mortgagor, his judgment being a lien upon the same real estate and the same buildings, is said not to have an insurable interest in them. The interest of the first is said to be specific, the interest of the latter general. As a general rule the distinction may be sound. But I think it would be difficult to show an appreciable practical difference in the pecuniary result to the two. If the mortgagor and judgment debtor should die, leaving no personal property, and no real estate save that mortgaged, it principally valuable for the buildings upon it, and they should be burned, each must then look to the real estate, the lands alone, for a security for his debt; and if that be insufficient, each must with equal certainty suffer a pecuniary disaster, resulting directly from the fire. What legal reason is there why the one may not, as well as the other, protect himself by a contract of insurance? * * *

It is not the name of the right which gives or refuses an insurable interest; it is the character of the right. A specific lien gives an insurable interest, because a loss of the particular property is at once seen to affect disastrously the specific lienor. But when a right to payment of debt exists, which can be satisfied only from a particular piece of property, is there not the same result from the same cause? If I have a debt against another, and he have but one piece of property from which my debt may be made, and he die leaving no personal estate, though in technical language my lien may not be spe-

cific upon that real estate, it is true in fact that there is a specific piece of property from which alone I may hope to satisfy my lien, and which is alone legally bound to satisfy it, and I am practically just like one to whom that piece of real property has been specifically pledged for a specific debt. If the latter, for that he may suffer pecuniary loss by the burning of that real property, has such an interest as that he may insure against that burning, I have such an interest also, and I, too, may insure. The probability—nay, the possibility of the payment of the plaintiff's debt out of the property of the deceased debtor—rested entirely upon the contingency of this real estate remaining without serious impairment in value. * * *

In Insurance Co. v. Allen, 43 N. Y. 389–395, 396, 3 Am. Rep. 711, it is said by Allen, J.: "An insurable interest may exist without any estate or interest in the corpus of the thing insured;" "it was enough that" there be a pecuniary interest in the preservation and protection of the property, and that one "might sustain a loss by its destruction." * * *

SECTION 6.—EFFECT OF ILLEGALITY

BASKET et al. v. MOSS.

(Supreme Court of North Carolina, 1894. 115 N. C. 448, 20 S. E. 733, 48 L. R. A. 842, 44 Am. St. Rep. 463.)

Action to restrain the defendant, W. E. Moss, trustee, from selling certain real estate described in the affidavits.

The affidavit on which the application was founded, after setting forth that the defendant John R. Moss was postmaster at Henderson on September 1, 1893, and that the full term to which he had been appointed expired March 1, 1894, stated:

That on or about September 1, 1893, defendant John R. Moss, represented to the plaintiff, Basket, an old man, easily influenced, that he, Moss, could procure for Basket the appointment of postmaster at Henderson as his successor, and represented further to said Basket that if he would secure to him, said John R. Moss, the sum of $952.50 (which sum was to be evidenced by the bond of said A. M. Basket) by a deed of trust on his (Basket's) real estate, that he, said John R. Moss, would go to Washington City, see President Cleveland and other authorities, resign said office in favor of Basket and surrender the office to him, and secure the appointment of Basket as postmaster in his stead, stating as a further inducement for the execution of said bond and trust deed, that if said Basket should be appointed and hold the office at the expiration of the term of said Moss, Mr. Cleveland would no doubt reappoint him.

That the said Basket, relying on John R. Moss's representations, executed his bond to J. R. Moss for $972.50, and at the same time executed to W. E. Moss, the other defendant, a trust deed on a tract of 125 acres.

That said bond and trust deed were executed without consideration, or upon a consideration which was illegal, and that said bond and trust deed are invalid.

That affiant is informed and believes that it was a part of the agreement when said bond and trust deed were executed, that if, upon the visit of John R. Moss to his Excellency, Grover Cleveland, at Washington, he should fail to have said Basket appointed postmaster as aforesaid, the said bond and trust deed should be cancelled and surrendered, the said Basket to pay the actual expenses of Moss.

That no part of the agreement (which affiant claims was invalid so far as the promising the office of postmaster for A. M. Basket is concerned) has been complied with by said Moss.

That defendant has indorsed the trust deed as being paid off and satisfied down to $199.

That, notwithstanding these facts, defendant John R. Moss has caused his codefendant W. E. Moss to advertise the said real property for sale under said invalid deed, to pay the alleged balance of $199 claimed as due on said invalid bond.

The defendant prays for a restraining order, etc.

CLARK, J. The public has a right to some better test of the capacity of their servants than the fact that they possess the means of purchasing their offices. The Code (section 1871) provides, "All bargains, bonds and assurances made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void." Notwithstanding the office is an office under the United States government, if an action were brought in our courts to recover upon a bond or mortgage given for such consideration, our courts would hold it void. Such agreements are void at common law, as well as by statute. So also contracts to procure appointment to office are void. * * * or to resign in another's favor. * * * Public offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity and fitness for the position. Agreements for compensation to procure these tend directly and necessarily to lower the character of the appointments to the great detriment of the public. Hence such agreements, of whatever nature, have always been held void as being against public policy. * * * Says Ames, C. J., in Eddy v. Capron, 4 R. I. 394, 67 Am. Dec. 541, "By the theory of our government, appointments to office are presumed to be made solely upon the principle detur digniori, and any practice whereby the bare consideration of money is brought to bear in any form upon such appointments to or resignation of office, conflicts with and degrades this great principle. The services performed under such appointments are paid for by salary or fees, presumed to be adjusted at the point of adequate remuneration only. Any premium paid to obtain office interferes with this adjustment and tempts to peculation, overcharges and frauds in the effort to restore the balance thus disturbed." Besides, the moral sense revolts at traffic to any extent in the bestowal of public office. It is against good morals as well as against the soundest principles of public policy. If public offices can be sold or procured for money, the purchasers will be sure to reimburse themselves by dispensing the functions of their offices for pecuniary consideration. The law wisely guards against the first step in that direction. For that reason, not only the sum agreed to be paid directly to the holder of this office to resign, but the amounts advanced for expenses and compensation of persons to go to Washington to procure the authorities there to accept the resignation of one party and the appointment of the other, are not recoverable. For the same

reason that agreements to pay for lobbying the passage of bills before a legislative body are void, * * * all agreements for expenses and compensation of persons seeking to influence or procure appointments to office are void. * * * Lawson on Contracts, §§ 309, 310. "The courts condemn the very appearance of evil, and it matters not that in a particular case nothing improper was done or expected to be done. It is enough that the employment tends directly to such results." Clippinger v. Hepbaugh, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519. * * *

If an action had been brought to recover these sums, or to foreclose a mortgage given to secure payment thereof, the court would dismiss the action. The defendant contends, however, that as he was careful to take a mortgage with a power of sale, the courts will not interfere by injunction, but will let him proceed to collect his ill-gotten gains. This would simply legalize the practice which is denounced both by statute and common law. Reasons of public policy forbidding this species of corruption are too profound and too important to the public welfare to be evaded and nullified by so simple a device. A mortgage given to secure a sum of money upon an agreement against public policy is void. * * *

Pomeroy, Equity Jurisprudence, §§ 939–942, calls attention to the fact that the rule in pari delicto is often misunderstood, and its application is properly and correctly that in such cases "potior est conditio possidentis"—that is, that the court will permit nothing to be done which will enable a party to collect from the other the fruits of his wrong. When he sues to recover, the law will not give him judgment. When he has shrewdly attempted to evade this by taking a mortgage with a power of sale, the court will by injunction prevent his collecting on a mortgage denounced as void by reasons of public policy. In section 941 he says: "Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this high principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by cancelling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance or transfer, and decree the recovery back of money paid or property delivered in performance of the agreement." Also, in section 940, he says that whenever the defensive remedy at law will not be equally certain, perfect and adequate, the equitable remedy will be granted by injunction and the like. "The equitable relief so conferred does not violate the general maxim concerning parties in pari delicto; on the contrary, it carries that maxim into effect." So in the present case the injunction against sale, under the void mortgage taken against public policy, enforces that maxim by prosecuting either party recovering anything from the other. This is also the well-settled rule in England. In Lloyd v. Gurdon, 2 Swan. 181, Lord Eldon granted an injunction to restrain the negotiation of bills of exchange which were made void by Statute 9 Anne, c. 14, which is in the very tenor of section 1871 of the Code, applicable to the present transaction. Lord Hardwicke granted the injunctive relief in a similar case. * * *

In such case, before the Master of the Rolls, Sir John Romilly, where part of the consideration was for money loaned, and part was for an immoral consideration, the whole mortgage was ordered to be can-

celled, the court declining to pass upon the question whether the mortgagee could recover at law for the valid part of the consideration—i. e., the money loaned. Willyams v. Bullmore, 33 L. J. R. (Eq.) N. S. 461. In the present case, upon the defendant's own showing $37.50 is the only valid part of the sum attempted to be secured. Whether the mortgage can be upheld to that extent is not before us, as the plaintiff in his reply expresses his willingness to pay said sum. The plaintiff recovering judgment for the cancellation of the mortgage, the defendant should be taxed with the costs. The injunction was properly continued to the hearing. Affirmed.

SHEPHERD, C. J. (concurring). I concur in the conclusion of the court that the agreement which the mortgage is given to secure is contrary to public policy, and therefore illegal, and I am also of the opinion that the injunction should be continued until the final hearing. It is alleged that the plaintiff Joseph Basket has a resulting trust in the land included in the mortgage, and as it does not appear that he had any connection with the illegal transaction between A. M. Basket, the mortgagor (the holder of the legal title), and the mortgagee, I see no reason why the equitable aid of the court should not be extended to him.

I cannot agree, however, in that part of the opinion which declares that A. M. Basket is entitled to equitable relief. "Whenever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, in pari delicto, it is a well-settled rule, subject only to a few exceptions depending upon other considerations of policy, that a court of equity will not aid a particeps criminis, either by enforcing the contract while it is yet executory, or by relieving him against it by setting it aside, or by enabling him to recover the title to property which he has parted with by its means. The principle is thus applied in the same manner when the illegality is merely malum prohibitum, being in contravention of some positive statute, and when it is malum in se, as being contrary to public policy or to good morals. Among the latter class are agreements and transfers, the consideration for which was violative of chastity, compounding of a felony, gambling, false swearing, the commission of any crime or breach of good morals." 1 Pom. Eq. 402.

"Where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded in illegality, immorality, or is base and unconscionable on his part—in such cases courts of equity will leave him to the consequences of his own iniquity, and will decline to assist him to escape from the toils which he has studiously prepared to entangle others, or whereby he has sought to violate with impunity the best interests and morals of social life. * * * Courts of equity could not, without staining the administration of justice, interfere to save the party from the just results of his own misconduct, when the failure of success in the scheme would manifestly be the sole cause of his praying relief." 2 Story, Eq. 696. * * *

These principles are so well established that it is hardly necessary to produce authority to their support. * * *

There are, it is true, limitations to the rule, as where parties are not equally in fault, or as in the case of usury, where the borrower is considered as in vinculo or where the security is for past cohabitation; and there are cases where, under peculiar circumstances, con-

siderations of public policy will be best subserved by granting relief. These and other instances will be found in the text-books and notes to which I have referred, and there seems to be some confusion in the decided cases upon the subject. No satisfactory authority, however, can, in my opinion, be found to take the present case out of the general rule. If, as we have seen, the court will not interfere where the consideration is the compounding of a felony for the commission of a crime, it is difficult to understand why it should extend its relief where the consideration is for the commission of the offence alleged in the complaint. Certainly, considerations of public policy are as grave in the former cases as in the latter. Again, it will hardly be contended that the plaintiff A. M. Basket is not equally in fault. Indeed, it appears from the written agreement executed contemporaneously with the mortgage, that he was the moving party in the transaction. The proposition was made by him, and it is perfectly clear that his guilt is equal if not greater than that of the defendant. Again, if it be conceded that he is entitled to the relief on the ground that part of the contract, the note, is executory, the court would only grant it upon terms, and as the mortgagee has, under the agreement, so credited the note that everything is eliminated except certain expenses and counsel fees, and a pre-existing debt (leaving only a balance of about $200), it would seem very clear that the court, even if it interfered, would not place him in any better condition. The expenses and counsel fees were actually expended in furtherance of his own proposition, and it would seem a complete reversal of the maxim "In pari delicto melior est conditio defendentis," to so use the equitable power of the court as to extricate the plaintiff from the position in which he has placed himself, and put the entire expense of carrying out his own proposition upon the shoulders of the defendant. No clearer case can, in my opinion, be conceived for the application of the rule than the present.

Furthermore, it is a fundamental principle that a court of equity never interferes where there is a complete defence at law. High on Injunction, 473. In the present case it is said that the mortgage is utterly void. If this be so, there is no occasion for equitable relief, not even on the ground that it is necessary to discover and preserve the evidence of its illegality, as the contemporaneous agreement executed by all of the parties is plenary proof of the vitiating element. 2 Story, Eq. 700.

This consideration, as well as the firmly established rule in pari delicto, etc., is also a complete bar to the prayer that the deed be cancelled on the ground that it is a cloud upon plaintiff's title. 2 Story, Eq. 700. Public policy will be far better subserved by leaving the plaintiff where his illegal conduct has placed him, than by encouraging him in another attempt to violate the law by the assurance that a court of equity will always stand ready to relieve him against the consequences of his unsuccessful experiments. "The suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern practice is established." 1 Story, Eq. 298.

The case of Patterson v. Donner, 48 Cal. 369, cited in the opinion to the effect that a mortgage given to secure money upon an agreement

against public policy does not divest the title, does not aid the plaintiff, for, if the title is not divested, there is certainly no occasion for resorting to a court of equity where the illegality is evidenced, as in this case, by the contemporaneous agreement referred to. The case, however, decides the other way. It holds that the title passes, but that the performance of the illegal condition will not divest the title of the grantee. The case cited from Indiana is equally inapplicable, as it was an action at law to enforce an illegal executory agreement, and it was of course held that the defendant could plead the illegality of the consideration. The case from Maryland is also inapplicable, as it was an action to foreclose a mortgage given upon an illegal consideration, and the court refused relief. It is no authority that the court would have aided the mortgagor had he been seeking a decree for cancellation. The case of Willyams v. Bullmore, 33 L. J. R. (Eq.) N. S. 461, cites no authority. It seems, however, that the mortgagee was seeking foreclosure, and that this action was consolidated with one brought by the mortgagor for cancellation. Under these circumstances there was a decree for cancellation. It is doubtful whether the court would have made such a decree, had not the mortgagee been seeking foreclosure. However this may be, it cannot be regarded as sufficient authority to overturn the well-established rule embodied in the maxim which I have quoted. There is nothing in the reference to Pomeroy's Equity Jurisprudence which at all countenances relief under the circumstances of this case. The defendant has already agreed to terms as favorable as would be imposed by a court of equity.

I think that A. M. Basket has no standing in a court of equity, and that, under the circumstances, he is entitled to no relief. To interfere in his behalf would be giving aid and comfort to the moving party in this illegal transaction.

SECTION 7.—SUNDAY CONTRACTS

RICHMOND v. MOORE.

(Supreme Court of Illinois, 1883. 107 Ill. 429, 47 Am. Rep. 445.)

WALKER, J. * * * On the trial in the superior court the evidence tended to prove the agreement was entered into on Sunday. Defendant, on this evidence, asked the court to hold that the contract was prohibited by our statute, and was void, but the superior court refused to so hold, and the principal question discussed by counsel is, whether, under our statute, such a contract is void, or binding on the parties.

The provision of our statute which it is claimed renders this contract void, is the 261st section of our Criminal Code. The portion of that section claimed to render the contract void, is this: "Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted) or by amusements or diversion on Sunday, shall be fined not exceeding $25." It contains other exceptions, of which is this: "Nor to prevent the due exercise of the rights of conscience by whomsoever thinks proper to keep any other day as a Sabbath." The common law did not prohibit the making of such contracts. In Drury v. Defontaine, 1 Taunt. 136, Lord Mansfield, in

delivering the opinion, said: "It does not appear that the common law ever considered those contracts as void which were made on Sunday." Judgment was accordingly given for the price of a horse sold on that day. * * * This is the doctrine of all the cases, English or American, with perhaps no more than one or two exceptions that announce a different doctrine. The doctrine that contracts made on Sunday are void, depends, therefore, alone on statutory enactments, and in the various states of the Union the statutes vary, in language or substance, and the decisions of the different courts have been based on the phraseology of their several statutes. The common law, on the other hand, seems always to have prohibited all judicial proceedings on Sunday. * * *

St. 29 Car. II, c. 257, seems to be the basis of the enactments of the various states of the Union. It is this: "That no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work, on the Lord's day." It contains exceptions, of which are works of necessity. A mere glance at that and our statute will show that they are materially different. That prohibits labor and business; ours only prohibits labor or amusement that disturbs the peace and good order of society. The offense by that statute is the performance of labor or business, and by ours it is the disturbance of the peace and good order of society. The British statute is much more comprehensive in its purposes and language than ours. Ours only prohibits labor that disturbs the peace and good order of society, not naming business, whilst the British statute renders the mere act of labor or business penal. * * *

But even under St. 29 Car. II the British courts have held that the sale of a horse on Sunday, out of the usual course of trade, by the vendor, was not void. * * * So the hiring of a laborer on Sunday by a farmer for a year, was held legal and binding, and conferred a settlement of the laborer in the parish. * * * That a baker might prepare dinners for his customers on Sunday. * * * Thus it is seen that the statute was rigidly construed, and the same is true of most of the statutes of the various states of the Union. Here there was nothing done to disturb the peace and good order of society, which it is the primary purpose of the statute to prevent. Had this contract been made in such a manner as to disturb the peace and good order of society, or any portion of it, then a very different question would have been presented, but one which need not be discussed here. But there is no evidence that in the slightest degree tends to prove any one was disturbed. * * *

Judgment [for the plaintiff] affirmed.

CHAPTER VIII

CAPACITY

Section
1. Introduction.
2. Disaffirmance.
3. Ratification.
4. Contracts for Necessaries.

SECTION 1.—INTRODUCTION

There are certain classes of persons who, for one reason or another, sustain a different relation to contracts entered into by them from that which usually exists. The problem in this chapter is to ascertain what rights are possessed by such persons.

There are five classes of persons who do not have full contractual capacity; that is, there are five classes of persons whose rights growing out of contracts are somewhat different from the rights which grow out of contracts generally. These are: (1) Infants; (2) insane persons; (3) intoxicated persons; (4) married women; and (5) corporations.

In the case of infants and insane persons, it has been thought that these classes are deserving of a higher degree of protection against the consequences of their acts than is necessary in the case of adults. Statutes usually prescribe the age under which all persons are to be deemed infants. The age of twenty-one is commonly provided. In some states girls become of age at eighteen. These age limits are more or less arbitrary. Minors under the age of twenty-one are, no doubt, in many cases, just as capable of looking after their own affairs as an adult; but a limit must be fixed somewhere, and the age of twenty-one is generally agreed upon as that limit.

Intoxicated persons are accorded some additional protection, for substantially the same reason that minors are protected. Married women, at common law, were under a disability, not because it was thought that they were entitled to additional protection, but largely because of the notion of legal identity of husband and wife. The incapacity of married women has quite generally been removed by statute so that, as a general proposition, it may today be said that married women in all states have full capacity to contract. But in some states there yet remain traces of their former incapacity.

Corporations do not have full capacity, not because they are entitled to special protection, but because a corporation has no power to contract, except the power given it by the state creating it. The probabilities are that no corporation has been given freedom to contract to the same extent as that possessed by individuals. Generally we speak of contracts which a particular corporation

does not have the power to make as ultra vires contracts; that is, contracts which are beyond or outside the power given it by the act creating the corporation. The subject of ultra vires contracts will be taken up in the chapters dealing with corporations.

To return to the inquiry as to the nature of the special rights accorded to persons who do not have full contractual capacity, it is more correct to think of these contracts, in the first instance, just as we look upon the contracts of all other persons; that is, an agreement between a minor and an adult, founded upon consideration is a contract, just as other like agreements are contracts. Being an adult is not a requisite to the existence of a contract. A minor may sue an adult for breach of contract with the same effect as if he were an adult, and in the same manner, except that the infant must bring his action "by his next friend."

Incapacity, therefore, is not a circumstance which makes it impossible for one who is said to be incapacitated from making a contract. Incapacity merely confers upon such persons certain weapons of defense and of attack that cannot be used in a legal battle between adults. But these weapons of defense and of attack are not acquired until some act has been done. This act is called disaffirmance. Our first question, therefore, is to ascertain what constitutes a disaffirmance and what are its consequences.

It should also be apparent that when a minor becomes of age that he should have the power of making contracts entered into by him while a minor, in all respects the same as if they had been made after he attained his majority. Such an act is called ratification. Our second question is: What circumstances amount to a ratification?

Finally, it will be found that there are certain kinds of contracts made by infants that are, in a sense, binding upon the infant; that is, the courts will entertain a suit against an infant and enter a judgment against him for the reasonable value of what he received. These contracts are for necessaries. The following cases present various problems relating to disaffirmance, ratification, and to contracts for necessaries.

SECTION 2.—DISAFFIRMANCE

LEMMON v. BEEMAN.

(Supreme Court of Ohio, 1888. 45 Ohio St. 505, 15 N. E. 476.)

William J. Beeman, the plaintiff below, sued the defendant, James F. Lemmon, as administrator, for money paid by him upon the purchase of a certain stock of drugs of James Lemmon, the defendant's decedent; the plaintiff being a minor at the time of the purchase, and having elected, on becoming of age, to rescind the contract. On the trial of the case, in the common pleas, the defendant excepted to a part of the charge of the court, and took a bill of exceptions, setting

forth the evidence and the charge to which exception was taken. The judgment was for the plaintiff, and was affirmed in the district court. The part of the charge to which exception was taken is to the effect that, upon the facts of the case, the plaintiff could recover without returning the property.

MINSHALL, J. In 1881, Beeman, then a minor, purchased of James Lemmon, then in life, but since deceased, a certain stock of drugs, for which he paid at the time $400, the price agreed on between them. The stock was in a store in the state of Illinois; and the sale was made by Lemmon, through his agent, Dr. Everett, who some time before had sold the stock to Lemmon, and, as his agent, had continued in possession of the property, and conducted the business for him. In a short time after the sale had been made to Beeman, the goods were taken from him under an execution issued upon a judgment against Everett, upon the claim of the creditor of the latter that they belonged to him, and not to Lemmon. Beeman made an effort to recover the property; and in a short time after he became of age (which was in 1882) disaffirmed the contract, presented a claim to the administrator of Lemmon's estate for the money he had paid on the purchase, and demanded its return; which was refused and the claim rejected.

No point is made as to the ownership of the goods; it is averred in the petition, and must be taken as the fact, that they belonged to the deceased at the time of the sale to Beeman. Again, there is no room for a claim, nor is it made, that the property purchased was in the nature of necessaries, and the contract, for such reason, incapable of being disaffirmed; nor is it claimed that the decedent or his agent was in any way deceived as to the age of Beeman at the time the sale was made. The only question presented upon the record is whether, upon the facts as stated, the minor had the right, on becoming of age, to rescind the contract, and recover the consideration he had paid, without returning the property that had been sold and delivered to him. The true doctrine now seems to be that the contract of an infant is in no case absolutely void. * * *

An infant may, as a general rule, disaffirm any contract into which he has entered; but, until he does so, the contract may be said to subsist, capable of being made absolute by affirmance, or void by disaffirmance of a contract by an infant, in the exercise of a right similar to that of rescission in the case of an adult, the ground being minority, independent of questions of fraud or mistake. But, in all else, the general doctrine of rescission is departed from no further than is necessary to preserve the grounds upon which the privilege is allowed; and is governed by the maxim that infancy is a shield, and not a sword. He is not in all cases, as is an adult, required to restore the opposite party to his former condition; for if he has lost or squandered the property received by him in the transaction that he rescinds, and so is unable to restore it, he may still disaffirm the contract and recover back the consideration paid by him without making restitution; for, if it were otherwise, his privilege would be of little avail as shield against the inexperience and improvidence of youth. But when the property received by him from the adult is in his possession, or under his control, to permit him to rescind, without returning it, or offering to do so, would be to permit him to use his privilege as a sword, rather than as a shield.

This view is supported, not only by reason, but by the greater weight of authority. It was recognized and applied by this court in Cresinger v. Welch's Lessee, 15 Ohio, 156, 45 Am. Dec. 565, decided in 1846. The following is the language used by Mr. Tyler on the subject: "If the contract has been executed by the adult, and the infant has the property or consideration received at the time he attains full age, and he then repudiates the transaction, he must return such property or consideration, or its equivalent, to the adult party. If, however, the infant has wasted or squandered the property or consideration received during infancy, and on coming of age repudiates the transaction, the adult party is remediless." He then adds that "there are expressions of judges and text writers against this latter proposition, but," he says, "the weight of authority is in harmony with it, and is decidedly in accord with the general principles of law for the protection of infants." Tyler, Inf. (2d Ed.) 80. * * *

See, also, the case of Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194, and the notes thereto of Mr. Ewell, in his Leading Cases on Infancy and Coverture, 119. After an exhaustive review of the cases, this author says: "The true doctrine, and the one supported by the weight of authority (at least in the United States), would seem to be that when an infant disaffirms his executed contract, after arriving at age, and seeks a recovery of the consideration moving from him, and where the specific consideration received by him remains in his hands, in specie, at the time of disaffirmance, and is capable of return, it must be returned by him; but if he has, during infancy, wasted, sold, or otherwise disposed of, or ceased to possess the consideration, and has none of it in his hands in kind on arriving at majority, he is not liable therefor, and may disaffirm without tendering or accounting for such consideration."

This statement of the law, supported, as it is, not only by the greater weight of authority, but also of reason, meets with our full approval. There is, however, much conflict in the decisions of the different states; greater perhaps than upon any other question connected with the law of infancy; * * * but we deem it unnecessary to attempt to review or discuss them, for the very good reason, that it has been done with thoroughness and ability by the authors just referred to. * * *

By his disaffirmance, the title has been restored to the estate of the vendor, and the property, or its value, may be recovered by the administrator, if it was wrongfully taken by the sheriff under the execution against Everett. Judgment affirmed.

JOHNSON v. NORTHWESTERN MUTUAL LIFE INS. CO.

(Supreme Court of Minnesota, 1894. 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473.)

BUCK, J. On the 25th day of October, 1888, the plaintiff, Johnson, who was then a minor, seventeen years old, obtained a policy of insurance on his own life in the Northwestern Mutual Life Insurance Company, this defendant, for the sum of $1,000, in consideration of the payment by him of the premium of $23.29, and the semiannual payment of a like sum to defendant on or before noon of the 25th days of October and April thereafter in each and every year during

the continuance of the policy, viz. for 20 years. He made eight semi-annual payments amounting to the total sum of $186.32, and immediately thereafter plaintiff attained his majority, or full age of twenty-one years; and thereupon, on December 21, 1892, he duly served upon said defendant his notice in writing that he had arrived at his majority, and that he elected to avoid the contract of insurance between the defendant and himself, and offered to return said policy to the defendant, and demanded of the defendant that it return to him the moneys which he had paid to the said company, amounting to the sum above named, which the defendant refused to do, whereupon he brought this action to recover of the defendant the amount so paid, upon the ground that he was an infant at the time of the execution of the said contract and during the times when he made the semi-annual payments as herein stated.

The defendant interposed a demurrer to the plaintiff's complaint upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court below overruled the demurrer, and the defendant appealed to this court.

In its memorandum the court below gave as its reason for overruling the demurrer that "this contract of insurance was not beneficial to the insured; it was for the benefit of third persons." We do not see how the court fell into such an error, for the plain provisions of the policy show clearly that it was for the benefit of the plaintiff, for it expressly provides that at the end of twenty years the policy is payable to himself if living, and after ten years he could share the company's surplus, according to usage, at each distribution, until all contributions to the surplus funds, found in the course of making such contributions to have arisen from the policy, should have been returned. After three or more annual premiums were paid in cash, if he made default in the payment of any premium on the day it became due, he was entitled to a paid-up nonparticipating policy for as many twentieth parts of the original sum insured as there were complete annual premiums so paid. There were also other benefits which he would receive, which we need not further specify particularly. But, notwithstanding the wrong reason given by the trial court for its decision, if the decision was correct, it must stand.

The question of the proper construction of contracts between an infant and an adult is frequently one of great difficulty. The power which exists upon the part of an infant to insist upon the performance of a contract which is for his benefit and to repudiate one which is against his interest necessarily results in this condition of affairs, and the only method for courts to deal with such questions is to apply so far as possible the legal or equitable rules to each case as it may present itself for judicial determination. The infirmities which are always attendant upon infancy are so many, and present themselves in so many different phases, that the law must necessarily throw its protection around them, and allow them to avoid acts which are obviously injurious, and which are brought about by their own imprudent conduct, or by the evil designs of others. But there are contracts made by infants which are valid and binding upon them, such as contracts for necessaries. It is conceded, however, that this contract is not one coming within the term "necessaries," and it must also be conceded that there was no fraud on the part of the defendant whereby the plaintiff was induced to enter into this contract of insurance. Nor does

the question of delay on the part of plaintiff in disaffirming this contract enter into the case for discussion or for determination. If he had a right to disaffirm the contract at all, it was done promptly, and without delay, after he attained his majority. Was this contract void or voidable? We are of the opinion that it was not void. It was for the benefit of the infant. That is to say, construing it in accordance with the well-understood business principles and practical experience of the age, it should be deemed one beneficial to him. Like all business ventures, even among adults, it might prove disastrous or it might be of benefit to the plaintiff. It was the ordinary policy of insurance upon the usual terms, and in a solvent company. At least no suggestion is made to the contrary.

It did not obtain the money of the plaintiff, it is true, through deceit, fraud, or concealment of any fact, nor in any way impose upon the infant, but it did obtain and receive a fund belonging to him which it was not necessary for him to part with. This was done at a time when the law adjudges him incapable of determining whether it was for his benefit or not. To leave this question of making contracts to the immature judgment of infants who are easily influenced or misled, and frequently to their great injury, and then have the courts continually called upon to decide whether the contract was of such a beneficial nature to the infant that it might be enforced against him, would lead to an endless variety of decisions. The interest of the infant will be best subserved by holding such contracts voidable. It is a rule which can be appropriately applied in this case, for the plaintiff has performed all that can be reasonably asked of him to do. We have examined many of the authorities cited by the counsel for the appellant in their brief, but we are of the opinion that the rule heretofore laid down in this court is the correct one to follow, and is applicable to this case. (Citing cases.)

The order appealed from is affirmed.

On Reargument.

MITCHELL, J. This case was argued and decided at the last term of this court. A reargument was granted for the reasons that although the amount was small the legal principles involved were important; the time permitted for argument under our rules was brief; the case was decided near the end of the term, without, perhaps, the degree of consideration that its importance demanded; and, on further reflection, we are not satisfied that our decision was correct.

The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant.

It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he had died during that time the defendant would have had to pay the amount of the policy to his es-

tate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant.

The question is: Can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of $5,000, should, from time to time, buy and pay for $100,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine he could recover back the $100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting.

But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessaries. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up the land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessaries, because nobody would dare to contract with him for anything else.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessaries:

First. That, in so far as the contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield.

Second. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor having received no benefits from it, he may recover back what he has paid or parted with.

Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received.

Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in statu quo,

although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider.

Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie.

Sixth. The courts will always grant an infant relief where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of Holmes v. Blogg, 8 Taunt. 508, approved as late as 1890 in Valentini v. Canali, 24 Q. B. Div. 166. Some obiter remarks of the Chief Justice in Holmes v. Blogg, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved—a fact which has sometimes led to the erroneous impression that the case itself has been overruled. Corpe v. Overton, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant had never enjoyed its benefits.

In Chitty on Contracts (volume 1, p. 222), the law is stated in accordance with the decision in Holmes v. Blogg. Leake, a most accurate writer, in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Comm. 240), and Reeves in his work on Domestic Relations (chapters 2 and 3, tit. "Parent and Child"), state the law in exact accordance with the "English rule." Parsons in his work on Contracts (volume 1, p. 322), undoubtedly states the law too broadly, in omitting the qualification, "and enjoys the benefit of it."

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, Riley v. Mallory, 33 Conn. 206; Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Breed v. Judd, 1 Gray (Mass.) 455. But many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The

result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule.

The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendency over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties.

If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessaries. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence or overreaching.

A similar principle applies to all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendency which prevents the other from exercising an unbiased judgment—as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no "fiduciary relation" between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction.

If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as Medbury v. Watrous, 7 Hill (N. Y.) 110, 16 N. Y. Com. Law, 529, Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726, Sparman v. Keim, 83 N. Y. 245, and Heath v. Stevens, 48 N. H. 251, really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered [received] by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy.

But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, nonparticipating policy for as many twentieths of the original sum insured ($1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the

original policy, to a paid-up, nonparticipating policy for $200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds.

Order affirmed.

RICE v. BOYER.

(Supreme Court of Indiana, 1886. 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53.)

ELLIOTT, C. J. It is alleged in the complaint of the appellant that the appellee, with intent to defraud the appellant, falsely and fraudulently represented that he was 21 years of age; that, relying on this representation, the appellant was induced to sell and deliver to the appellee, on one year's credit, a buggy and a set of harness; that the appellee, in payment for the property, delivered to appellant, a buggy, and executed to him a promissory note, payable one year after date, and also executed a chattel mortgage to secure the payment of the note; that the appellee's representation was untrue; that he had not yet attained the age of 21 years; that, on account of appellee's nonage, the note cannot be enforced; that the appellee avoided his note and mortgage by a sale of the mortgaged property, and repudiates and refuses to be bound by his contract in reference thereto; that the appellant brings into court the note and mortgage executed to him. and tenders them to the appellee. Prayer for judgment for the value of the property delivered to appellee. To this complaint a demurrer was sustained, and error is assigned on that ruling.

The appellee's counsel defend the ruling principally upon the ground that the action was prematurely brought, inasmuch as it cannot be determined that any injury will be done the appellant until the expiration of the year fixed for the payment of the property purchased of the appellant. We agree with counsel that the contract is voidable, not void, and that the appellee might have performed it notwithstanding his nonage, if he had so elected. * * *

But this principle is not broad enough to meet the averment of the complaint that the appellee has repudiated his contract, and refuses to be bound by it. As the authorities relied on by counsel do not fully cover the case, further investigation is necessary, and the first step in this investigation is to ascertain and declare the effect of the infant's repudiation of his contract.

In Shrock v. Crowl, 83 Ind. 243, the holding in Mustard v. Wohlford, 15 Grat. (Va.) 329, 76 Am. Dec. 209, that, where a voidable act of an infant is disaffirmed, it avoids the contract ab initio, is fully approved. If this is the law, then, when the appellee repudiated his contract, he destroyed it for all purposes. It no longer bound him, nor could he take any benefit from it. If the contract was destroyed back to the beginning, it ceased to be operative for anybody's benefit. We think the principle of law is correctly stated in the cases to which we have referred, and that the conclusion we have stated is the logical, and, indeed, inevitable, sequence of that principle. * * *

An infant may repudiate a contract respecting personal property,

during nonage. * * * The repudiation by the appellee was therefore a complete avoidance of the contract, effectually putting an end to its existence, both as to him, and as to the adult with whom he contracted.

It is evident, from what we have said, that the ground taken by the appellee's counsel is not tenable; for, when their client repudiated the contract, as it is alleged he did do, it ceased to be effective for any purpose. * * *

Infants are, in many cases, liable for torts committed by them, but they are not liable where the wrong is connected with a contract, and the result of the judgment is to indirectly enforce the contract. Judge Cooley says: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it, as a tort." Cooley, Torts, 116. In another place the same author says: "So, if an infant effects a sale by means of deception and fraud, his infancy protects him." Id., 107. Addison, following the English cases, says an infant is not liable "if the cause of action is grounded on a matter of contract with the infant, and constitutes a breach of contract as well as a tort." Addison, Torts, par. 1314.

Upon this principle it has been held in some of the cases that an infant is not liable for the value of property obtained by means of false representations. * * * It is also generally held that an infant is not estopped by a false representation as to his age; but this doctrine rests upon the principle that one under the disability of coverture or infancy has no power to remove the disability by a representation. * * *

It is evident, from this brief reference to the authorities, that it is not easy to extract a principle that will supply satisfactory reasons for the solution of the difficulty here presented. It is to be expected that we should find, as we do, stubborn conflict in the authorities as to the question here directly presented, namely, whether an action will lie against an infant for falsely representing himself to be of full age. * * *

Our judgment, however, is that, where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action ex delicto for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract; for the recovery is not upon the contract, as that is treated as of no effect, nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability; for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age is well sustained by authority, although, as we have said, there is a fierce conflict, and it is strongly entrenched in principle. * * *

Aside from mere personal torts, it is scarcely possible to conceive a tort not in some way connected with a contract, and yet all the authorities agree that the liability of infants is not confined to mere personal torts. * * * The cases certainly do agree—it is, indeed, difficult, if not impossible, to perceive how it could be otherwise—that, although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is that he is liable, to the extent of the loss actually sustained, for his tort, where a recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise?

There is no enforcement of a promise where an infant, who has been guilty of a positive fraud, is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith, and has exercised due diligence; nor does such a rule open the way for designing men to take advantage of an infant, for it holds one who contracts with an infant to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, for it allows him only compensation for the actual loss sustained. It does not permit him to make any profit out of an executory contract, but it simply makes good his actual loss.

It is worthy of observation that, in the cases which hold that an infant's representation will not estop him to deny his disability, it is generally declared that he may, nevertheless, be held liable for his tort. It may often happen that the age and appearance of the infant will be such as to preclude a recovery for a fraud, because reasonable diligence, which is exacted in all cases, would warn the plaintiff of the nonage of the defendant. On the other hand, the infant may be in years almost of full age, and in appearance entirely so, and thus deceive the most diligent by his representations. Suppose a minor who is really 20 years and 10 months old, but in appearance a man of full age, should obtain goods by falsely and fraudulently representing that he is 21 years of age, ought he not, on the plainest principles of natural justice, to be held liable, not on his contract, but for the loss occasioned by his fraud? * * *

Judgment reversed, with instructions to overrule the demurrer to the complaint.

SECTION 3.—RATIFICATION

HOBBS et al v. HINTON FOUNDRY, MACHINE & PLUMBING CO.

(Supreme Court of Appeals of West Virginia, 1914. 74 W. Va. 443, 82 S. E. 267, Ann. Cas. 1917D, 410.)

Suit by T. E. Hobbs and others against the Hinton Foundry, Machine & Plumbing Company and others. From a decree for plaintiffs, defendants appeal.

LYNCH, J. Does one who, while a minor, purchases personal property, and thereafter and for three months next ensuing his majority uses and operates it in the conduct of a foundry and plumbing business, taking unto himself the profits, if any, arising therefrom, ad-

vertises it for sale, but sells no part of it, pays part of the consideration therefor and a rental on a building leased to him by the seller, thereby ratify his contract, and bind himself to pay the residue of the consideration? Or may he, notwithstanding these acts on his part, subsequently disaffirm the contract, and thereby exonerate himself from further liability thereon? If so, does his disaffirmance operate to discharge the lien of a deed of trust by himself and wife and a brother to secure the payment of the consideration and rental payable under the contract and leasehold? A proper answer to each of these inquiries determines the issues involved in this cause.

On April 17, 1911, T. E. Hobbs, then a minor, purchased of the Hinton Foundry, Machine & Plumbing Company its machinery and plumbing outfit. The consideration therefor and the rental on the building in which the property was then located and used, was secured by a deed of trust by plaintiff, his wife (also then a minor), and his brother on the machinery and appliances and on undivided interests in a lot in the town of Hinton; plaintiff alone signing the note thus secured.

From the date of the purchase until September 1, 1911, plaintiff used the property in the operation of a general foundry and plumbing business, contracting for work appertaining to such business, and taking to himself the profits, if any, arising from the conduct thereof; he also paid part of the original purchase price, and the rental as it became due, advertised part of the property for sale, but did not sell any of it, and in addition purchased and operated with it other like machinery and appliances. But on September 1, 1911, by notice in writing duly served, he notified defendant of his disaffirmance of the contract, offered to return the property purchased of it, and demanded a cancellation of the note and trust deed.

With few exceptions not necessary to be noted here, the contracts of infants are voidable, and not void. * * * But whether an infant should, within a reasonable time after arriving at full age, do some affirmative act indicative of an intention on his part to repudiate, we are not now called upon to decide, because of plaintiff's notice and offer, though whether he acted within a reasonable time does become an important inquiry in connection with the facts recited, which, according to defendant's contention, operated as a ratification prior to the service of such notice.

While ratification is, generally speaking, a question of intention, it is not essential that the purpose to ratify shall be expressly declared. It may be, and ordinarily is, inferred from the free and voluntary acts and conduct of the party sought to be charged, although at the time he may not have had in mind any definite idea or purpose of ratification.

But, to effectuate a ratification, his acts, words, or conduct must be inconsistent with any other purpose, as where, after arriving at age he retains for an unreasonable length of time the property purchased by him while in infancy, or uses it as his own, or exercises such acts of ownership over it as clearly evinces a purpose to ratify. * * * Whether he acts within a reasonable time after full age, and, if he does, what acts constitute a confirmation of contracts made in infancy, are questions of fact, to be determined in the usual manner either by a jury under proper instruction or by the chancellor when properly submitted to him. * * *

While much depends upon the promptitude with which acts are performed by way of ratification or disaffirmance after attaining his majority no period of time generally applicable in all cases has been, or in the nature of things can ever be, definitely fixed. The acts and conduct relied on for confirmation, and the reasonableness of the time, must be determined from the facts and circumstances of each particular case, for what may be a reasonable time, and what a ratification, under some conditions, may be unreasonable and insufficient under other conditions.

An infant s contract wholly consummated by him either before or after full legal age requires more prompt action and a less degree of confirmatory conduct than one not fully performed by him, as in this case, for as to plaintiff the contract remains executory, though executed by defendant. A like distinction is noted and upheld between sales to infants and sales by them, and between conveyances of their lands and purchases of land by them. For if, after full age, one, who while a minor sells lands belonging to him, stands by an unreasonable length of time, and, without notice or warning of an intention to repudiate his contract or deed, sees his vendee make valuable improvements on the land he will thereby estop himself from the assertion of a right to annul the contract or deed and to demand a rescission and reconveyance. * * *

Did plaintiff act, or fail to act, within a reasonable time after June 3, 1911? Or did he, by his acts and conduct thereafter and before notice to the defendant, preclude right to disaffirm? These are questions so inseparable that both may to some extent be properly treated and answered together. In Hook v. Donaldson, 9 Lea (Tenn.) 56, a delay of four years was held unreasonable, while in Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919, a delay of three years was deemed reasonable. In Green v. Wilding, 59 Iowa, 679, 13 N. W. 761, 44 Am. Rep. 696, and Kline v. Beebe, 6 Conn. 494, a delay of four years was held unreasonable. But payment, four months after full age, of part of the consideration for land purchased while an infant does not alone imply a ratification. Land Co. v. Sandford (Tex. Civ. App.) 24 S. W. 587. Acknowledgment of the validity of the debt and oral promise to pay it are insufficient. Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Hinely v. Margaritz, 3 Pa. 428; Hatch v. Hatch, 60 Vt. 160, 13 Atl. 791. Nor does part payment of the debt alone constitute a legal affirmance. Kendrick v. Neisz, 17 Colo. 508, 30 Pac. 245. See, also, Barnaby v. Barnaby, 1 Pick. (Mass.) 221, where, after majority, he paid rent arrearages previously due. Mere inactivity is insufficient. Thomas v. Pullis, 56 Mo. 211.

These cases sustain ratification of contracts made in infancy, where, after majority, he continued in the possession, use, and enjoyment and exercising acts of ownership inconsistent with an intention to disaffirm: Boody v. McKenney, 23 Me. 517, where it seems the property was personalty, only a small part of which came into his possession after majority, but which he retained for three years and then sold, the residue having been consumed or otherwise disposed of during his minority; Ellis v. Alford, 64 Miss. 8, 1 South. 155, where an infant exchanged his for other lands which he occupied and used for nine years after full age; Luce v. Jestrab, 12 N. D. 548, 97 N. W. 848, where an infant purchased and for nine months after majority retained possession of a team of horses, using them, and twice promised to pay

the note executed by him therefor; Lawson v. Lovejoy, 8 Me. (8 Greenl.) 405, 23 Am. Dec. 526, where the facts were similar to those in the Luce Case; Robinson v. Hoskins, 77 Ky. (14 Bush) 393, where infant purchased a horse, which, after majority, he sold and appropriated to use the proceeds thereof; Boyden v. Boyden, 50 Mass. (9 Metc.) 519, where the infant purchased goods (not necessaries) on credit, and retained and used them an unreasonable time (duration not noted), without offer to restore or notice of disaffirmance; Chesire v. Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735, where infant purchased a horse, and sold it after his majority. A suit for specific performance is a ratification. Carrell v. Potter, 23 Mich. 377.

But while, in case under consideration, the acts on which defendant relies for confirmation consist only in the retention by plaintiff for three months after full age of the property sold to him, and the beneficial use and profits derived from it during that period, payment of part of the consideration therefor and of rent accruing under the lease, and offering the property for sale but not selling or otherwise disposing of it, cannot so far operate to defendant's prejudice as to warrant the conclusion either that plaintiff delayed his disaffirmance an unreasonable length of time, or that his acts authorized the inference of an intention to ratify or amounted to a ratification of the contract, especially since it appears, at least it is not denied or alleged, that plaintiff offered to restore to defendant the property, which, so far as disclosed, virtually remains in the same condition as at the date of the contract. And, while by the decree complained of the defendant was required to refund part of the consideration paid to it, plaintiff was virtually required to pay defendant the rent due under the leasehold to September 1, 1911, the date of plaintiff's notice of disaffirmance.

That a contract made by an infant may be repudiated by him after he attains his majority is, of course, elementary. It is not questioned here. Nor is his right to disaffirm within a reasonable time after his majority. Having that right, and exercising it, as he did, within three months from the time he could legally act by way of confirmation or repudiation, we cannot say the time was unreasonably prolonged, or that plaintiff's acts indicated an intention on his part to ratify his purchase. This conclusion is reached without any intention to assert or deny the application to the facts of this case of clause 2, § 1, c. 98, Code, cited but not argued. * * *

Finding no error, we affirm the decree from which defendant has appealed.

SECTION 4.—CONTRACTS FOR NECESSARIES

MAULDIN v. SOUTHERN SHORTHAND & BUSINESS UNIVERSITY.

(Court of Appeals of Georgia, 1908. 3 Ga. App. 800, 60 S. E. 358.)

POWELL, J. Dora Mauldin, of Tunnell Hill, Ga., a 17 year old girl, an orphan, whose whole estate consisted of about $75, came to Atlanta, and over the objection of her guardian made a contract with the defendant to take a five-months' course in stenography for $35, which at her request her guardian paid out of her moneys in his hands. Being disappointed in her expectations of being lodged and cared for by

relatives while in Atlanta, she within about five days, notified the president of the business school of her inability to take the course, and requested a return of her tuition; and this he refused. She brought suit. The defendant set up that her contract provided that the tuition should not be refunded except in certain providential contingencies; and that this contract was for necessaries and therefore binding on her. A jury on the first trial having found in favor of the defendant, the Supreme Court granted a new trial because it did not affirmatively appear that the tuition in stenography was a necessary thing for her station in life. * * * On the second trial there was a verdict for the plaintiff, but, on a certiorari containing substantially the general grounds, the judge of the superior court ordered a new trial; and to this the plaintiff brings error.

In our judgment the determination whether the course in shorthand would have been such a necessary thing as to charge the plaintiff with a liability therefor if she had taken it is not in the case. The right to recover from an infant for necessaries does not arise out of the contract between the parties, but from a quasi contractual relation arising by operation of law. Keener on Quasi Contracts, 20. The quality of justice in the law, not the quality of efficacy in the infant's agreement, is the basis of the right of the person who has furnished the necessaries to hold the infant bound therefor. A corollary to the foregoing principle is the well-recognized rule that an infant may repudiate an executory contract for necessaries. The case of Jones v. Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043, is absolutely identical in every essential fact and feature with the case at bar. The plaintiff there, an infant, paid for a scholarship in a business school, but afterward, concluding not to enjoy the privilege, demanded a return of the money, which was refused, whereupon he sued for it. The court says: "It is elementary law that an infant is bound by implied contract to pay reasonably for necessaries furnished him. The limitations of the rule are plainly indicated by the statement of it. In order that the infant may be bound, all the circumstances must exist essential to raise a promise by implication of law. There must have been furnished him property or something of value, being such as to administer to his necessities. That obviously excludes the idea of an infant's being liable upon an executory contract to furnish him necessaries, as has been uniformly held. Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. No liability can be created by an infant for necessaries by express contract. His liability therefor is wholly a creation of law. * * *

In view of the foregoing, we need not stop to inquire whether an infant may bind himself by implied contract to pay for educational training of the kind promised by appellant, under the rule above stated since there is no claim that such training was bestowed upon respondent." In Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618, the infant, being a student of Yale College, made an engagement to take lodging from the plaintiff for a year. After holding that the infant's liability for necessaries arises by operation of law and not from any contract he may have attempted to make, and that, therefore, no executory contract is enforceable against him, the court applied the law to the case, deciding that "an infant may disaffirm his contract for the lease of a room suitable to his needs and situation in life, and is not liable for the rent of the room alleged to have accrued

after such disaffirmance and after he has ceased to occupy it, although such period was within the period covered by his contract." * * * The case at bar has therefore been contested over the immaterial question whether tuition in shorthand would have been necessary for the girl in her station of life; for the principle of law above stated concludes the proposition that she should not be held bound on the contract in either event.

There is a suggestion in the argument that the plaintiff's right to recover back the money may be defeated on the theory that she did not pay the defendant the money, but that her guardian paid it, making the contract his contract. This position is likewise untenable. It is a well-recognized rule that a minor may recover from whomsoever knowingly received any of his money paid out by his guardian without lawful authority. * * * It requires the approval of the ordinary to legalize any encroachment upon the corpus of the ward's estate by a guardian for education or maintenance. * * * No such approval is shown. The verdict in the plaintiff's favor was demanded, and the court erred in sustaining the certiorari.

Judgment reversed.

The rule relating to necessaries, in so far as it concerns contracts for the sale of personal property, has been codified in the Uniform Sales Act, as follows:

Section 2. Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

CHAPTER IX

CONTRACTS REQUIRED TO BE IN WRITING

Section

1. Introduction.
2. Contracts of Guaranty.
3. Contracts of Executors and Administrators.
4. Contracts Made in Consideration of Marriage.
5. Contracts for the Sale of Lands.
6. Contracts Not to be Performed Within the Space of One Year.
7. Contracts for the Sale of Personal Property.
8. Compliance with the Statute.
9. Effect of Non-Compliance with the Statute.

SECTION 1.—INTRODUCTION

The Statute of Frauds, originally enacted by the British Parliament in the twenty-ninth year of the reign of Charles II (1677), and subsequently enacted in the American states, provides that certain kinds of contracts must be in writing in order to be enforceable. There is no general requirement that all contracts must be in writing. In fact, a great many kinds of contracts, perhaps a majority of them, need not be in writing. This statute, which makes the enforceability of certain kinds of contracts depend upon a writing, is called a statute relating to fraud, for the reason that originally it was designed to render ineffective the apparently common practice of testifying falsely to the existence of certain kinds of contracts. Of course, it should be impossible to prove a contract which has no existence. Theoretically, it is impossible. Practically, it is possible, just as it is possible for a person guilty of a crime to be acquitted, or for a person not guilty to be convicted. Courts and juries act upon sworn testimony. Presumably it is true, but it may be untrue. Doubtless, at the time the statute was originally enacted in England, there was a great deal of perjury in actions upon oral contracts. Possibly there was greater likelihood of false testimony in trials involving certain contracts than in those involving others. Presumably the kinds of contracts which, after the passage of the statute, were required to be in writing, comprised those contracts concerning whose existence and nature perjury was considered most likely. The statute has come down to the present time practically unchanged. It is possible, of course, so to use the statute as to defeat honest obligations, in which case it becomes an instrument of fraud, rather than an agency to prevent fraud. In spite of the possibility that the Statute of Frauds may be used to defeat honest obligations, it is true that a rule which requires persons to put into indisputable form the terms of certain kinds of contracts tends, in the long run, to diminish the amount of litigation. The probabilities are that these general benefits from the Statute of Frauds outweigh the wrongs sometimes resulting.

The injustice that would result from the repeal of the statute, we can probably safely say, would be more general and widespread than the injustice now resulting from the operation of the statute in occasional cases.

There are two distinct kinds of problems arising out of the Statute of Frauds: (1) The problem of interpreting the statute with a view to ascertaining what contracts fall within the classes named in the statute and what contracts fall outside the scope of the terms; (2) the problem of determining the legal effect of noncompliance with the statute.

With respect to the first problem, it is apparent that, where a statute attempts to designate certain kinds of contracts and to prescribe a certain rule with respect to the classes thus marked off, the language used to describe the classes cannot be so clear as to prevent controversy over the question whether a particular transaction falls within the statute. This general type of problem pervades the whole field of the law—the problem of interpretation. If a statute makes the felonious taking and carrying away of the personal property of another larceny, and A., with intent to steal, takes hold of B.'s dog and starts to run away with him, when he finds that the dog is securely chained to a post, we have before us the question of interpreting the words "taking and carrying away." Likewise, with respect to the Statute of Frauds, if the statute applies to all special promises to answer for the debts of others, the question will arise, in a particular case, whether the promisor undertook to pay the debt of another or to pay his own debt.

As to the second problem, we are to determine whether an agreement not complying with the requirement of the statute is no contract, or is to be treated as an illegal contract, or is to be considered, in some respects, like any other contract, and, in other respects, different from the ordinary contract.

SECTION 2.—CONTRACTS OF GUARANTY

NUGENT v. WOLFE.

(Supreme Court of Pennsylvania. 1886. 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291.)

STERRETT, J. If the verbal agreement which plaintiff offered to prove is within the supplement of 1855 to the statute of frauds and perjuries, there was no error in rejecting the testimony, nor in entering judgment of nonsuit. The supplement declares:

"No action shall be brought whereby * * * to charge the defendant upon any special promise to answer for the debt or default of another unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized." P. L. 308.

Plaintiff gave in evidence the record of two judgments in favor of the First National Bank of Ravenna, one dated January, 1876, against

Powers & Co., and the other March, 1877, against himself as bail for stay of execution on the first-mentioned judgment. He then offered to prove, in substance, that in February, 1876, defendant Wolfe requested him to become bail for stay of execution, and, in consideration of his agreeing to do so, promised and undertook to indemnify and save him "harmless from any loss or liability, and from paying anything by reason of his so going security"; that, relying on said promise and undertaking of defendant, he did become bail for stay of execution on the judgment against Powers & Co. This offer was objected to on the ground that the agreement was not in writing as required by the statute, and the proposed testimony was excluded by the court. In the same connection it was admitted that Powers & Co. became insolvent; that plaintiff was compelled to pay the judgment, then amounting to $1,499.74, and that defendant, though often requested, had not paid any portion thereof. The question thus presented is whether the alleged agreement which plaintiff was not permitted to prove is within the clause of the supplement above quoted.

The clause in question is copied substantially from the fourth section of the English statute, 29 Car. II, c. 3, which, with slight changes in phraseology, has been generally adopted in this country. During the more than two centuries since its original enactment the construction of this section, and its application to various forms of contract, have been constantly the subject of contention; and on no question, perhaps, has there been greater diversity and contrariety of judicial decision in this as well as in the parent country. Cases of real or apparent hardship have repeatedly led courts to put a strained and unnatural construction on what appears to be a plain and easily comprehended act, passed for the purpose of preventing the commission of fraud and perjury. If time would permit, a review of the many conflicting and irreconcilable decisions that from time to time have been rendered, and the refined distinctions upon which they have been based, would be interesting; but the undertaking would be too great, and withal not specially profitable. It is very evident the statute was not intended to apply except in cases where, in addition to the promisor and promisee, there is also a third party to whose debt or undertaking the agreement of the promisor relates, and not even then unless the liability of the third party continues. In other words, the agreement, to be within the purview of the statute, must in a certain sense be a collateral and not an original undertaking. Independently of the debt or liability of the third party, there must, of course, be a good consideration for the collateral or subordinate agreement; such, for example, as a benefit or advantage to the promisor, or an injury to the promisee. It is difficult, if not impossible, to formulate a rule by which to determine whether a promise relating to the debt or liability of a third person is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute. * * *

If one says to another, "Deliver goods to A., and I will pay you," the verbal promise is binding, because A., though he receives the goods, is not responsible to the party who furnishes them. But if, instead of saying, "I will pay you," he says, "I will see you paid," or "I will pay you if he does not," or uses words equivalent thereto, showing that the debt is in the first instance the debt of A., the undertaking is collateral, and not valid unless in writing. In these latter cases, the same consideration, viz., the consideration of the promise of the principal, is a good consideration for the promise of the surety or collateral promisor. The credit is given as well upon the original consideration of the principal as the collateral promise of the surety, and is a good consideration for both. * * *

[Judgment granting nonsuit affirmed.]

WHITE v. RINTOUL.

(Court of Appeals of New York, 1888. 108 N. Y. 222, 15 N. E. 318.)

This action was brought upon an alleged verbal promise of defendant to pay the amount of two notes owned by plaintiff and made by the firm of Wheatcroft & Rintoul.

FINCH, J. The doctrine prevailing in this state which serves to distinguish between original and collateral promises in cases arising under the statute of frauds has been reached in three stages. Each was a definite and deliberate advance toward a more faithful observance of the statute, and an abandonment of efforts to narrow the just and natural range of its application. When, by some authorities, it was said that a verbal promise to pay the debt of another was always collateral, and invalid if the primary debt continued to exist concurrently with the promise, a simple and easy test was furnished to determine whether the statute did or did not apply. But when that test was discarded, and it became the law that a promise to pay another's debt might be original, although that debt subsisted and was in no manner extinguished, the presence of such continued liability raised a cloud of doubt and ambiguity, which perhaps will never be entirely dissipated. * * *

[The cases have] ended in establishing a doctrine in the courts of this state which may be stated with approximate accuracy thus: That where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor. * * *

We are, therefore, to bring the facts of the case to the test of the rule above stated, and in doing so, we are to take them from defendant's own lips, to treat as true his representations as detailed by his adversary, and to draw from the evidence every possible inference which is favorable to the plaintiff's case.

The firm of Wheatcroft & Rintoul, of which defendant was not a member, became indebted to the plaintiff in the amount of two notes, one dated June 1, 1880, and maturing September 4, 1880, and the other dated July 1, 1880, and to become due October 4, 1880. On the 16th of August, 1880, and so before the maturity of either note, the defendant requested the plaintiff to forbear any effort at their collection until June or July, 1881, promising, if the plaintiff would do so, to pay

the amount of the notes. The plaintiff did forbear, and now sues upon the promise. The courts have held many times that a promise upon consideration of forbearance to sue the debtor is not original, and, to be valid, must be in writing. * * *

One member of the debtor firm was the defendant's son, and that firm was somewhat in debt and not managing the business successfully or satisfactorily. The defendant was a creditor of the firm. He had loaned to them something over $5,000, for which he held as security a chattel mortgage on the fixtures and machinery of the firm. He was, therefore, to some extent at least, a secured creditor. He represented to plaintiff that he had advanced all the money for the business of the firm; that he was determined to get rid of his son's partner, who was drawing money that was his money; that the business was not paying, and he wanted to give it up, or he was going to conduct it alone or through his son; that if plaintiff tried to collect his debt he would not be able to get anything; that there was a chattel mortgage against the property; that he had furnished money himself for which he had a mortgage, or would get one, and plaintiff could not get anything; that the only way and the best way would be to give the firm time; that it was late in the season, and by waiting until the next summer they could sell their beer, and that he would pay plaintiff for the two notes. That is plaintiff's account of the conversation given on his direct examination. On his cross-examination he added that defendant said he had a claim or a confession or a mortgage or some security for the amount of money due him, and that plaintiff could not get anything anyway, and that the money that was due defendant was the first to be paid out of the firm. Upon the basis of this evidence, the plaintiff contends that the defendant had a direct personal interest in procuring a forbearance to sue the firm, which he explains in his brief by saying "that if the plaintiff pressed the collection of the notes, and did not wait till the then next summer, defendant would lose his money," which had been loaned to the firm. But I do not discover a single fact in the case which tends to any such conclusion. * * *

The motive disclosed was regard for his son, and desire that his business credit should not be damaged by a failure. The purpose for which he sought delay was wholly in the interest of that son, and to enable him to market his beer the next summer, and so procure the means to pay the plaintiff without sacrifice or discredit. The debt of the firm was in no sense defendant's debt. No consideration of benefit moved to him from either party, and least of all had there been any new dealing with either which put upon him a duty of payment. Before the promise was made he owed no such duty and came under no such obligation. The doctrine of the court clearly stamps the promise as collateral and void for want of a writing. * * *

Judgment reversed.

LAMKIN v. PALMER.

(Court of Appeals of New York, 1900. 164 N. Y. 201, 58 N. E. 123.)

HAIGHT, J. This action was brought to recover the sum of $2,150 upon an oral promise of the defendant to pay the plaintiff that sum out of the proceeds of the sale of the property of the M. S. Robinson Musee Company. The facts are somewhat complicated, but, for the

purpose of raising the questions presented upon this appeal, they may be briefly stated as follows:

The plaintiff was an employé and stockholder in the M. S. Robinson Musee Company, a corporation operating theaters in the city of Buffalo and in the city of Rochester. He had loaned to the president of the company, M. S. Robinson, to be used by the company in the operation of its theaters, the money in question. The Buffalo theater had been destroyed by fire, and the defendant had become obligated to pay certain indebtedness incurred by the Rochester theater. He had procured from a person in Detroit an offer to purchase from him the Rochester property, and was endeavoring to procure the consent of the stockholders for the sale to him of such theater, to the end that he might accept the offer of the Detroit gentleman and effect a sale to him, and then appropriate the proceeds to the payment of the debts of the Rochester theater which he had become obligated to pay. The defendant, in order to induce the plaintiff to sign the consent, made the agreement upon which this action is founded. The defendant, by his answer, denied many of the allegations of the complaint, and then alleged: "That the agreement referred to in the complaint, if made at all, was made without consideration, and the same, not being in writing, was void by the statute of frauds of the state of New York." * * *

The plaintiff had furnished money to be used in carrying on the business of the corporation. He was a creditor and had the right to seek indemnity from the assets of the company. The defendant was seeking a transfer of the assets of the company, so that he could convert the same into money and pay off the debts that he had become obligated to pay. The plaintiff, by his consent, released his right to follow the assets for the satisfaction of his claim, and accepted the promise of the defendant to pay him out of the proceeds of the sale. The contemplated purchaser refused to complete the purchase unless the claim of the plaintiff was settled or his consent to the transfer obtained. The sale was for $12,000. The transaction was, therefore, beneficial to the defendant, for it enabled him to relieve himself of a greater portion of the obligations assumed by him to the other creditors. The question of consideration to support the agreement was not, therefore dependent solely upon the consent of the plaintiff as stockholder. * * *

Judgment [for plaintiff] affirmed.

SECTION 3.—CONTRACTS OF EXECUTORS AND ADMINISTRATORS

The Statute of Frauds provides:

No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

An executor is nominated by a testator in his will, qualifies as

executor in the probate court, receives "letters testamentary" from the court, and is then charged with the duty of paying the testator's debts out of the testator's estate and of distributing the remaining property among the beneficiaries designated in the will, according to the terms thereof. An administrator occupies the same position with respect to the estate of a deceased person, except as regards the source of his authority. The administrator is appointed by a probate court to administer the estate of a decedent leaving no will. An administrator with the will annexed is appointed by a probate court to act practically as executor, where no executor is nominated in the will, or where the person nominated by the testator fails or refuses to qualify as executor.

The above section of the Statute of Frauds carries out the general rule that guaranty contracts must be in writing. If, for any reason, an executor or an administrator, in the absence of some independent consideration to himself, contracts individually to pay the debt of the decedent whom he represents, such contract must be in writing in order to be enforceable.

SECTION 4.—CONTRACTS MADE IN CONSIDERATION OF MARRIAGE

The Statute of Frauds provides:

No action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

This section has been construed not to require mutual promises to marry to be in writing in order to be enforceable. It is possible to construe this section to apply to mutual promises to marry, but doubtless the courts, in recognition of the fact that people generally find it more desirable to conduct such negotiations orally, have wisely excluded such contracts from the operation of the statute. The above section of the statute applies to what are sometimes called marriage settlement contracts. One of the parties to the contract, or a third party, may, in consideration that two designated persons shall marry, promise to transfer certain property to one of the contracting parties. The fact of marriage may be sufficient consideration for this promise, but, in a sense, it is a promise to make a gift upon the happening of a certain contingency. It is the kind of contract, therefore, where false testimony as to the making of such a promise might frequently be made, and it is probably for this reason that it was included among those contracts not enforceable unless in writing.

SECTION 5.—CONTRACTS FOR THE SALE OF LANDS

With reference to contracts for the sale of interests in land, the Statute of Frauds provides:

No action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

A discussion of the various interests in land is beyond the scope of this book. It should be apparent, however, that there are many possibilities for dividing the sum total of rights of ownership in land. The highest interest in land is usually called a fee-simple interest. It is this interest which is commonly meant when we speak of a person as owning land. It is possible for one to have less than a fee-simple title. He may have but a life estate, or a lease for years. The deed, or will, or other instrument which created the interest, may provide that, upon the termination of the life estate, the fee-simple title or some lesser interest shall pass to a third party. This future interest is sometimes called a remainder. The interest which the grantor retains after creating an estate in another is called a reversion. There are various other kinds of future interests in land. The point here is not, however, to discuss the nature of these interests, but simply to note the fact that ownership in land is capable of division into numerous interests of this character.

There are other types of interests in land. A person may have acquired the right to use another's land in a particular way, as, for example, A. may have the right to drive across B.'s land and to use B.'s private roadway, or A. may have acquired the right to construct a drain pipe through B.'s land. These interests are called easements or licenses, depending upon the manner in which they are created. A. may have the right to take gravel from B.'s gravel bed. This is something more than an easement, because it involves the taking of something of value from B.'s land. Such a right is called a profit.

There are several interests in land which owe their origin to the doctrines of that branch of the law which we call equity, as, for example, the interest of the beneficiary of a trust in land, or that of a mortgagee.

Again it is customary, for some purposes, to regard as part of the land all fixtures attached to the realty, growing trees, and growing crops. The expression "interests in land" is very broad, for it includes a great many groups of rights capable of segregation from the total interest of ownership and of sale to different persons.

In discussing the transfer of interests in land, there are two things which should be kept quite distinct: (1) The contract

which creates the duty to transfer the interest; and, (2) the instrument which actually transfers the interest. The Statute of Frauds has nothing to do with prescribing the manner in which an interest in land shall be transferred. While we are not directly interested in this subject here, it may be remarked in passing that interests in land are commonly transferred either by deed or by will. Independent rules of law prescribe that deeds and wills must be in writing, and moreover that they shall conform to certain other formal requisites. Statutes of the various states prescribe, generally with considerable detail, the form by which interests in land are to be conveyed, whether by deed or by will.

We are here interested, however, in the contract which antedates the execution and delivery of the deed, and we find that such contracts must be in writing in order to be enforceable. Short term leases are, in most states, expressly exempted from the operation of the statute, which makes it possible to make a valid oral lease in many states for a period of one year, and in some states for a period as long as three years. The following cases will give some idea of a few of the questions that have arisen involving the interpretation of this section.

MOORE v. SMALL.

(Supreme Court of Pennsylvania, 1852. 19 Pa. 461.)

WOODWARD, J. The statute of frauds and perjuries, regarded as a rule of property, is simple and intelligible. Every mind is capable of understanding that contracts about land, if more is meant than a three years' lease, must be in writing. This rule is as apprehensible and appreciable by the common mind as those other statutory rules which make twenty-one years' adverse possession of land, title thereto; bar actions on simple contracts after six years' delay; require judgments to be revived once in five years; and liens of mechanics and material men to be entered within six months after the contract executed.

And what rule is more reasonable? Land is the most important and valuable kind of property. Or if it be not, there is no other stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money and even blood sometimes are poured out like water. The evidence of land title ought to be as sure as human ingenuity can make it. But if left in parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest. * * *

WETOPSKY v. NEW HAVEN GAS LIGHT CO.

(Supreme Court of Errors of Connecticut, 1914. 88 Conn. 1, 90 Atl. 30, Ann. Cas. 1916D, 968.)

Action by Sylvester Wetopsky against the New Haven Gaslight Company. From a judgment as of nonsuit, plaintiff appeals.

The complaint alleges that the defendant sold a dwelling house to the plaintiff (who then owned a lot on the opposite side of the street

to which he intended to remove it), for a good and valuable consideration then paid; that the defendant had knowledge of the purpose for which the plaintiff purchased the house; and that the defendant afterwards refused to permit the plaintiff to remove or take possession of the house or to deliver the same to him. * * *

THAYER, J. * * * The plaintiff claims that the sale of a house to be immediately removed from the land on which it stands, and to which it is affixed, is a sale of personal property, and not of an interest in real estate, and so is not within the section of the statute of frauds which prevents the maintenance of an action upon agreements for the sale of real estate, unless the same shall be in writing. * * *

Williston says: "If the contract is to sell and deliver a house, even though the house is, at the time, affixed to the realty, it is a contract for the sale of goods, for the parties contract to buy and sell a house separated from the realty and moved from its foundations. On the other hand, if the parties attempt to make a present transfer of a building or materials fixed in a building, it is evident that they are attempting to make a sale of realty, even though it is also agreed that the subject-matter of the sale shall be severed in a short time." Williston on Sales, § 66. The Supreme Court of Massachusetts, speaking in a case where the contract related to growing trees, said: "It may be difficult in many cases to determine, from the terms of the contract, whether the parties intend to grant a present estate in the trees while growing or only a right, either definite or unlimited as to time, to enter and cut with title to the property when it becomes a chattel. If the former be the true construction, then it comes within the statute, and must be in writing; if the latter, then, though wholly oral, it may be enforced." White v. Foster, 102 Mass. 375, 378. There is great conflict in the decisions, but this is the rule in England and in many of our sister states. * * * We think, notwithstanding the numerous opposing authorities, that this is the better rule.

Counsel for the defendant attempted to distinguish cases of contract to sell millstones or other fixtures attached to the realty and belonging to the owner thereof, * * * or a case of contract to sell the boards and brick of which a building is composed, where the vendee is to remove the millstones in the one case and to tear down the building and remove the materials of which it is constructed in the other, from a contract to sell an entire building to be severed and removed by the vendee. We see no difference in principle between the cases. * * *

Where the intent to sell a building as a chattel is thus apparent from the contract and circumstances attending it, the severance may be made by the vendee. * * * The fact that the vendee is to remove the building is important only as bearing upon the intent of the parties in determining whether the title to the building is to pass at once or only after severance from the realty. When the parties to the contract have in contemplation the sale of a building or a tree as a chattel, when it shall be detached from the land, there is no good reason why a court should not give effect to the contract as the parties understood and intended it. In such a case neither party intends that any interest in the real estate shall pass. The very purpose of the contract may be to rid the land of such tree or building. Until detached from the land, the thing contracted to be sold would remain a part of the realty, and a conveyance of the realty to a third party would carry it to the purchaser.

The implied license to enter and sever the chattel, if this was to be done by the vendee, would be revoked by such conveyance of the land, and the vendee's remedy must be against the vendor for breach of the contract.

Growing crops, fructus industriales, are an exception to the rule, and may be sold and the title pass to the purchaser before severance from the soil. * * *

The plaintiff was entitled to show that the contract was as he claimed for the sale of the house as a chattel after severance from the soil, and there was error in excluding the evidence offered for this purpose.

There is error; the judgment is set aside; and a new trial ordered.

MILLER v. BALL.

(Court of Appeals of New York, 1876. 64 N. Y. 287.)

Appeal from judgment of the General Term of the Supreme Court in the Third Judicial Department, affirming a judgment in favor of plaintiff. This action was brought to compel a specific performance of an alleged parol contract for the sale of land.

The referee found in substance the following facts: That in the fall of 1863, Robert Miller, agent of plaintiff, without disclosing his agency, made a verbal contract with Philip Potter, defendant's agent, for the purchase of fifty acres of land at three dollars per acre, which he agreed to pay on delivery of a warranty deed, Potter agreeing to have a survey made and to procure the deed. This land was subsequently surveyed and its metes and bounds fixed. Defendant, upon receipt of the survey bill, executed a warranty deed of the premises to Robert Miller. The consideration was stated therein to be $100, and there was a reservation of mines and minerals, and the right to use and occupy all streams for logging and milling purposes. The deed was delivered by Potter to Robert Miller, who delivered it to plaintiff, who objected to the statement of consideration and to the reservations and returned it to Robert, who returned it to Potter, who agreed to have it corrected and returned. The deed was sent back to defendant, who, after promising several times to fix the matter satisfactorily, in April, 1867, refused to execute a deed unless paid two dollars more per acre. Plaintiff tendered a deed and demanded that defendant execute the same, which he refused. The referee also found as follows: "The land in question is situated about two and a-half miles from a highway in one direction, and about five miles in another, and was a wild, uncultivated lot, and of no practical value for cultivation until cleared, nor for any purpose without means of access to it by teams. In November, 1864, the plaintiff entered upon the lot, cut and constructed a road thereto across the adjoining lands of other parties, under a parol license from the owners, to construct, occupy and use the same, said road connecting with roads which the plaintiff also made upon the lot in question. He underbrushed and cut up fallen trees, preparatory to clearing about a quarter of an acre of land; built a bough shanty, and since that time and down to the commencement of this action, on the 12th day of April, 1867, he continued in the occupancy of the said lot, cutting trees and timber upon it, and paying the taxes thereon, and also continued to labor upon and improve the roads upon the lot and those connecting the same with the public highway.

EARL, J. We will assume, for the present purpose, that there was not a sufficient note or memorandum of the agreement between the parties to satisfy the requirement of the statute of frauds, and we still reach a conclusion adverse to the appellant. * * *

It is not always easy to determine whether there has been sufficient part performance of a parol agreement for the sale of land, in the sense of courts of equity, to free it from the operation of the statute of frauds. The general rule is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed. * * * The principle upon which courts of equity hold that part performance is sufficient is that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement in compliance with which they were performed had not been made; in other words, upon the ground of fraud, in refusing to execute the parol agreement after a part performance thereof by the other party, and when he cannot be placed in the same situation that he was in before such part performance by him. Taking possession under a parol agreement, with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute. * * *

The payment of the consideration alone, in a case where its recovery in an action at law would fully indemnify the party paying, would not be a sufficient part performance within the rule under consideration, and neither would mere possession be, without any other circumstance of hardship or fraud. But payment of the consideration and possession under the agreement, or by the consent of the vendor, are facts which may be considered with other facts upon the question of part performance. Here the whole consideration-money was paid, and the plaintiff took all the possession of such a lot which is ordinarily practicable. He built roads to it and upon it; built a shanty and made some clearing. His improvements thus made were probably equal in cost to the consideration paid for the lot, and that cost would be lost to him unless the defendant be compelled to perform his agreement. He paid the taxes, and the money thus paid he cannot recover back. I am therefore of opinion that enough was done by the plaintiff to bring his case within the equitable rule as to part performance.

But before acts, otherwise sufficient for part performance, can have the effect within the rule, they must have been done in pursuance or fulfillment of the parol agreement, or in just reliance thereon. They must have been done with a view to the agreement, and be referable exclusively thereto. * * * In the respects here mentioned, plaintiff's acts were sufficient. The plaintiff paid the entire consideration under the agreement. * * *

Judgment affirmed.

SECTION 6.—CONTRACTS NOT TO BE PERFORMED WITHIN THE SPACE OF ONE YEAR

The section of the Statute of Frauds here involved provides as follows:

No action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

DOYLE v. DIXON.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 208, 93 Am. Dec. 80.)

Defendant sold his grocery business to plaintiff, and agreed not to go into the grocery business in the same village within the next five years. Defendant contends that this agreement is within the statute of frauds. The trial judge ruled that the agreement was not within the statute. Defendant excepts to this ruling.

GRAY, J. It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds, which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in Peters v. Westborough, 19 Pick. 364, 31 Am. Dec. 142, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year would be wholly performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisor or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in Hill v. Hooper, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for any-

thing beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed within the year. * * * An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again in Chicopee for five years was therefore not within the statute of frauds. * * *

Exceptions overruled.

O'DONNELL v. DAILY NEWS CO. OF MINNEAPOLIS.

(Supreme Court of Minnesota, 1912. 119 Minn. 378, 138 N. W. 677.)

PHILIP E. BROWN, J. This is an action for damages for breach of an alleged contract for the plaintiff's employment as advertising manager for the defendant, the Minneapolis Daily News. * * *

Was the contract within the statute of frauds, as being a contract not to be performed within one year from the making thereof? In its ultimate analysis, however, the question here is: What must be deemed to be the date contemplated by the contract for the commencement of its performance? For it is settled that a contract for services, which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute, * * * while a contract for one year's services commencing on the date of the contract is not within the statute. * * *

Does, then, the contract here involved show that it was not to be performed or was incapable of performance within one year from the date on which it was made, January 31, 1910? The plaintiff contends that it does not so appear, insisting that it must be deemed to be for one year's services, beginning January 31st, and ending on the same date in the following year. The defendant, on the other hand, contends that the contract was for services beginning February 7th. As between these two contentions, we hold with the defendant. * * * February 7th was the date in the minds of the parties throughout the negotiations, and such date was expressly incorporated in the contract by the telegrams and the letter above quoted. It was the date fixed as giving the plaintiff a reasonable time in which to reach Minneapolis from his home in another state, and the distance he would have to travel in order to reach Minneapolis precluded the possibility of his actually beginning work in that city on the date of his telegram of acceptance.

Undoubtedly the parties could have contracted that the plaintiff's services, and his pay, should be deemed to begin January 31st; but they did not do this. Nor did they leave the date undetermined. They fix-

ed February 7th as the date when the plaintiff should come and take the position contracted for. * * * If nothing whatever had been said about when the plaintiff was to report for work, there might be room for the plaintiff's contention that a contract is, if possible, to be construed so as to keep it out of the operation of the statute of frauds, and that where no other date is specified the date of the contract will be presumed to be the date for the commencement of its performance; but where, as in this case, the contract indicates the date when the services are to begin such contentions are irrelevant. * * * And it makes no difference that the year is exceeded by only a week. "An hour more than the time specified is in law as fatal to the contract as though it were two, five, or a hundred years." * * *

The contract in this case being, as we have held above, one which contemplated that its performance should commence in futuro, and that the services contracted for should continue for one year from the commencement thereof, it follows that, in the absence of writing sufficient to satisfy the statute of frauds, the plaintiff was not entitled in any event to a more favorable judgment than he obtained.

Judgment affirmed.

SECTION 7.—CONTRACTS FOR THE SALE OF PERSONAL PROPERTY

The English Statute of Frauds prescribed that all contracts for the sale of goods of the value of £10, in order to be enforceable, must be in writing, unless the buyer has made a partial payment or accepted and received the goods. This section has been re-enacted in most, but not all, of the states in this country. The section was commonly made to apply to contracts where the value of the property was $50 or over. There is some variation as to the amount in the various states. The Uniform Sales Act, which has codified most of the common law relating to contracts for the sale of goods, contains a section which is a restatement of that section of the statute of frauds dealing with sales of personal property.

This section reads as follows:

Section 4. (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually received the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale notwithstanding that the goods may be intended to be delivered at some future time or may not, at the time of such contract or sale, be actually made, procured or provided or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer

and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section, when the buyer, either before or after delivery of the goods, expresses, by words or conduct, his assent to becoming the owner of those specific goods.

GODDARD v. BINNEY.

(Supreme Judicial Court of Massachusetts, 1874. 115 Mass. 450, 15 Am. Rep. 112.)

The plaintiff, a carriage manufacturer in Boston, testified that the defendant came to his place of business in April, 1872, and directed the plaintiff to make for him a buggy, and the plaintiff entered the order in his order book; the defendant gave directions that the color of the lining should be drab, and the outside seat of cane, and as to the painting, and also that the buggy was to have on it his monogram and initials. The sum of $675 was agreed as the price. It was to be done in or about four months. The plaintiff immediately began work upon the buggy and made every part, it being painted, lined, and with the initials, as ordered. By the fire of November 9, 1872, this buggy and all the property on the plaintiff's premises were destroyed. Plaintiff sues defendant for the price. Upon the evidence, the presiding judge directed a verdict for the defendant.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. * * * In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in Lee v. Griffin, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. * * *

In this commonwealth, a rule avoiding both of these extremes was established in Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. * * * "The distinction," says Chief Justice Shaw, in Lamb v. Crafts, 12 Metc. 353, "we believe is now well

understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner v. Joy, 9 Metc. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. * * * In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. * * * We must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action. * * * Judgment entered for the plaintiff.

WEEKS v. CRIE et al.

(Supreme Judicial Court of Maine, 1900. 94 Me. 458, 48 Atl. 107, 80 Am. St. Rep. 410.)

Assumpsit to recover damages for nondelivery of a quantity of fish, which the plaintiff alleged he purchased of the defendants under an oral contract. The defendants denied the contract, and invoked the statute of frauds. The verdict was for plaintiff, and damages assessed at $128.70. * * *

SAVAGE, J. At the trial of this case the plaintiff claimed, and introduced evidence tending to show, that the defendants in November, 1898, orally agreed to sell him from three to five hundred drums of hake at $1.65 per kentle, to be delivered at Rockland when called for by him, and at the same interview agreed to sell him ten barrels of split herring at $4.25 per barrel, to be delivered in Rockland by next boat from Criehaven, which would be within one week; that he (the plaintiff) orally agreed with the defendants to purchase the hake and the herring upon these terms. It was admitted by the defendants that they sold the herring to the plaintiff as claimed, and that they were delivered according to the agreement, and paid for by the plaintiff. The plaintiff in January, 1899, demanded 300 drums of hake to be delivered in accordance with the alleged agreement, but the defendants refused to deliver them; and to recover damages for that alleged breach of contract this action was brought.

The defendants denied that they agreed to sell any hake to the plaintiff. But the jury, under instructions to which no exceptions were taken, have found they did make such a contract. In this contingency the defendants claim that, if any such contract of sale was made, it was oral merely, and, being for more than $30, it was invalid under the statute of frauds. The case shows that no memorandum was made, and nothing was given in earnest to bind the bargain; and the defendants claim that no part of the goods sold were accepted and received by the purchaser, so as to bind the defendants to deliver the hake. This last proposition is controverted by the plaintiff, and hereon, as will be seen, the case hinges. * * *

The plaintiff, however, contends that the contracts for the hake and the herring constituted in fact but one entire contract for hake and herring, and that his acceptance and receipt of the herring, a part of the

merchandise contracted for, took the sale out of the statute as to the whole. * * *

Now, if there were two separate contracts of sale, one for the herring and one for the hake, it is clear that the acceptance and receipt of the herring did not take the contract for the hake out of the statute, for an acceptance under one contract cannot make another contract valid. But if there was in fact only one contract, for both herring and hake, negotiated for, it may be, successively, a delivery followed by an acceptance and receipt of the herring did take the hake out of the statute. * * *

The application of the statute of frauds in case of the purchase of a number of articles at the same transaction may depend upon whether there is one contract or more. The mere fact that a separate price is agreed upon for each article, or even that each article is laid aside as purchased, makes no difference, so long as the different purchases are so connected in time or place, or in the conduct of the parties, that the whole may be fairly considered as one transaction. * * * Such is the common case of a number of articles purchased at private sale of a shopman, for instance, at the same time, though at separate prices. * * * The same doctrine was applied in a case where the parties made bargains for the purchase and sale of several lots of timber at different places, some miles apart; the bargains being made at the different places and at separate prices, but all on the same day. * * * Such purchases may be regarded as entire, though composed of separate parts. But whether such negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances. It raises a question of fact properly to be passed upon by a jury. Were the transactions near in time or place or similar in circumstances? What was the conduct of the parties? Was the seller a merchant engaged in the regular course of his business in his shop or store? What was the language used? What are the proper inferences to be drawn as to the intention of the parties? The answers to these and other like questions solve the problem. If the circumstances are such as to lead to a reasonable supposition that the parties intended that the whole series of transactions should constitute one trade, they may be regarded as one entire contract; otherwise, not.

Now, in the case at bar, the jury were instructed, in effect, that, if the two contracts for sale were made at the same interview, that would be sufficient. We think this ruling was erroneous. Even if there were no other facts or circumstances to be considered, which is hardly supposable, it cannot be said, as a matter of law, that the mere fact that the negotiations for the herring and the hake were made at the same interview resulted in a single contract. They may have constituted one contract only, and they may not. If not, then the hake were not taken out of the statute by the acceptance of the herring. Whether the negotiations constituted one contract or more was a question of fact, and should have been submitted to the jury.

Exceptions sustained.

SECTION 8.—COMPLIANCE WITH THE STATUTE

CASTLE v. SWIFT & CO.

(Court of Appeals of Maryland, 1918. 132 Md. 631, 104 Atl. 187.)

PATTISON, J. The action in this case was brought by the appellee, Swift & Co., to recover the loss sustained by it in the resale of eggs claimed to have been sold by it to the appellant, Frederick C. Castle, and which he refused to take under such alleged sale. This appeal presents the question whether, under the statute known as the "Sales Act," there was a sale of the eggs by the appellee to the appellant that can be legally enforced.

J. Frederick Conrad, salesman for Swift & Co., testified that on Friday night, November 24, 1916, the defendant, a dealer in butter and eggs in the city of Baltimore, called the plaintiff over the phone at its Eutaw Market, Baltimore, Md., and asked the price of eggs. Witness quoted them to him at 37 cents per dozen, whereupon the defendant first offered 36 cents, but finally offered to purchase 200 cases and to pay therefor 36½ cents per dozen, if, as stated by the witness, "I would put them in our upstairs butter cooler, and he would order them out as he needed them." The eggs were to be placed in the butter cooler to save him the cost of storage. This offer was accepted, but, as Saturday was "a half holiday," the eggs were not put aside for the defendant until Monday, when, as requested by him, they were put in the butter cooler and designated as his eggs. On Tuesday morning the eggs were billed to him. On Wednesday morning the defendant again called the plaintiff over the phone, and Conrad, who answered the phone, was told by him that "the egg deal was off." Castle assigned as a reason therefor that the plaintiff's Pratt Street Market, as well as another dealer, had offered eggs to him at a lower price. The plaintiff refused to treat the deal as off, and upon the defendant's refusal to take the eggs and to comply with the terms of said agreement, they were resold by the plaintiff; the sum received therefor being less than the amount at which they had been sold to the defendant at such alleged sale. * * *

It is conceded that there was nothing given in earnest to bind the contract, or in part payment of the purchase money for the eggs said to have been bought by the defendant, and that there was no note or memorandum in writing of the contract or sale signed as required by the statute; consequently, in order to hold the contract or sale binding and enforceable against the defendant, the alleged buyer, it must be shown that he accepted at least a part of the eggs contracted to be sold or sold, and that he actually received the same. Therefore in this case we are concerned only in the meaning of the statute in respect to the provisions requiring acceptance and receipt by the buyer of the goods sold.

It is clear that the terms of the statute require two distinct acts on the part of the vendee; he must accept, and he must actually receive, a part of the goods, in order to render the contract binding on him. There may be an actual receipt without any acceptance, and there may be an acceptance without any receipt. An acceptance may precede or follow the receipt, or it may be contemporaneous therewith; and

at times even a receipt may be evidence of acceptance, but it is not the same thing. * * * As defined by the statute (section 25) there is an acceptance of the goods "when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to become the owner of those specific goods." By section 69 of the same article he "is deemed to have accepted the goods when he intimates to the seller that he has accepted them."

In Williston on Sales, § 483, it is said: "The ways of manifesting acceptance may be reduced to the three enumerated in the section of the Sales Act under consideration, namely: (1) Intimation of acceptance. (2) Exercising acts of ownership. (3) Retaining the goods. Under the first head will be included both cases where the buyer receives goods and expresses his acceptance of them, and also cases where by the terms of the bargain the buyer agreed to accept goods, whether specified at the time of the bargain or to be afterwards selected by the seller, without inspection."

All cases admit that the term "actually receive," found in the statute, means the acquisition of possession by the buyer, and whatever difficulties exist in regard to its meaning are largely due to the inherent difficulty of determining what is, in fact, possession. This court, however, has said, speaking through Judge Alvey, that: "The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them." Hewes & Co. v. Jordan, 39 Md. 472, 17 Am. Rep. 578.

It is said, however, upon good authority, that goods may be received by the buyer within the meaning of the statute, and yet allowed to remain in the hands of the vendor, if it be shown that the seller has ceased to hold in the character of unpaid vendor and holds wholly as bailee for the buyer. Williston on Sales, § 91, and the numerous cases cited in note thereto.

In this case we think there is evidence of both acceptance and actual receipt of the goods, which should be submitted as a question of fact to the jury under proper instructions of the court; thus we find no error in the ruling of the court in its rejection of the defendant's first prayer, asking that the case be taken from the jury.

But the court in our opinion erred in granting the plaintiff's prayer, in which it is said that, if it be disclosed by the evidence that the defendant purchased the eggs at the price named, and the same were to be placed in the butter cooler to save him storage, and that upon the eggs being placed therein and an invoice sent to him he was to pay for the eggs, then the placing of the eggs in the butter cooler under such circumstances vested the title to said eggs in the defendant. This prayer fails to recognize, or at least within sufficient clearness, the essential requirements of the actual receipt of the goods by the buyer and the intention of the parties as to the same. It was not only necessary to find that the eggs were placed in the butter cooler, but it was also to be found that by so doing the unrestricted control of the eggs passed to the buyer, and that such was the intention of the parties. * * *

Because of the error of the court in granting the plaintiff's prayer, the judgment of the court below will be reversed. * * *

DRIGGS v. BUSH et al.

(Supreme Court of Michigan, 1908. 152 Mich. 53, 115 N. W. 986, 15 L. R. A. [N. S.] 654, 125 Am. St. Rep. 389, 15 Ann. Cas. 30.)

Action by Hue H. Driggs against Levi Bush and another. Judgment for plaintiff, and defendants bring error.

MONTGOMERY, J. The plaintiff is a buyer of hay, and through his agents, Homer B. McWilliams and John Van Horn, made a contract with the defendants, who own and operate two farms in Van Buren county, and who were the joint owners of the hay crop thereon, for the purchase of 24 tons of hay or more at the option of the defendants. The contract was by parol, and, as appears by the testimony offered on behalf of the plaintiff, was as follows: "Mr. Dean said: 'I want $10 a ton and you bale the hay.' We finally bought all of the hay for $10 a ton, and we to do the baling, and we were to take the hay the first cars we could get at Gobleville after the hay was baled." * * * After the contract was made, the plaintiff sent balers to the premises of the defendants who baled the hay, the defendants being present and assisting in the work. The price paid for baling the hay was $1.10 per ton, or $33.55, that being the regular price for such services. The defendants subsequently refused performance of the contract, and this action was brought to recover damages for the breach. Plaintiff was permitted to recover below the difference between the purchase price of the hay and its actual market price at the date when delivery was contemplated. Defendants bring error, and contend that the contract was void under the statute of frauds, and has never been validated and this presents the principal question for our consideration. * * *

It is strenuously insisted that there was no such delivery or acceptance, and plaintiff's counsel do not seek to maintain that there was. Without passing directly upon the question, therefore, in this case, we may assume that there was no such completed delivery as the statute requires, and that the defendants still retained the title to the property after the same was baled. * * * The question occurs, therefore, whether the expenditure of $1.10 per ton upon this hay, which remained the property of the defendants, which expenditure was received and accepted by them, and was made in pursuance of the contract between the parties, was such a part payment as answered the requirements of the statute. It is contended that the thing in earnest must be actually paid, and received by the seller. This we fully accept. But there can be no doubt in this case that the service of baling this hay was received and accepted by these defendants, and if this was done at a time while the hay remained their property, and such service was received in pursuance of the contract made between the parties, we can conceive of no valid objection to treating this as a part payment of the consideration which was to pass from the plaintiff to the defendants at a time prior to the passing of the title of the hay to plaintiff. * * * It is not necessary that the payment made upon the contract be in money. * * *

In the present case, any work done upon the hay in baling the same, passed a present benefit from the purchaser to the seller, and as it was done in pursuance of the contract, it could be nothing else than payment upon the contract. None of these cases, therefore, militate

against the conclusion which we announce, that this contract was validated by the receipt of the benefit of baling the hay in pursuance of the contract. * * *

Judgment affirmed.

ULLSPERGER v. MEYER.

(Supreme Court of Illinois, 1905. 217 Ill. 262, 75 N. E. 482, 2 L. R. A. [N. S.] 221, 3 Ann. Cas. 1032.)

RICKS, J. * * * From the reading of the sections of the statute it will be seen that it is only necessary that some memorandum or note be made of the contract and signed by the party to be charged therewith. "The statute does not require that the contract itself shall be reduced to writing. It is sufficient if there be a memorandum of the contract in writing signed by the party to be charged or by some one by him duly authorized. * * * No particular form of language is necessary to constitute the memorandum requisite to satisfy the requirements of the statute. An admission in writing of the bargain having been made, although it may not furnish exclusive evidence of the contract, as a final agreement would do, or an offer in writing so stating the proposal that its mere acceptance would fix the terms of the bargain, will, if accepted, satisfy the statute, and the acceptance of the offer in writing may be shown by parol. * * *

The authorities are agreed that if the memorandum shall contain on its face the names of the parties vendor and vendee, a sufficiently clear and explicit description of the thing, interest, or property as will be capable of identification, together with the terms and conditions of the contract, and signed by the party to be charged, it will be sufficient upon which to predicate a decree for specific performance. * * * The contract or memorandum set up in the bill while in the nature of a receipt, clearly evidences a sale of the property therein described as having taken place from appellee to appellant, and acknowledges that $100 has been paid upon the purchase price of $14,000 by appellant. Appellant is named as the purchaser, and the text of the writing clearly designates appellee as the vendor by whom the writing is signed; so that it will be seen that the contract or writing relied upon contains all that is required by the statute, and more, as the statute does not require that the consideration shall be stated in the writing but authorizes it to be established by parol.

It is insisted that there is no time specified for the completion of the contract, and that therefore the contract is not complete. Under such a contract the law would imply that it was to be performed within a reasonable time after entering into the same, and what would be a reasonable time would be a matter of proof under all the conditions and circumstances that might surround the case. * * *

It is urged that this contract lacks in the material element of mutuality. The particular ground upon which this contention is based is that the contract is signed by appellee only. * * * We are unable to understand why the mere written option signed by the vendor shall bind him by the verbal acceptance of the vendee and his offer to perform be held to be a mutual and binding contract within the statute of frauds, and the contract of sale acknowledging the receipt of part payment, signed by the vendor, shall be held void for want of mutual-

ity upon the alleged ground that the vendee has not bound himself to perform by some writing. We are aware that there is a diversity of opinion and a contrariety of holdings by the courts of last resort in the various states upon this subject; but a careful review of the authorities leads us to conclude that a contract otherwise clear and explicit is sufficient to meet the requirements of the statute of frauds, if signed by the vendor. In 29 Am. & Eng. Enc. Law (2d Ed.) the subject under consideration is extensively discussed and the authorities touching it reviewed, and the conclusion there announced is (page 858): "The weight of authority is that the statute is satisfied if the memorandum be signed by the parties sought to be charged alone, or, in other words, by the party defendant in an action brought to enforce the contract, whether he be vendor or vendee. In the case of a contract for the sale of lands, the vendor is usually the person to be charged, and a memorandum signed by him alone is valid. The party not signing the memorandum is not bound unless, as held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of both parties to sign cannot be successfully pleaded as a defense by the party who did sign, as the act of filing a bill for specific performance binds the plaintiff and renders the contract mutual." A reference to the authorities there cited shows that the rule thus obtains in England and in the majority of the United States. Speaking of this rule, Mr. Pomeroy, in his work on Specific Performance (section 75), in part says: "It may, perhaps, be sustained upon the following grounds: The statute of frauds does not reach the substance of contracts and render them valid or invalid. It simply furnishes a rule of evidence. Whenever, therefore, any agreement is enforced against a defendant who has signed it by a plaintiff who has not, it cannot be said that the agreement, so far as it purports to bind the plaintiff, is a nullity. In the suit against him the statute does no more than require a certain kind of proof in case he avails himself of it as a defense. The defense, however, is wholly a personal one, and if he neglects to set it up the agreement would be established against him, notwithstanding the statute. For these reasons it cannot be said that a memorandum signed by one party alone is so completely wanting in mutuality that no action upon it can be sustained." * * *

SECTION 9.—EFFECT OF NON-COMPLIANCE WITH THE STATUTE

BIRD et al. v. MUNROE.

(Supreme Judicial Court of Maine, 1877. 66 Me. 337, 22 Am. Rep. 571.)

PETERS, J. On March 2, 1874, at Rockland, in this state, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered (by immediate shipments) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New

York, put their previous verbal contract into writing, antedating it as an original contract made at Rockland on March 2, 1874. On the same day (March 24), by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10th or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover. * * *

Then, the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date (March 2), although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it; we incline to the latter view. * * * Such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but as said by Bigelow, J., in Marsh et al. v. Hyde, 3 Gray (Mass.) 331, "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The locus pœnitentiæ remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from the first verbal inception. That must depend upon circumstances. In many, and perhaps, most instances, such a version of the transaction would not agree with the

actual understanding of the parties. In many cases, undoubtedly, the written instrument is per se the contract of the parties. * * *

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of Townsend v. Hargraves, 118 Mass. 325, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. We are not aware of any case where the question has been directly adjudicated adversely to these cases. * * *

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication: Such as: that the statute does not apply where the contract has been executed on both sides; * * * that no person can take advantage of the statute but the parties to the contract, and their privies; * * * that the memorandum may be made by a broker, or by an auctioneer; that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale, * * * or several days after, * * * or ever so long after; that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained; * * * that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract, Leroux v. Brown, 12 C. B. 801, but this case has been questioned somewhat; that a witness may be guilty of perjury who swore falsely to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received; * * * that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards; * * * that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed; * * * that the recognition of the contract may be contained in a letter, or in several letters, if so connected by "written links" as to form sufficient evidence of the contract; that the letters may be addressed to a third person; that an agent may write his own name instead of that of the principal if intending to bind his principal by it; * * * that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum; * * * that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed; that the written contract may be rescinded by parol, although many decisions are opposed to this proposition; * * * that equity will interfere to prevent a

party making the statute an instrument of fraud; * * * that a contract verbally made may be maintained for certain purposes, notwithstanding the statute; that a person who pays his money under it cannot recover it back if the other side is willing to perform, and he can recover if performance is refused; * * * that a respondent in equity waives the statute as a defense unless set up in plea or answer; * * * that it must be specially pleaded in an action at law; * * * that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it. * * *

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid paid contracts, but only precludes the bringing of actions to enforce them. As said in Thornton v. Kempster, 5 Taunt. 786, 788, "the statute of frauds throws a difficulty in the way of the evidence." * * * Jervis, C. J., said. "The effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." * * *

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. Willes, J., perhaps correctly describes it in Gibson v. Holland, L. R. 1 C. P. 1, when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." * * * In the last case it is said: "Strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

CHAPTER X

REMEDIES

Section
1. Introduction.
2. Measure of Damages.
3. Rescission.
4. Judgments and Executions.
5. Garnishment.
6. Attachment of Property.
7. Specific Performance.
8. Injunction.
9. Enforcement of Decrees by Attachment for Contempt.
10. Bankruptcy.
11. Receiverships.

SECTION 1.—INTRODUCTION

In the preceding chapters we have dealt at some length with contractual legal relations. We have noted the origin, nature and scope of legal rights and legal duties. In the chapter on Performance we had occasion to observe, in detail, the circumstances under which the law regards a contractual duty as violated. Our inquiry, then, primarily, was to determine what constitutes a breach of contract and to ascertain the circumstances under which the other party might successfully sue the party in default. Our inquiry stopped upon the discovery of the existence or non-existence of this right to succeed in such an action and of the reasons which impelled the court so to decide. Our primary question was: "May this plaintiff recover anything?" not, "How much or what may he recover."

In this chapter our attention is directed more pointedly toward the nature and operation of the remedy, rather than to the question: "Is the plaintiff entitled to any relief at all?" In the following cases and discussion we are assuming, usually, that the plaintiff is entitled to some relief under the rules of the substantive law of contracts. It is our purpose to find out what the court actually will do to help the plaintiff out of his difficulty. Our problem divides itself into two parts: (1) What is it that the court may decide that the plaintiff is entitled to receive? Will the court order the defendant actually to perform certain personal services for the plaintiff, or to refrain from doing certain acts which cause damage to the plaintiff? In its broad aspect, therefore, the question is: What will the court order the defendant to do? (2) The second question arises after the court has decided what the defendant should do and has ordered him to comply with its mandate. Suppose the defendant is no more inclined to obey the positive direction of the court than he was to do his duty before the action was brought against him. What will the court then do? There exists quite a range of possibilities. It is possible to put the de-

fendant in jail until he decides to obey. The court may order some of his property sold and the proceeds turned over to the plaintiff. The court might even, in some cases, permit the plaintiff to do something which in the absence of the court's order would be a wrongful act. In the last analysis most legal remedies resolve themselves finally into one of two kinds of acts; either the doing of something to one's person, such as imprisoning him, or in the doing of something to his property, such as selling it or destroying it. The following sections, therefore, seek to call attention to the nature of the weapons which the courts may employ to compel obedience to their mandates and to the circumstances under which each may properly and effectively be used.

SECTION 2.—MEASURE OF DAMAGES

The principles which fix the amount of money recoverable for breach of contract are of equal importance with the principles which determine the existence of liability. If a person has in fact been caused a loss of $2,000 by reason of a breach of contract, from his standpoint there should be a recovery of $2,000. Many times, perhaps in a majority of cases, a successful plaintiff does obtain a judgment for an amount sufficient to reimburse him for his actual loss. But often this will not be true. There are cases where the loss to the plaintiff is definitely determined; but the circumstances may be such that it would not be just to compel the defendant to pay the full amount of plaintiff's loss. The law attempts, therefore, to fix the amount of recoverable damages, after a careful consideration of the interests of both plaintiff and defendant. The following cases do very little toward developing the rules of damages, but they may serve to indicate the point of view from which the situation is approached.

HADLEY et al. v. BAXENDALE et al.

(Court of Exchequer, 1854. 9 Exch. 341, 5 Eng. Rul. Cas. 502.)

The plaintiffs carried on an extensive business as millers at Gloucester, and on the 11th of May, their mill was stopped by a breakage of the crank shaft, by which the mill was worked. The steam engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken the answer was that if it was sent up by twelve o'clock any day it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to

Greenwich, and the sum of £2. 4s. was paid for its carriage for the whole distance. At the same time the defendants' clerk was told that a special entry, if required, should be made, to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect, and the consequence was that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court by defendant, which was £25.

ALDERSON, B. We think that there ought to be a new trial in this case; but in so doing we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. * * * "There are certain established rules," this court says, in Alder v. Keighley, 15 M. & W. 117, "according to which the jury ought to find." And the court in that case adds: "And here there is a clear rule that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken." Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things, from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

Now, the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the nonpayment of money, or in the not making a good

title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were millers of that mill.

But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession, put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants.

It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that upon the facts then before them they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

MILLER v. TRUSTEES OF MARINERS' CHURCH.

(Supreme Judicial Court of Maine, 1830. 7 Greenl. 51, 20 Am. Dec. 341.)

Assumpsit for the contract price of a quantity of stone, which plaintiffs contracted to supply to defendants at Portland by a certain date. The stones were not finished until about four months after the date specified. Defendants claim the right to offset damage occasioned

by the delay. The lower court instructed the jury that defendants would be entitled to no more damages than they had or would have sustained if, when the time of delivery had expired, they had stopped the receiving of any more from the plaintiffs, and had proceeded, with due diligence, to furnish themselves elsewhere.

WESTON, J. * * * If the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. Thus in a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer to save and turn to the best account such of the property assured as can be preserved.

The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and, if they bring less, he may recover the difference, with commissions and other expenses of resale, from the first purchaser.

If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach at a trifling expense, or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. "Qui non prohibet, cum prohibere possit, jubet." And he who has it in his power to prevent an injury to his neighbor, and does not exercise it, is often in a moral, if not in a legal point of view, accountable for it. The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might, by common prudence, have prevented. For example; a party contracts for a quantity of bricks to build a house, to be delivered at a given time; and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality, and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built. The party who is not chargeable with a violation of his contract should do the best he can in such cases, and, for any avoidable loss occasioned by the failure of the other, he is justly entitled to a liberal and complete indemnity. * * *

Judgment affirmed.

GALLAGHER v. JONES.

(Supreme Court of the United States. 1889. 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658.)

BRADLEY, J. This is a suit brought by Jones, a stock-broker, against his customer for the balance of account alleged to be due to the plaintiff arising out of advances of money, and purchases and sales made, and commissions. * * *

The defendant set up the following counterclaims, to wit: (1) That on the 13th day of November, 1878, being at Virginia City, he ordered the plaintiff, (at Salt Lake City,) by telegraphic dispatch, to sell certain mining stocks then in his hands as defendant's agent, to wit: 320

shares of "Justice" stock, worth $9 per share; 50 shares of "Alta" stock, worth $8 per share; 200 shares of "Tip Top" stock, worth $1.60 per share; and to invest the proceeds in "North Bonanza" stock—another mining stock on the same board, which the defendant had been investigating. That the plaintiff received this dispatch in ample time to make the transaction, as directed, on that day, but refused and neglected to do so; and that the defendant relied on its being done, and agreed with another party to sell the stock he had ordered purchased. That the plaintiff did not give notice to the defendant of his refusal to comply with said order until several days afterwards, and then by letter. That afterwards, and without any orders so to do, the plaintiff sold the "Alta" stock at $7.75 per share; the "Justice" at $4.40 per share; and the "Tip Top" at $1.25 per share; making a net loss to defendant of $1,200; and that the "North Bonanza" stock was not worth more than $2 per share on that day, and within five days thereafter it advanced to $5.60 per share, which the defendant would have realized if the plaintiff had complied with his order,—whereby the defendant lost the sum of $6,125. * * *

[The trial court entered judgment for the plaintiff and disallowed the defendant's counterclaim upon the theory that the difference between the values of the stocks at the time the order was made and at the time they were afterwards sold is immaterial in this action.]

In this, we think, the court was in error. A broker is but an agent, and is bound to follow the directions of his principal, or give notice that he declines to continue the agency. In the absence of a special agreement to the contrary, it is the principal's judgment, and not his, that is to control in the purchase and sale of stocks. The latter did not ask for any further advances by the order in question; he only directed a conversion or change of one stock into another. The plaintiff should have given prompt notice that he objected, and declined to make the change. Telegraphic communication was used by the defendant, and no reason appears why the plaintiff could not have used the same. The delay caused by using the mail alone was inexcusable under the circumstances. The plaintiff charged ample compensation for his services, and was bound to act faithfully, fairly, and promptly. We think that he was liable for all the damages which the defendant sustained by his refusal to change the stocks, both for the loss on the sales of the "Justice," "Alta," and "Tip Top," and the loss occasioned by not purchasing the "North Bonanza." The report of the referee, being made in conformity with the decision of the supreme court, does not show sufficient facts to determine the amount of loss in these respects. If the answer states the facts truly, the loss on the failure to sell the old stocks was over $2,000; and it appears from the report that the North Bonanza could have been purchased at $2 to $2.50 per share on the 13th of November, and sold for $5 to $5.50 within a few days,—showing a loss of $3 per share; and as the proceeds of the other stocks, if they had been sold as directed, would have been sufficient to purchase 1,600 to 2,000 shares of North Bonanza, the loss on this account must have been more than $5,000. But the want of a sufficient finding of facts necessitates a new trial. * * *

It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed

to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust. The rule of highest intermediate value, as applied to stock transactions, has been adopted in England, and in several of the states in this country; while in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. * * * Perhaps more transactions of this kind arise in the state of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that state, and may be found laid down in Romaine v. Van Allen, 26 N. Y. 309, and Markham v. Jaudon, 41 N. Y. 235, and other cases, although the rigid application of the rule was deprecated by the New York superior court in an able opinion by Judge Duer, in Suydam v. Jenkins, 5 N. Y. Super. Ct. 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great that the court of appeals of New York was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages in these cases to be the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was very ably enforced in an opinion of the court of appeals delivered by Judge Rapallo in the case of Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507. * * * On the whole, it seems to us that the New York rule, as finally settled by the court of appeals, has the most reasons in its favor, and we adopt it as a correct view of the law.

The judgment is reversed, and the cause remanded to the Supreme Court of Utah, with instructions to enter judgment in conformity with this opinion.

We have seen that the courts have certain fairly definite rules for determining the amount of damages to be assessed in compensation for the loss occasioned by the breach of a contract. However, in order to make judicial inquiry as to the amount of damages unnecessary, the parties sometimes place in their contract a stipulation that, in the event of a breach of the contract by one of the parties, he shall pay a certain sum as liquidated damages.

"Where a sum named is construed by a court as being liquidated

damages, such sum is the amount of recovery for a breach. A penalty, which differs in its nature very widely from liquidated damages, is a sum named in a contract, to be paid by a defaulting party as punishment for his breach. Unlike liquidated damages, a penalty is not regarded as constituting an agreed measure of compensation; it is considered as a punishment agreed upon beforehand. The practical purpose of the parties in naming such a sum, is to make the agreement for the penalty a kind of security for the performance of the contract. If their purpose is to make a penal sum absolutely due in toto in case of breach, their purpose will not be given effect; a sum which would, on principles to be stated hereafter, be unreasonable and unconscionable, will not be in any way determinative of the amount to be assessed for a breach. A court does not feel itself compelled to regard a penalty as being either the maximum or minimum amount to be assessed for a breach, where the penalty is named in a mere contract, although it is regarded as the maximum of liability, where it is named in a penal bond. Where a sum named in a contract is construed by a court as being a penalty, it cannot be collected in full as a stated compensation; only damages for the actual loss occasioned by the default will be assessed, whether such damages be greater or less than the penalty named. Where a penalty is named in either a statutory undertaking or a penal bond, the sum so named is the limit of recovery; and, while a lesser amount may be recovered on the bond, a greater cannot be."[1]

There is some conflict on various questions connected with liquidated damages; but, in general, the following rules are followed:

"An intention to liquidate the damages is controlling. In seeking to ascertain the real intent, the courts lean strongly towards a construction that the sum fixed is a penalty, rather than liquidated damages. The language of the parties is not conclusive, and will be strictly construed.

"Where the stipulated sum is wholly collateral to the object of the contract, and is evidently inserted in terrorem as security for performance, it will be construed to be a penalty.

"Where the stipulated sum is to be paid on the non-payment of a less amount, or on failure to do something of less value, it will generally be construed to be a penalty.

"Where the stipulated sum is to be paid on breach of a contract of such a nature that the damages arising from a breach may be either much greater or much less than the sum fixed, it will be construed to be a penalty.

"Where the stipulated sum is to be paid on the breach of a contract of such a nature that the damages resulting from a breach would be uncertain, and incapable or difficult of being estimated by any definite standard, it will generally be construed to be liquidated damages, if reasonable in amount.

[1] Bauer on Damages, § 33.

"Where the stipulated sum is to be paid on the breach of a contract of such a nature that the damages arising from a breach are capable of exact measurement by a definite standard, the sum fixed, if materially variant from the actual damages, will usually be regarded as a penalty; but where such sum is fixed to cover contemplated consequential losses, not recoverable under legal rules, and is not more than a reasonable compensation therefor, it may be sustained as liquidated damages.

"Where the contract provides that a certain sum, deposited to secure performance, shall be forfeited for nonperformance, the sum deposited, if reasonable in amount, will be construed to be liquidated damages.

"Where the stipulated sum is to be paid on any breach of a contract containing several stipulations of widely different degrees of importance, it is usually held to be a penalty.

"A sum stipulated to be paid upon a breach of contract cannot be recovered as liquidated damages upon a partial breach, where the other party has accepted part performance.

"A sum stipulated to be paid in evasion of the usury laws will be regarded as a penalty." [3]

JAQUITH v. HUDSON.

(Supreme Court of Michigan, 1858. 5 Mich. 123.)

CHRISTIANCY, J. * * * The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must therefore, we think, be very obvious that the actual intention of the parties, in this class of cases, and relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and can not, be made the real basis of these decisions. * * *

In this class of cases, where the law permits the parties to ascertain and fix the amount of damages in the contract, the first inquiry obviously is, Whether they have done so in fact? And here, the intention of the parties is the governing consideration; and in ascertaining this intention, no merely technical effect will be given to the particular words relating to the sum, but the entire contract, the subject-matter and often the situation of the parties with respect to each other and to the subject-matter, will be considered. * * *

[3] Hale on Damages (2d Ed.) §§ 51–60.

UNITED STATES v. BETHLEHEM STEEL CO.

(Supreme Court of the United States, 1907. 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731.)

PECKHAM, J. * * * The courts at one time seemed to be quite strong in their views, and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts and to carry out their intentions, even when it would result in the recovery of liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. * * * The question always is: What did the parties intend by the language used? When such intention is ascertained, it is ordinarily the duty of the court to carry it out. * * *

KEEBLE v. KEEBLE.

(Supreme Court of Alabama. 1888. 85 Ala. 552, 5 South. 149.)

Plaintiff and defendant's testator had been in partnership in the mercantile business. Plaintiff sold out to defendant's testator, but was employed by the latter as business manager. The terms of the employment imposed on plaintiff the obligation wholly to abstain from the use of intoxicating liquors, and, in the event he should become intoxicated, that he should pay, "as liquidated damages," the sum of $1,000. The plea alleged that plaintiff violated his promise to keep sober, and thereby became bound to pay to defendant's testator said sum of $1,000, which sum was offered as a set-off to plaintiff's demand.

SOMERVILLE, J. * * * The appellant violated his promise by becoming intoxicated, and remained so for a long time, and acted rudely and insultingly towards the customers and employés of the testator, and otherwise deported himself, by reason of intoxication, in such manner as to do injury to the business. It is not denied by appellant's counsel that this is a total breach of the promise to keep sober; nor is it argued that the damage resulting from the violation of such a promise can be ascertained with any degree of certainty; nor even that the amount agreed to be paid as liquidated damages, in the event of a breach, is disproportionate to the damages which may have been actually sustained in this case. But the contention seems to be that, inasmuch as it was possible for a breach to occur with no actual damages other than nominal, the amount agreed to be paid should be construed to be a penalty. * * * It is argued, in other words, that becoming intoxicated in private, while off duty, would be a violation of the contract, but would be attended with no actual damage to the business of R. C. Keeble & Co. * * * There are but few agreements of this kind where the stipulation is to do or not do a particular act, in which the damages may not, according to circumstances, vary, on a sliding scale, from nominal damages to a considerable sum. One may sell out the goodwill of his business in a given locality, and agree to abstain from its further prosecution, or, in the

event of his breach of his agreement, to pay a certain sum as liquidated damages; as, for example, not to practice one's profession as a physician or lawyer, not to run a steamboat on a certain river or to carry on the hotel business in a particular town, not to re-establish a newspaper for a given period, or to carry on a particular branch of business within a certain distance from a named city.

In all such cases, as often decided, it is competent for the parties to stipulate for the payment of a gross sum by way of liquidated damages for the violation of the agreement, and for the very reason that such damages are uncertain, fluctuating, and incapable of easy ascertainment. * * * It is clear that each of these various agreements may be violated by a substantial breach, and yet no damages might accrue except such as are nominal. The obligor may practice medicine, and possibly never interfere with the practice of the other contracting party, or law, without having a paying client; or he may run a steam-boat without a passenger; or an hotel without a guest; or carry on a newspaper without the least injury to any competitor. But the law will not enter upon an investigation as to the quantum of damages in such cases. This is the very matter settled by the agreement of the parties. If the act agreed not to be done is one from which, in the ordinary course of events, damages, incapable of ascertainment save by conjecture, are liable naturally to follow, sometimes more and sometimes less, according to the aggravation of the act, the court will not stop to investigate the extent of the grievance complained of as a total breach, but will accept the sum agreed on as a proper and just measurement, by way of liquidated damages, unless the real intention of the parties * * * designed it as a penalty. We may add, moreover, that no one can accurately estimate the physiological relation between private and public drunkenness, nor the causal connection between intoxication one time and a score of times. The latter, in each instance, may follow from the former, and the one may naturally lead to the other. There would seem to be nothing harsh or unreasonable in stipulating against the very source and beginning of the more aggravated evil sought to be avoided. * * *

[Judgment allowing defendant's set-off affirmed.]

SECTION 3.—RESCISSION

When a party has materially broken his contract, the injured party may sue the party in default and recover damages for the breach of contract. This is a suit upon the contract. The plaintiff will obtain a judgment for money damages, presumably sufficient in amount to equal what the plaintiff would have gained had the contract been performed. Where the suit is for specific performance of the contract, a successful complainant obtains, literally, what he was entitled to under the contract. In contrast with these remedies, which seek to put the plaintiff in the same position he would have occupied had the contract been performed by the defendant, the remedy of rescission, on the other hand, seeks to put the plaintiff in the same position which he occupied before he entered into the contract; that is, the remedy of rescission enables a plain-

tiff to recover what he parted with. The remedy of rescission does not entitle the plaintiff to damages in addition to the remedy of obtaining restitution. Sometimes the term "rescission" is used to describe the election of the plaintiff to hold the party in default for breach of contract, but its narrower meaning is confined to that stated above.

RAFTERY v. WORLD FILM CORPORATION.

(Supreme Court of New York, Appellate Division, 1917. 180 App. Div. 475, 167 N. Y. Supp. 1027.)

Action by George A. Raftery against the World Film Corporation. From an interlocutory judgment, directing an accounting, and directing a return to plaintiff of 26 films of a motion picture known as "The Head Hunters" defendant appeals.

SMITH, J. Upon February 13, 1915, the Seattle Film Company, Incorporated, the plaintiff's assignor, entered into a contract with the World Film Corporation, the defendant in this action, called in the contract the "distributor." The general provisions of the contract were that the defendant, the distributor, should distribute and have produced the motion pictures representing the Head Hunters in the various theaters controlled by the defendant, which were 26 in number. The film was the property of the plaintiff's assignor. Under the contract 26 positive prints, so called, were delivered to the defendant for the purpose of the production, upon the express covenant of the defendant to return these prints to the producer at the expiration of the contract. * * * It was further provided that the distributor should upon Tuesday of each week pay to the producer the said 50 per cent. of the gross cash receipts over and above the amount so provided to be retained during the week ending nine days prior to the date of payment, and at the time of each payment to the producer the distributor was to submit to the producer a statement showing such gross receipts, and the producer should have the privilege once a month at a reasonable time to inspect the accounts of the distributor relative to such gross cash receipts.

The trial court has found that the distributor did not turn over to the producer one-half of the gross receipts as required by the contract, did not render to the said company just, true, and accurate statements of the rentals received, but, on the contrary, it rendered the said Seattle Company, the producer, week by week, false, untrue, and fraudulent statements of the rentals received by it and of the leases by it, and of the expenses incurred by it. * * * The trial court has further found that the defendant has retained possession of and still has the 26 sets of films of positive prints of said production known as "The Head Hunters," although the defendant by the eighth clause of the aforesaid contract of February 13, 1915, contracted and agreed to return the said prints upon the termination of the contract, which occurred on the 15th day of August, 1916. * * *

The defendant offered no evidence on its own behalf, and now stands upon the specific objection that the plaintiff at no time had, and does not now have, any right to ask the interposition of a court of equity, and for that reason insists that the complaint should have been dismissed in accordance with its motion made at the trial. There are, I think, two questions of law involved: First, was the defendant's of-

fense, in giving false statements of its receipts and refusing to allow the plaintiff to examine its books to verify the statements given, sufficiently grave to authorize the plaintiff at the time the action was brought, to rescind the contract; secondly, assuming that the right of rescission then existed, had the plaintiff an adequate remedy at law? * * *

First. The Seattle Film Company was at the time this action was commenced authorized to rescind the contract by the defendant's willful and fraudulent breach of the contract in failing to make true reports of the proceeds of the production and refusing the plaintiff an opportunity to inspect the books of the company. The authorities in this state bearing upon the right of a party to a contract to rescind for breach of the contract * * * are not plentiful, as it does not appear that the question has many times arisen. The rule in England has been ultra strict in holding that the breach of the contract must amount practically to a repudiation or an abandonment of the contract in order to authorize a rescission.

Professor Williston, one of the most eminent authorities in this country upon the Law of Contracts, has an article in 14 Harvard Law Review, p. 318 et seq., in which this question is discussed, in which it is shown that the law as applied in the United States is materially different from that as applied in England. In speaking of the English rule as stated, Professor Williston says: "This doctrine, though perhaps it is that of the English law to-day, must be regarded as erroneous in principle and unfortunate in practice. It seems to be based in large part on the notion that, in order to justify such a rescission of the contract, mutual assent of the parties must be established—an offer by the party in default accepted by the other party. In almost any case this can be established only by resorting to the baldest fiction."

Professor Williston, in speaking of the American rule, then says: "In truth rescission is imposed in invitum by the law at the option of the injured party, and it should be, and in general is, allowed, not only for repudiation or total inability, but also for any breach of contract of so material and substantial a nature as should constitute a defense to an action brought by the party in default for a refusal to proceed with the contract." * * *

To this proposition many cases are cited in the United States court and in many states of the Union. The leading authority in New York state is the Case of Callanan v. K., A. C. & L. C. R. R. Co., reported in 199 N. Y. 269, 92 N. E. 747. That was a case brought in equity to rescind a contract for breach of a condition subsequent. Judge Vann, writing for the court, in speaking of the holding of the referee, said: "* * * There is no hard and fast rule on the subject of rescission, for the right usually depends on the circumstances of the particular case. It is permitted for failure of consideration, fraud in making the contract, for inability to perform it after it is made, for repudiation of the contract or an essential part thereof, and for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but, as a general rule, only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract. Failure to perform in every respect is not essential,

but a failure which leaves the subject of the contract substantially different from what was contracted for is sufficient."

Within the strict letter of the rule thus laid down the plaintiff has, in my judgment, shown a right of rescission. The consideration of the contract was the payment of 50 per cent. of the gross proceeds after certain deductions. Inasmuch as the defendant was giving the production through its different agencies, the amount of those proceeds was known only to the defendant. It was therefore deemed necessary to stipulate that the defendant should make weekly reports of the gross receipts, and should allow the plaintiff access to its books, that their accuracy might be tested. The giving of false and untrue reports of the proceeds, and the refusal of the defendant to allow the plaintiff access to its books as stipulated, were clearly "material and willful" breaches and "repudiation of the contract or an essential part thereof," and also such a "breach as substantially defeats its purpose." It would seem from this authority that the breach must be fundamental, if it be not willful; but, if willful, then a breach in any material stipulation constitutes ground for rescission. That the breach must be of a material provision is undoubted, but that false reports upon which payments are made under the contract and a refusal to allow a verification of those reports constitute a breach of a material stipulation in the contract, is too plain for controversy. * * *

The judgment should therefore be affirmed. * * *

SECTION 4.—JUDGMENTS AND EXECUTIONS

In the broadest sense of the term, a judgment is the formal declaration by a court that the plaintiff either is or is not entitled to the relief sought by him. The evidence of the judgment will be found usually in a book, called the docket, kept by the judge or by a clerk of the court. The judgment may be entered either with or without a trial. Judgment may be entered against a defendant because of his failure to appear in court either in person or by counsel. Such a judgment is usually called a judgment by default. So, also, may a judgment be entered against the plaintiff and in favor of the defendant because of a like failure on the part of the plaintiff to appear at times designated in court orders for his appearance. Such a judgment is usually called a dismissal for want of prosecution. The judgment may be entered against either of the litigants as the result of argument on propositions of law, as for example upon a demurrer. A judgment may be entered after a trial, either before the judge alone, or before the judge with a jury. A finding of facts by a judge, or a finding of facts by a jury, called a verdict, is to be distinguished sharply from a judgment, in that the finding of ultimate facts in and of itself does not produce the legal effect which is produced by the formal entry of judgment.

Judgments may be classified in several ways. It is convenient to group them according to the legal effect upon the relations of the parties to the litigation. Looked upon in this way, judgments

may be classified as follows: (1) Judgments for money; (2) judgments for the restitution of specific property or which otherwise affect specific property; (3) judgments ordering the performance of specific acts by the defendant; (4) judgments which dissolve certain legal relations then existing between the parties. This list is not entirely exhaustive, but they include and describe the distinctive aspects of most forms of judicial relief.

Perhaps in a majority of actions the plaintiff is seeking a judgment for money damages. This is illustrated by the ordinary actions for breach of contract and for tort. Judgments for the restitution of property are entered when the defendant is unlawfully withholding possession thereof from the plaintiff. The property so held may be personal property or real property. In suits for specific performance the judgment, or decree as it is usually called, takes the form of an order from the court, directed to the defendant, to perform the act specified, such as that a deed be executed and delivered by the defendant to the plaintiff. The decree may order the defendant to refrain from acting, as, for example, that the defendant, who has contracted not to engage in a certain business within specified territory, should cease his violation of this promise. The decree may order the defendant to cease the commission of a tort, as, for example, that the defendant shall take steps to prevent the continuance of a nuisance in the vicinity of plaintiff's residence. Such an order is commonly called an injunction.

There are several types of cases where the judgment of the court will take the form merely of putting an end to existing legal relations between the parties. Such a judgment is more commonly called a decree. For example, a decree of divorce destroys the rights, duties, powers, and privileges incident to the marriage relation. A decree dissolving a partnership has a similar effect. In suits to remove a cloud from title to land, the decree will declare certain adverse claims to be non-existent. A court may in certain cases decree the dissolution of a corporation. An injunction may be incorporated in the decree in order to make it effective.

The principal legal effect of a judgment for money is that, usually, the entry of the judgment operates to confer upon the owner of the judgment a lien upon the real property owned by the judgment debtor within the jurisdiction of the court. Such a lien is similar to a mortgage, in that the property upon which the lien was impressed by the judgment may be sold under appropriate process to satisfy the claim evidenced by the judgment. Sometimes the judgment does not operate to create a lien upon property, the statute providing that some act must be done before the lien attaches, such as recording the judgment in a designated office or the taking out of a formal execution. This aspect of the legal effect of a judgment is, therefore, to confer upon the judgment creditor the power to have the judgment debtor's property sold to satisfy the debt.

The term "execution" is used to describe one of the formal documents, which is issued from the office of the clerk of the court, and under the authority and direction of the court, directed to the sheriff of the county, the bailiff of the court, or constable, commanding him to serve the same upon the judgment debtor and to demand payment of the debt. This document is the source of the power of the sheriff or other officer to sell the judgment debtor's property. Frequently this document and the service thereof upon the judgment debtor will not, in and of itself, bring about a judicial sale. Generally another document will be issued, usually from the sheriff's office, which is called a levy; the judgment creditor having specified therein certain property which he declares to be owned by the judgment debtor. The levy directs the sheriff to proceed, in accordance with the statute, to sell the property therein designated. Usually a short period of time must elapse between the issuance of the levy and the date set for the sale. This period may vary from a few days to three or four weeks or even more. Statutes generally require, as a condition precedent to the holding of a valid judicial sale, that the time and place of such sale be advertised in the papers and notices posted up in certain public places within the county or district wherein the sale is to occur. The effect of the sale will be to pass a good title to the purchaser, but there is usually a period allowed by statute within which time. the judgment debtor may demand a re-transfer of the property from the purchaser at the sale, upon payment of the amount for which the property sold and the court costs. This period is called a period of redemption.

The nature of the other types of judgments or decrees, and the methods of their enforcement, are illustrated in the following sections.

SECTION 5.—GARNISHMENT

Oftentimes a judgment debtor has no real or personal property which may be seized on execution and sold to satisfy the judgment. Such judgment debtor, however, may have claims for money against other persons. A claim for money against a third party is a right possessing value, but it is not of such a nature as to be capable of seizure under ordinary judicial process, such as an execution. To meet this situation statutes prescribe a procedure, generally known as a "garnishment proceeding," under which it is possible for the judgment creditor to obtain another judgment against the person who owes money to the judgment debtor. The person who owes money to the judgment debtor is called the "garnishee." A successful garnishment suit will therefore result in an order by the court directed to the garnishee, commanding him to pay the sum which he owes to his creditor, to the plaintiff in the garnishment suit.

HALL v. KANSAS CITY TERRA COTTA CO. et al.

(Supreme Court of Kansas, 1916. 97 Kan. 103, 154 Pac. 210, L. R. A. 1916D, 361, Ann. Cas. 1918D, 605.)

Action by W. C. Hall against the Kansas City Terra Cotta Company, wherein the Southwest National Bank of Kansas City, Mo., was impleaded. From a judgment for plaintiff, interpleader appeals. * * *

DAWSON, J. The plaintiff, W. C. Hall, commenced this action on October 12, 1912, against the Kansas City Terra Cotta Company to recover on the defendant's promissory note, and on the same day caused garnishment proceedings to be served on Albert Neville, a Coffeyville contractor. Neville, the garnishee, answered and alleged that on July 26, 1912, he had entered into a written contract with the defendant, the Kansas City Terra Cotta Company, for certain materials to be delivered to him at Coffeyville on or before September 20, 1912. Other allegations covered failure of the Terra Cotta Company to comply in full with its contract, consequent damages to garnishee, including freight bills which he was compelled to pay for the defendant, etc. He also pleaded that on November 16, 1912, he had been notified by the Southwest National Bank of Kansas City that the claim of the Terra Cotta Company had been assigned to it on September 16, 1912, and advising him that all the proceeds of his contract should be paid to the bank. He also prayed that the bank should be impleaded and required to set up its rights, and that he be protected.

By leave of court, the bank filed its answer and cross-petition, and by agreement of parties, and with the approval of the court, Neville, the garnishee, was permitted to pay into court a sum of money and was discharged. This action thereupon proceeded between the plaintiff and the interpleading bank. * * *

The district court found that the Terra Cotta Company was indebted to the bank, and that for the purpose of securing the same and to procure a further loan, which was then made, the contract between Neville and the Terra Cotta Company was assigned and delivered to the bank on September 16, 1912; that the bank did not notify Neville until about a month after this action and garnishment were begun. * * *

The general rule is that garnishment, like other proceedings in invitum, only affects the actual property, money, credits, and effects of the debtor in the hands of the garnishee, and the rule relating to bona fide holders or purchasers without notice has no application. * * *

In 20 Cyc. 1012, it is said: "Where the principal defendant has made a valid assignment of the garnishee's indebtedness, or conveyance of the property in his possession belonging to such defendant, before the service of the summons upon the garnishee, the latter cannot be charged on account of such debt or property."

"The above rule is especially applicable to bills of exchange, promissory notes, and other evidences of indebtedness, and where such paper is assigned or transferred in good faith before the drawer, maker or indorser thereof is served in garnishment proceedings by a creditor of the payee, or of the last holder thereof, the rights of the

assignee or transferee are not affected by such proceedings." Page 1013.

"In the absence of statutory provision prescribing the mode of assignment, no particular mode or form is necessary to effect a valid assignment of property, claims, or debts so as to defeat garnishment proceedings by a creditor of the assignor. If the intent of the parties to effect an assignment be clearly established, that is sufficient, and the assignment may be in the form of an agreement or order or any other instrument which the parties may see fit to use for that purpose. * * * The rule is sometimes broadly stated that an assignment is not complete so as to defeat proceedings in garnishment until the garnishee is notified thereof; however, this rule seems to be subject to limitations; thus as between assignor and assignee, it is not necessary to the validity of an assignment that the garnishee be notified thereof; and the assignment will likewise be complete as against creditors of the assignor instituting garnishment proceedings after assignment and before notice of the assignment to the garnishee, provided that notice of the assignment be given to the garnishee in time to permit him to disclose the assignment in his answer to the garnishee process." Pages 1016, 1017.

The district court treated the assignment of the contract between the Terra Cotta Company and Neville as a chattel mortgage. If it were treated as a mortgage of the contract, then the possession of the contract by the bank would obviate all necessity for its registration. Nothing is more common than the advancement of funds to contractors and manufacturers, and while banks with proper prudence usually take more tangible security than the potential and possible future profits of the pending contracts of the borrowers, yet there is no impropriety in taking an assignment of the latter also; nor does the statute require such assignments to be recorded.

When the borrower thus assigns his contract or the possible profits of his contract in good faith, such assignments should be respected. Nor can a later garnishing creditor justly complain. The garnishment process only reaches the property, assets, and credits of the debtor, and not that of which the debtor was formerly the owner, nor that which he has lawfully assigned to a third party. This view seems to be amply sustained by the authorities. * * *

In the case at bar, the debt due from Neville to the Terra Cotta Company for goods sold and delivered and resting for evidence on a written contract, was assigned to the bank, and such assignment must likewise be valid though made only by mere delivery of the contract. * * *

But in our opinion the assignment was neither a chattel mortgage nor a pledge. It was simply what it purported to be—an assignment of a sum or sums of money due and to become due. There was nothing about the transaction which was unusual or against public policy. This general subject is one which might well be regulated by statute, but so far it has been left free to develop in the usual course of modern business. * * *

We do not think the fact that the Terra Cotta Company was made the agent of the bank to collect the proceeds of the contract can affect the validity of the assignment. Neither can the later modification of the contract by remitting $330 of the contract price. That deduction in plain terms recognized that "this money is subject to the

order of the court." Recurring to the proposition first laid down, that the garnishing creditor can reach only the property of the defendant in the hands of its debtor, the plaintiff could not reach or attach that which had already passed by lawful assignment, and this necessitates a reversal of the judgment with instructions to render judgment for the interpleader. All the Justices concurring.

SECTION 6.—ATTACHMENT OF PROPERTY

The general policy of the law is not to permit a plaintiff to obtain any hold on the defendant's property until a judgment has been entered against him. This rule is obviously just, because until final judgment it is not known whether the plaintiff's claim against the defendant is true in law and fact. It would not be just to the defendant, therefore, to allow the plaintiff to seize the defendant's property and to hold it during the time the action was pending. But there are some special cases where the plaintiff's interests overbalance the interests of the defendant in this respect, and accordingly the plaintiff is permitted to have the property kept by an officer of the court from the time the action is commenced. Such a proceeding is known as an "attachment proceeding." The circumstances under which a plaintiff is allowed to attach the property of the defendant differ somewhat in the various states. Generally, however, non-residence of the defendant or some kind of fraudulent conduct by him will be ground for attachment. The proceeding, being one which confers upon the plaintiff an extraordinary privilege, the plaintiff must give some counter protection to the defendant. This is secured by requiring the plaintiff to give a bond, which must be approved by the court.

WEARE COMMISSION CO. v. DRULEY et al.

(Supreme Court of Illinois, 1895. 156 Ill. 25, 41 N. E. 48, 30 L. R. A. 465.)

Attachment by the Weare Commission Company against William M. Druley and Albert A. Druley. Plaintiff obtained judgment for its debt, but the attachment was dissolved. This judgment was affirmed by the Appellate Court, and the plaintiff appeals.

BAILEY, J. On the 3d day of September, 1890, the Weare Commission Company commenced its suit in assumpsit, by attachment, as against William M. Druley and Albert A. Druley. The grounds for the attachment, as stated in the affidavit, were: (1) That the defendants had, within two years then last passed, fraudulently conveyed or assigned their effects, or part thereof, so as to hinder and delay their creditors; (2) that they had, within two years last past, fraudulently concealed or disposed of their property so as to hinder and delay their creditors; and (3) that they were about fraudulently to conceal or dispose of their property or effects so as to hinder and delay their creditors. * * *

The principal controversy, as presented here, turns upon the propriety of the peremptory instruction to the jury to find the issues

upon the attachment affidavit for the defendant. If that instruction, and the consequent verdict and judgment, are sustained, it is manifestly immaterial whether the court erred in refusing to quash the attachment on motion of Albert A. Druley, or on the subsequent motion of the administratrix. * * *

Some time about the year 1885, Jesse Druley, William M. Druley's father, sold a farm in McLean county, and of the proceeds loaned to William M. Druley, or put into his business, about $18,000. William M. Druley afterwards advanced to his father and mother various sums of money, and about March 10, 1887, a settlement was had between them, at which it was found that William M. Druley was indebted to his father in the sum of $10,000. For this sum William M. Druley, with his father's consent, executed his promissory note, dated March 10, 1887, payable to Jane Druley, his mother, five years after date, with interest at the rate of 6 per cent per annum, payable quarterly. This note remaining wholly unpaid, William M. Druley, some weeks prior to his death, but whether in payment of or as security for the note is left by the evidence somewhat in doubt, signed and acknowledged a deed conveying the two-acre tract of land upon which the attachment writ was afterwards levied to Jesse Druley, his father, in trust for Jane Druley, his mother.

This deed was executed as the result of considerable negotiations between William M. Druley and an attorney representing Jesse and Jane Druley, such negotiation resulting in an agreement that the deed should be executed, but that, if William M. Druley recovered from his illness, he should have the land back, or that the deed should be returned to him. The deed, after it was signed and acknowledged, remained in the possession of the grantor about two weeks, and he then handed it to his brother, Edwin P. Druley, who was attending and taking care of him in his illness, saying to him that he should take it, and carry it in his pocket, and that if he, the grantor, got well, he should return it to him, but that, if he did not, he should put it on record. On the 2d day of September, 1890, Edwin P. Druley, having learned that the firm of Druley Bros. was about to fail, or supposing that it had failed, put the deed on record, and about six weeks afterwards he got it from the recorder's office, and delivered it to his father and mother. This deed, and the circumstances attending its execution, constituted the only evidence given by the plaintiff in support of the grounds for an attachment alleged in its attachment affidavit.

It is urged, and with some show of reason, that the deed was never delivered so as to become effectual as a conveyance. The contention is that Edwin P. Druley took and held the deed merely as agent of the grantor, and that by delivering it to him with instructions to keep it in his pocket, and return it to the grantor in case of his recovery, and to record it only in case of his death, the grantor did not, and did not intend to, absolutely yield dominion over it, but that it remained, down to the time of his death, subject to his control, and liable to be recalled by him at any time; and it would seem that, if the deed was never delivered, it has no tendency to prove the charge of fraud made by the attachment affidavit. But, without determining the question of delivery, we prefer to place our decision upon another ground.

Even if the deed is to be regarded as having been effectually delivered, it must be conceded that there is no evidence of express fraud, or what is usually termed "fraud in fact." There is no evidence of

any actual intention on the part of the grantor to hinder or delay his creditors. But the evidence tends to show that the deed, though absolute on its face, was intended by the parties as a mortgage to secure the $10,000 note given by the grantor to his mother, and the rule is supported by many authorities that a conveyance of lands, absolute on its face, but intended as a mortgage or security for a debt, is fraudulent and void as against existing creditors, although there may have been no actual intent to defraud. * * *

The question thus arises whether, under our statute, an attachment will issue where the fraud charged is a legal or constructive fraud only, as contradistinguished from express or intentional fraud, usually denominated "fraud in fact." This question, so far as we are advised, has never been decided by this court, but it has received consideration by the Appellate Courts in several cases, and in each case it has been decided in the negative. It first arose in the Second district, in Shove v. Farwell, 9 Ill. App. 256, and there the court said: "The law does not allow a creditor to ignore the process of the common law in the collection of his debt, and resort to a summary seizure of the debtor's property upon mesne process, from the fact, alone, that the debtor has, within two years, sold his property, or any part of it, or has secured some other creditor by mortgaging or pledging it, even though the attaching creditor should be hindered or delayed in the collection of a just debt. Another element must exist in the transaction, the fraud of the debtor, and, in our opinion, the statute contemplates that this fraud shall be one of fact, as contradistinguished from a legal or constructive fraud. If a man has shown himself to be dishonest by making a conveyance of his property, designing thereby to delay and hinder his creditors, and such effect is produced, then, for the space of two years, the statute permits the creditor to treat him as one who may repeat the fraud, and authorizes its prevention by a seizure of his property upon mesne process, and hold it to answer any judgment that may be rendered in the action."

The same question arose in the same district in First National Bank v. Kurtz, 22 Ill. App. 213, where the same conclusion was again announced. * * * In Spencer v. Deagle, 34 Mo. 455, an attachment writ was issued under a statute apparently identical with ours, and it was held to be error for the court to refuse to instruct the jury that, to render the deed of trust there in question fraudulent as to the defendant's creditors, it must appear that it was executed for that purpose; that it was not enough that the effect of the deed was to delay his creditors, but it must have been executed with that purpose and intent.

While some decisions, perhaps, may be found in other states supporting the contrary view, we are disposed to think that the interpretation put upon our statute by the Appellate Court is the correct one. It seems to be the policy of our attachment law to give creditors the right to seize the property of their debtors on original or mesne process, and hold it for the satisfaction of such judgments as may be subsequently recovered, in those cases where the situation or conduct of the debtors is or has been such as to raise a reasonable apprehension that the ordinary common-law processes of the court will be thwarted, and thus rendered unavailing.

The Revised Statutes of 1845 authorized attachments for only the first five of the nine causes for attachment specified in our present attachment act, viz.: (1) Where the debtor is not a resident of the state; (2) where he conceals himself, or stands in defiance of an officer, so that process cannot be served upon him; (3) where he has departed from the state with the intention of having his effects removed from the state; (4) where he is about to remove from the state with the intention of having his effects removed from the state; and (5) where he is about to remove his property from the state, to the injury of the creditor suing. Rev. St. 1881, p. 123. Here the writ was given only where the debtor was already a nonresident, and so beyond the reach of the ordinary processes of the law, or where there was an affirmative intention and design on his part to place his person and property, or his property alone, beyond the reach of those processes. The writ was given for the purpose of seizing the property so as to forestall its threatened removal, and to hold it as security for the judgment to be recovered.

It cannot be doubted, we think, that when the statute was so amended as to add the three causes for attachment set up in this case, the legislature was acting in furtherance of the same general intention expressed in the original act.

The writ was not given for the purpose of enabling the creditor to attack a transaction which is only constructively fraudulent, but to enable him to seize the property of his debtor in cases where fraud has been committed or contemplated of such character as to raise a reasonable apprehension that by further fraudulent acts the debtor will put his property and effects beyond the reach of legal process. But such apprehension does not arise from the commission of a mere legal or constructive fraud. There evil intention, moral turpitude, and actual dishonesty are wanting. Equity, it is true, will set such transactions aside, in a proper proceeding, at the instance of creditors; but no inference arises that the debtor will attempt, by any dishonest disposition of his property, to interfere with his creditors in the assertion of their just rights. We are of the opinion, then, that granting writs of attachment in cases where only legal or constructive fraud is shown is outside of the general scheme and purpose of the attachment law.

It is apparent that any other construction of the statute would often lead to consequences extremely oppressive. Thus a sale of goods where possession has not actually been delivered to the purchaser, though valid as between the parties, is constructively fraudulent as to the creditors of the seller, and the goods may be seized by them on execution as his goods, however honest he may have been in the transaction. In contemplation of law he has made, or attempted to make, a disposition of his property which is constructively fraudulent, and, if attachments may issue for constructive frauds, he has thereby subjected himself, however innocent he may have been, to all such attachment writs as his creditors may see fit to sue out against his property for the period of two years. So, if a debtor, in perfect good faith, executes a chattel mortgage to secure an honest debt, but fails to have it executed, acknowledged, and recorded in all respects as required by the statute, the transaction is constructively fraudulent and void, as against his creditors. But can it be said that he thereby subjects himself, for a period of two years, to attachments by any of

his creditors? Other similar illustrations without number will suggest themselves.

In view of these various considerations, it seems to us to be very clear that the legislature, in authorizing writs of attachment in cases where the debtor has fraudulently assigned his property so as to hinder or delay his creditors, could have had in mind only such conveyances or assignments as are fraudulent in fact, and that it was not their intention to grant this writ where the debtor acts honestly, and with no fraudulent purpose or design. It follows that the instruction to the jury to find the issues upon the attachment affidavit for the defendant was properly given. * * *

Judgment affirmed.

SECTION 7.—SPECIFIC PERFORMANCE

In the ordinary case, where the defendant has broken his contract the plaintiff is allowed to recover a judgment for money damages. This remedy may be described as one of substitutional redress. The law does not, in these cases, aid the plaintiff by compelling or by attempting to compel the defendant to do what he promised to do. Of course, where the defendant has promised to pay money to the plaintiff a judgment in plaintiff's favor does give him exactly what he bargained for. But where the defendant has promised to sell the plaintiff certain described property or to perform certain services for the plaintiff, an action by the latter will usually be for the purpose of obtaining a judgment for money. The court substitutes money for that which, under the contract, the plaintiff was entitled to receive.

There are some cases when a judgment for money damages is a poor substitute for that which defendant promised, or, as the law usually puts it, a judgment for money damages is not an adequate remedy. When such a situation is presented the court will order the defendant specifically to perform his promise; hence the remedy of specific redress, or, as it is usually called, specific performance. Of course, the above fact that a court orders a defendant to perform his contract, in itself carries no great assurance that the court's mandate will be obeyed. So the inquiry into the nature of the remedy of specific performance involves the further inquiry as to the judicial methods for compelling obedience. There are two such methods: (1) Where the act to be done is of such a nature that it may be performed by an officer of the court a direction to such officer to perform such act will be given. This is illustrated in the case where the defendant has promised to execute and deliver a deed to certain land to the plaintiff. The court, by having the deed executed and delivered by some officer, may then give the same legal effect to such execution and delivery as though the acts had been done by the defendant himself. (2) Where the promised acts are numerous, or difficult, and sometimes even where the duty is merely to pay money, the court may hold that the refusal of the defendant to comply with its decree shall result in imprisonment. The important question to decide, therefore, is: What are

the circumstances under which a court will decree specific performance?, The remedy is a severe one, and obviously, is not available, except upon a definite showing that the remedy of money damages is inadequate.

In the cases on this topic it appears that the remedy of specific performance, and also of injunction are "equitable remedies." There is a great deal of discussion as to the circumstances under which "equity will decree specific performance" or grant an "injunction." This is because, historically, the courts, in the early days, during the eleventh, twelfth, thirteenth, and fourteenth centuries, in England, did not grant such remedies. Not only at this time were there deficiencies in legal remedies, but the substantive law itself was not developing to meet the demands of the people. Accordingly a change took place as the result of special petitions to the king. The king's chancellor occupied a position which logically tended to make of him a special judicial officer. In time the chancellor became the head of an established court where the decisions were somewhat at variance with the rules of the courts of the older judicial system. Remedies were granted by the chancellor, or by the Court of Chancery, as it came to be called, which were not granted by the other courts, the courts of common law. The Court of Chancery sought to "do equity" between the parties. This development involved the assumption that the cases which came to the Court of Chancery would not have been decided equitably had they come before the courts of common law.

In a great many cases, no doubt, this was true. The natural tendency of a judicial system, in certain periods of its development, is to contract rather than to expand; that is, a change in legal doctrine, to meet new social, economic, and political conditions in society, is difficult of accomplishment. There is an attempt made, by the enforcement of settled principles of law, to force society to conduct its affairs in precisely the same way that similar affairs had been conducted by the same or other society in an earlier stage of its history. Often, of course, change is accomplished gradually through the medium of existing judicial machinery; but sometimes it is brought about by the introduction of some entirely new organization. This was the case in the development of that portion of existing law which is called "equity." Historically, these doctrines were formulated and applied by the English Court of Chancery.

Changes of somewhat analogous nature are of present-day occurrence. In recent years many states in this country have organized special tribunals, to which is assigned jurisdiction over certain special types of controversies. For example, most states have public service and industrial commissions. These commissions fix rates and standards of service and adjudicate the rights and liabilities of employers with respect to injuries to employees under workmen's compensation acts. Even the practice of persons convicted of crime in appealing to the governor for executive clem-

ency is also illustrative of the broad truth that judicial doctrines do not, in all cases, function as many people think they should function, and that change in, or relief from, the strict application of the formulated rules of law is often accomplished by creating new machinery, judicial, administrative, or executive, which establishes new principles and new remedies and applies them by a procedure somewhat at variance with the doctrines and methods of procedure of existing judicial bodies.

The history of the development of equitable doctrines is a long one. For a long time separate tribunals applied these newer principles of equity. Generally, to-day, a court which possesses common-law jurisdiction will also possess jurisdiction in equity. But in many states, even to-day, procedure in a cause of equitable cognizance is somewhat different from the procedure in common-law causes, and everywhere account must be taken of the peculiar origin and development of the doctrines of equity.

PADDOCK v. DAVENPORT.

(Supreme Court of North Carolina, 1890. 107 N. C. 710, 12 S. E. 464.)

SHEPHERD, J. * * * The true principle upon which specific performance is decreed does not rest simply upon a mere arbitrary distinction as to different species of property, but it is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon (1) where there is a peculiar value attached to the subject of the contract which is not compensable in damages. The law assumes land to be of this character "simply because," says Pearson, J., in Kitchen v. Herring, 42 N. C. 191, "it is land—a favorite and favored subject in England, and every country of Anglo-Saxon origin." The law also attaches a peculiar value to ancient family pictures, title deeds, valuable paintings, articles of unusual beauty, rarity, and distinction, such as objects of vertu. A horn which, time out of mind, had gone along with an estate, and an old silver patera, bearing a Greek inscription and dedicated to Hercules, were held to be proper subjects of specific performance. These, said Lord Eldon, turned upon the pretium affectionis, which could not be estimated in damages. So, for a faithful family slave, endeared by a long course of service or early association, Chief Justice Taylor remarked that "no damages can compensate, for there is no standard by which the price of affection could be adjusted, and no scale to graduate the feelings of the heart." Williams v. Howard, 7 N. C. 80.

The principle is also applied (2) where the damages at law are so uncertain and unascertainable, owing to the nature of the property or the circumstances of the case, that a specific performance is indispensable to justice. Such was formerly held as to the shares in a railway company, which differ, says the court in Ashe v. Johnson's Adm'r, 55 N. C. 149, from the funded debt of the government, in not always being in the market and having a specific value; also a patent (Corbin v. Tracy, 34 Conn. 325), a contract to insure (Carpenter v. Insurance Co., 4 Sandf. Ch. [N. Y.] 408), and like cases. The general principle everywhere recognized, however, is that, except in cases falling within the foregoing principles, a court of equity will not de-

cree the specific performance of contracts for personal property; "for," remarks, Pearson, J., in Kitchen v. Herring, supra, "if, with money, an article of the same description can be bought, * * * the remedy at law is adequate." * * *

Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the exercise of the equitable power of the court. The trees were purchased with a view to their severance from the soil, and thus being converted into personal property. It is not shown that they have any peculiar value to the plaintiff, nor does there appear any circumstances from which it may be inferred that the breach of the contract may not be readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce at the contract price. The simple fact that they are near a water-course does not alter the case, for the convenience of transportation are elements which may be considered in the estimation of the damages. Neither is the circumstance that the plaintiff purchased "a few trees of like kind" in the vicinity sufficient to warrant the equitable intervention of the court. We can very easily conceive of cases in which contracts of this nature may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the court as to this branch of the case is sustained. * * *

FIRST NAT. BANK OF HASTINGS v. CORPORATION SECURITIES CO.

(Supreme Court of Minnesota, 1915. 128 Minn. 341, 150 N. W. 1084.)

PHILIP E. BROWN, J. Action to enforce specific performance of an agreement to buy shares of stock. * * * The cause was tried, and findings made for plaintiff. Defendant appealed from an order denying a new trial.

Defendant * * * insists it was error to grant specific performance, because plaintiff had an adequate remedy at law. * * * The power of a court of equity, upon a proper showing, to grant relief in such cases is now universally conceded, and in 50 L. R. A. 501, note, the present state of the law in this regard is well stated, as follows: "The general rule in this country is that a contract for the sale of corporate stock will not be specifically enforced, where the stock can be purchased on the market, and its value can be readily ascertained, unless there is some special reason for the purchaser's obtaining the same, but where the shares are limited and not easily obtainable, or where their value cannot be readily ascertained, the contract will be enforced. The tendency seems to be towards a more liberal allowance of the remedy. In England it seems to be allowed almost as a matter of course, except in case of government stocks, in which case it has generally been refused." * * *

The inquiry, then, is whether the court's determination that the value of the stock was not readily ascertainable was unsupported by the evidence, and we cannot so hold. Crocker, S. D., where the bank issuing the stock was located, had about 150 inhabitants. Another bank, having twice as much business, was also located there. A large part of the surrounding country was suitable and used for grazing purposes only. Part of the tributary population consisted of a "drifting class," thus making bank loans and discounts extra hazardous. The

bank was organized in 1907, its capital being $10,000. Defendant and its officers held a majority of its stock, which was not listed in commercial reports, and only two or three sales thereof were ever made; these being between officers of the company or local people. The bank never paid a dividend. Its books showed a surplus of $4,619 on April 27, 1911, which was reduced to $3,473 on August 1, 1911, and the profits for the year preceding December, 1911, were $589. While, therefore, there was some testimony to the contrary, it is patent under all the circumstances disclosed that the establishment of the value of the stock would involve, not only the obviously difficult task of proving the value of the bank's assets, but also a speculative forecast upon its prospects; so that it is doubtful whether any basis could be laid upon which to found a reasonable approximation of market value. At least, such could not be done without imposing an unwarranted burden on plaintiff.

We discover nothing inequitable in the relief granted, and find no reversible error.

M. M. & D. D. BROWN v. WESTERN MARYLAND RY. CO.

(Supreme Court of Appeals of West Virginia, 1919. 84 W. Va. 271, 99 S. E. 457, 4 A. L. R. 522.)

LYNCH, J. Judged by the prayer of the bill, dismissed on demurrer, of which action plaintiffs complain, the chief objects of this suit were to obtain a mandatory injunction to require defendant, by way of enforcement of an oral contract, to extend one of its yard side tracks about 800 feet, the cost and expense of which plaintiffs contracted to pay upon the conditions hereafter noted, and to furnish the railroad ties necessary therefor; to enjoin defendant from carrying into execution its announced purpose to cause the removal of lumber stacked on its property with defendant's consent and approval pursuant to such contract; and for general relief. The court justified its decree upon the ground that equity will not entertain jurisdiction to enforce the specific execution of a contract for the performance of work the supervision of which requires the exercise of professional skill and judgment. Thus there is presented the one main question whether a court of equity can and should require defendant to extend its side track, which it contracted to do, where plaintiffs, acting in good faith, with the consent and upon the direction of defendant's agents, have in part done what the contract authorized them to do. * * *

It is further contended that this contract is not one which equity will enforce specifically owing to the amount of court supervision which will be necessary, and for the further reason that the remedy at law is adequate. A railroad contract stands on no higher plane than the contract of any other corporation or individual, and the same principles apply to and govern all of them alike. There is this qualification to be made, however, where the specific performance of a railroad contract is sought: Equity may decline to exercise its coercive power in that respect if to do so will injuriously affect the performance by the railroad of its full public duties. * * * But where the public rights will not be injured, a railroad company is subject to the same duty respecting its contracts as any other company or an individual.

Underlying every contract is the fundamental conception of exchange, one contracting party offering to exchange services or com-

modities which he possesses or can control in return for services or commodities not within his possession or control, but which he desires. At the time of entering upon the agreement each expects to receive and render performance according to its express terms, and the contract can never be fully satisfied unless its execution is of that character. Frequently, however, the circumstances are such that performance in kind is excused, and this is especially true when, with an award of damages, the disappointed party can easily obtain on the market or elsewhere the same or a substantially similar commodity or service that he contracted for. But when the remedy at law is not thus adequate, equity has full jurisdiction, and in its discretion may exert its inherent power to compel performance of the obligation on the part of the delinquent obligor. The normal end or termination of every contract is performance in accordance with the agreement, and such a consummation should be the presumptive one; resort to the legal remedy being had only when the circumstances are such that it is better to compel the obligee to accept damages in lieu of what he contracted for than to compel specific performance. Lightly to permit a contracting party to disregard his obligation and compel the obligee to accept, not the thing contracted for, but money damages, is to place a premium upon contractual insincerity. Especially is this true where one party has fully performed his part of the agreement. Vice Chancellor Sir James Bacon, in Greene v. West Cheshire Ry. Co., L. R., 13 Eq. 44, 50, well expresses a reasonable view of such a situation in decreeing specific performance of a contract to construct and maintain a railroad siding of specified length. * * *

In this country the authorities generally have reached the same conclusion with respect to contracts for sidings or spur tracks. Taylor v. Florida, etc., Ry. Co., 54 Fla. 635, 45 South. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155, 14 Ann. Cas. 472. * * * A similar result has been reached during more recent years in contracts for the operation of trains. The editor of recent editions of Pomeroy's Equity Jurisprudence, and of the treatise on Specific Performance in 36 Cyc., says at page 587 of the latter work: "Beginning with the year 1890, contracts involving the operation of railroads, often of the utmost complexity and extending over long terms of years, or perpetually, have been enforced specifically."

The authorities in this state relative to the specific performance of railroad contracts are indicative of the trend of courts of equity toward greater latitude in enforcing construction contracts where the only reason urged against them is the necessity of court supervision. * * *

It is true many of the cases cited involve contracts entered into by the railroad company in consideration of the conveyance by the plaintiff of a right of way through his land. The consideration here is of a different nature, but of equal dignity. Besides, the extent of the duty created by a contract is not determined by the kind of consideration on which it is based. It is sufficient if the consideration is such as the law deems valuable without regard to its nature or character. * * *

Superfluous, perhaps, is the observation that we are now only testing the sufficiency of the bill on demurrer, and while we think the bill presents on its face a cause for relief, the case may, when fully matured for final hearing upon bill, answer, and proof, show plaintiff

not to be entitled to any relief. In the meantime, however, the status quo should be maintained, and to this end we reverse the decree, overrule the demurrer, reinstate the injunction, and remand the cause.

SECTION 8.—INJUNCTION

What was said with respect to the origin and development of the equitable remedy of specific performance may also be said with respect to the equitable remedy of injunction. The remedy of injunction is by no means confined to actions upon contracts. Where this remedy is invoked in contract actions, the plaintiff is asking for a decree that the defendant shall not break a particular promise or promises in the contract. In its operation an injunction is, therefore, much like a decree of specific performance. Still there is some difference between a decree ordering the defendant to perform an act and one ordering him not to do an act. The remedy of injunction in contract actions is most frequently sought where the defendant has covenanted not to do a certain thing, as, for example, a vendor of a business may agree not to engage in business within a specified district for a specified time. In many cases a breach of such a promise as this will be enjoined. Of course, the effect of ordering a person to cease business operations will necessarily result in his doing many affirmative acts, still such a decree does not burden the court with the task of supervising the work to such an extent as would be true if the court undertook specifically to enforce contracts for personal service. Just as in considering specific performance, the larger question concerning the remedy of injunction is: "What are the circumstances under which the courts will grant the remedy?" They will not do so when the remedy of money damages is deemed adequate.

The equitable remedy of injunction, as suggested above, is available in many suits not directly involving contracts. In fact, this remedy is perhaps more often sought to prevent commission of torts than to restrain breaches of contracts, especially to prevent torts that would work an irreparable injury to property. Maintenance of nuisances, for example, is frequently enjoined. Of very great present-day importance is the use of injunction in labor disputes. The application for an injunction in such cases is predicated upon the contention that the actual or threatened conduct of the defendants will amount to a tort causing irreparable injury to the plaintiff, either with respect to his property, to his privilege of entering freely into business relations with other persons, or to his legal right to the performance of his existing contracts with other persons. The remedy of injunction is also available to prevent the violation of certain statutes, as, for example, to bring about cessation of such practices of large industrial combinations as are unlawful under anti-trust acts.

The case following illustrates one type of situation where an injunction is sought to restrain the breach of a negative covenant in a contract.

PHILADELPHIA BALL CLUB, Limited, v. LAJOIE et al.

(Supreme Court of Pennsylvania, 1902. 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627.)

POTTER, J. The defendant in this case contracted to serve the plaintiff as a baseball player for a stipulated time. During that period he was not to play for any other club. He violated his agreement, however, during the term of his engagement, and, in disregard of his contract, arranged to play for another and a rival organization. The plaintiff, by means of this bill, sought to restrain him during the period covered by the contract. The court below refused an injunction, holding that to warrant the interference prayed for "the defendant's services must be unique, extraordinary, and of such a character as to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff." In the view of the court, the defendant's qualifications did not measure up to this high standard. The trial court was also of opinion that the contract was lacking in mutuality, for the reason that it gave plaintiff an option to discharge defendant on 10 days' notice, without a reciprocal right on the part of the defendant.

The learned judge who filed the opinion in the court below, with great industry and painstaking care, collected and reviewed the English and American decisions bearing upon the question involved, and makes apparent the wide divergence of opinion which has prevailed. We think, however, that in refusing relief unless the defendant's services were shown to be of such a character as to render it impossible to replace him he has taken extreme ground. It seems to us that a more just and equitable rule is laid down in Pom. Spec. Perf. p. 31, where the principle is thus declared: "Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill, and ability in the employé so that in case of a default the same service could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. * * * The damages for breach of such contract cannot be estimated with any certainty, and the employer cannot by means of any damages purchase the same service in the labor market." * * *

The court below finds from the testimony that "the defendant is an expert baseball player in any position; that he has a great reputation as a second baseman; that his place would be hard to fill with as good a player; that his withdrawal from the team would weaken it, as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the game." We think that, in thus stating it, he puts it very mildly, and that the evidence would warrant a stronger finding as to the ability of the defendant as an expert ball player. * * * Lajoie is well known, and has great reputation among the patrons of the sport, for ability in the position which he filled, and was thus a most attractive draw-

ing card for the public. He may not be the sun in the baseball firmament, but he is certainly a bright particular star. We feel, therefore, that the evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill, and ability, as renders them of peculiar value to the plaintiff, and so difficult of substitution that their loss will produce "irreparable injury," in the legal significance of that term, to the plaintiff. The action of the defendant in violating his contract is a breach of good faith, for which there would be no adequate redress at law, and the case, therefore, properly calls for the aid of equity in negatively enforcing the performance of the contract by enjoining its breach.

But the court below was also of the opinion that the contract was lacking in mutuality of remedy, and considered that as a controlling reason for the refusal of an injunction. * * *

The term "mutuality" or "lack of mutuality" does not always convey a clear and definite meaning. As was said in Grove v. Hodges, 55 Pa. 516: "The legal principle that contracts must be mutual does not mean that in every case each party must have the same remedy for a breach by the other." In the contract now before us the defendant agreed to furnish his skilled professional services to the plaintiff for a period which might be extended over three years by proper notice given before the close of each current year. Upon the other hand, the plaintiff retained the right to terminate the contract upon 10 days' notice and the payment of salary for that time and the expenses of defendant in getting to his home. But the fact of this concession to the plaintiff is distinctly pointed out as part of the consideration for the large salary paid to the defendant, and is emphasized as such; and owing to the peculiar nature of the services demanded by the business, and the high degree of efficiency which must be maintained, the stipulation is not unreasonable. Particularly is this true when it is remembered that the plaintiff has played for years under substantially the same regulations.

We are not persuaded that the terms of this contract manifest any lack of mutuality in remedy. Each party has the possibility of enforcing all the rights stipulated for in the agreement. It is true that the terms make it possible for the plaintiff to put an end to the contract in a space of time much less than the period during which the defendant has agreed to supply his personal services; but mere difference in the rights stipulated for does not destroy mutuality of remedy. * * *

The defendant sold to the plaintiff, for a valuable consideration, the exclusive right to his professional services for a stipulated period, unless sooner surrendered by the plaintiff, which could only be after due and reasonable notice and payment of salary and expenses until the expiration. Why should not a court of equity protect such an agreement until it is terminated? The court cannot compel the defendant to play for the plaintiff, but it can restrain him from playing for another club in violation of his agreement. No reason is given why this should not be done, except that presented by the argument, that the right given to the plaintiff to terminate the contract upon 10 days' notice destroys the mutuality of the remedy. But to this it may be answered that, as already stated, the defendant has the possibility

of enforcing all the rights for which he stipulated in the agreement, which is all that he can reasonably ask. * * *

The specifications of error are sustained, and the decree of the court below is reversed, and the bill is reinstated. * * *

SECTION 9.—ENFORCEMENT OF DECREES BY ATTACHMENT FOR CONTEMPT

O'BRIEN v. PEOPLE ex rel. KELLOGG SWITCHBOARD & SUPPLY CO.

(Supreme Court of Illinois, 1905. 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966.)

Proceedings for contempt by the People, on the relation of the Kellogg Switchboard & Supply Company, against John O'Brien, Thomas Queenan, Lee S. Fisher, Jacob Christensen, and Albert Mashek. From judgments sentencing defendants to various penalties, affirmed by the Appellate Court, they bring error.

On May 25, 1903, the Kellogg Switchboard & Supply Company, a corporation organized under the laws of the state of Illinois, and engaged in the business of manufacturing and selling telephones, switchboards, and electrical supplies, with its principal office in Chicago, filed its bill for an injunction in the superior court of Cook county against certain parties named therein as defendants, and prayed for an injunction restraining said defendants from doing certain things mentioned in said bill. A preliminary injunction was issued, which restrained the defendants and their confederates from in any manner interfering with the business of the said Kellogg Switchboard & Supply Company.

On June 3, 1903, the complainant filed a petition in the superior court, which petition stated that persons named therein, since the issuing of said injunction, had been picketing and patrolling complainant's place of business, stopping persons on their way to take employment with complainant, and had been endeavoring, by threats, intimidation, and persuasion, to compel complainant's employés to leave its service, and to prevent persons from seeking employment with complainant, and that the persons named therein had congregated on the streets and approaches to the complainant's factory in order to accomplish these purposes. At a hearing on the petition and affidavits, on June 15, 1903, the court found that Jacob Christensen, S. E. Doty, Charles Heinig, Andrew Emerson, Fred Waggoner, Albert Marshek, and others were guilty of violating the injunction order, and they were each fined the sum of $10.

On July 14, 1903, the complainant filed still another petition. The court found that George Christensen, Albert Mashek, Lee S. Fisher, John Brent, Charles Evans, and John O'Brien had violated said writ of injunction, and ordered that Lee S. Fisher be fined $100, that George Christensen be committed to the county jail for 30 days, that John O'Brien be committed to the county jail for 10 days, that Albert Mashek be committed to the county jail for 60 days, that Charles Evans be fined $25, that John Brent be fined $25, and that R. S. Schoenbacker be discharged.

WILKIN, J. * * * It is a well-known rule of law that, in proceedings for contempt in failing to obey an order of court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrant it may appear to be. The judgments of courts cannot be attacked collaterally for mere irregularities. Therefore plaintiffs in error cannot question in this proceeding the sufficiency of the bill upon which the writ of injunction was granted. Courts of chancery have within themselves full power and authority to enforce their official mandates in a summary and effective manner. To say otherwise, would render them powerless and inefficient.

It is again insisted with much earnestness that this proceeding is criminal in its nature, and therefore the defendants below were entitled to be discharged upon their sworn answer, and, if their answer was not sufficient, they could only be punished after they had been tried and convicted by jury. Proceedings for contempt of court are of two classes: those which are criminal in their nature, and those which are designated as purely civil remedies. When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act, and to vindicate the authority and dignity of the people as represented by their judicial tribunals. In such cases the application for attachment may be made in the original cause, yet the contempt proceeding will be a distinct case, criminal in its nature. Cases of this kind are clearly distinguished from cases where the parties to a civil suit, having the right to demand that the other party do some act for their benefit, obtain an order from a proper court commanding the act to be done, and, upon refusal, the court, by way of executing its orders, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant, and not in the public interest, merely. If imprisonment is ordered, it is not as a punishment, but to the end that the other party to the suit may obtain a remedy for the advancement of his own private interest and rights which he could not otherwise maintain. * * *

Upon this bill being filed, a writ of injunction was ordered for the purpose of protecting the company against the unlawful acts of certain persons; and when the injunction was issued, and the plaintiffs in error were attached for contempt of court, it was primarily because they were injuring the business of the Kellogg Company, and the punishment was inflicted to prevent such injury. While it is true that the dignity of the law and the order of the judicial tribunal have been violated, this was merely incidental to the rights of private individuals. The proceeding for the attachment was civil, and in no sense criminal. The rule is that, when the defendant is attached for contempt of court for a criminal offense and files a sworn answer, that answer, if sufficient to purge him of the alleged contempt, may be taken as true and the defendant discharged. But this rule applies only where the proceeding is brought to vindicate the law or the dignity of

the court, and does not apply to acts treated as contempts, for the enforcement of orders and decrees as a part of the remedy sought to be enforced. * * *

It is, however, contended that, even though they were not entitled to be discharged upon their sworn answers, they still had the constitutional right to a trial by jury, and could not be legally deprived of their liberty or property without such a trial. Upon the filing of the petitions for contempt and the appearance of the defendants thereto, the court proceeded in the summary to hear the case upon the petitions, answers, and affidavits filed by the respective parties. In 1893 the Legislature of this state passed an act providing for a trial by jury in all cases where a judgment was to be satisfied by imprisonment. Laws 1893, p. 96. In the case of Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821, we decided that this act did not apply to the case of proceedings for contempt of court, where it was sought to coerce defendant into the performance of the duty which the court had ordered him to perform. * * * These authorities are decisive of the question here raised, and hold that the defendants in such a proceeding as this are not entitled to a trial by jury. * * *

We have endeavored to give the material questions raised and discussed in the argument due consideration, and have reached the conclusion that the judgments of the superior court were properly affirmed by the Appellate Court. The judgment of the latter court will accordingly be affirmed.

SECTION 10.—BANKRUPTCY

Section 8 of article 1 of the Constitution of the United States confers upon Congress power to establish uniform laws on the subject of bankruptcies throughout the United States. Under this grant of power Congress enacted the first National Bankruptcy Act in 1800, but this act was repealed in 1803. The second National Bankruptcy Act was passed in 1841, but, like its predecessor, it was repealed two years later. Again, in 1867, a National Bankruptcy Act was passed, which act remained in force until its repeal in 1878. The present National Bankruptcy Act (U. S. Comp. St. §§ 9585–9656) was passed in 1898. Several amendments thereto have been adopted since its original enactment.

The primary purpose of a bankruptcy act is to provide the machinery, administrative as well as judicial, for the expeditious and economical collection of the assets of an insolvent person and for the equitable distribution thereof among his creditors. The act is passed largely in the interests of the creditors, although, under the present act the bankrupt usually obtains the benefit of a discharge from most of his legal obligations. In the absence of such a system as that provided for by the Bankruptcy Act, creditors must prosecute independent suits against their common debtor. The prosecution of such actions results in needless expense. Moreover, the property of the judgment debtor will not be distributed proportionately among the creditors, because the extent of their several rights generally will be fixed as of the date of the entry of

their respective judgments. Some creditors are, therefore, likely to be paid in full, while other creditors will receive nothing. Under a system of bankruptcy legislation, all of the property of the bankrupt is placed beyond the reach of all courts except the bankruptcy tribunal, the title thereto vested in a trustee, upon whom is imposed the general duty of distributing it, or the proceeds arising from its sale, among the creditors in proportion to the amount of their respective claims. After the filing of a petition in bankruptcy, the custody of the property of the bankrupt vests in the federal court having jurisdiction of the cause.

In the following very brief résumé of some of the more prominent features of the operation of the Bankruptcy Act, we are concerned with three general questions: (1) What persons may be adjudicated bankrupts? (2) Under what circumstances may these persons be adjudicated bankrupts? (3) What is the nature and extent of the rights of the trustee, who is charged with the duties of administering the bankrupt estate, in the property of the bankrupt, and what are his duties with respect to its distributon among creditors?

(1) WHO MAY BE BANKRUPTS?

With respect to the persons who may become bankrupts, the act draws some distinctions between voluntary bankrupts, that is, those persons who, upon their own petition, ask to be adjudicated bankrupts, and involuntary bankrupts, namely, those persons who have been proceeded against by creditors. Section 4 provides, with four exceptions, that any person may be adjudicated a voluntary bankrupt. Section 1, clause 19, defines the word "person" to include corporations and partnerships. The four exceptions to the rule that any person may be adjudicated a voluntary bankrupt are municipal, railroad, insurance, and banking corporations. Notice that the exception concerns corporations engaged in these enterprises, and does not include partnerships engaged in the private enterprises named. There is no provision with reference to the amount of debts which one must owe before one may file a petition in voluntary bankruptcy, and, indeed, there is no requirement that such person be insolvent, although as a practical matter a person would rarely seek an adjudication in voluntary bankruptcy unless he were insolvent.

Not every person who is privileged to obtain an adjudication in bankruptcy upon his own voluntary petition may be proceeded against by his creditors upon their petition in involuntary bankruptcy. With reference to the persons who may be adjudicated involuntary bankrupts the act contains provision with respect to three classes of persons: (1) Natural persons; (2) unincorporated companies; and (3) corporations. Section 4 provides that "any natural person * * * may be adjudged an involuntary bankrupt." To this rule, then, are two exceptions; the same section providing that wage-earners and persons engaged chiefly in

farming or the tillage of the soil cannot be adjudicated involuntary bankrupts. Who are wage-earners? Who are farmers? When will a person be engaged chiefly in farming or in the tillage of the soil? Section 1, clause 27, defines a wage-earner as "an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." This definition is but a partial definition of the term "wage-earner," for there are many persons who earn less than $1,500 per year who could not properly be regarded as wage-earners. Would a school-teacher earning less than $1,500 per year be a wage-earner, within the meaning of this section? Is a lawyer, physician, broker, or a preacher a wage-earner, within the meaning of this section? What should the test be? [3]

With respect to the second exception, may one be a tiller of the soil without being a farmer? Is a stock raiser a farmer? Would one be a farmer who was engaged in raising fruit? Where land has been rented to a tenant, who cultivates it, is the owner a farmer by reason of his receiving an income from the land? A. owns a tract of land and keeps a large herd of dairy cows. He raises very little of his feed. Is he a farmer? A. owns a tract of land, and employs B. to cultivate the land, to raise and care for the crops. A. does no work on the land. B. is paid by the month. Is A. a farmer? Is B. a farmer? Occasionally questions of this nature are presented to the courts. The questions may be further complicated by the requirement that, in order to be exempt from involuntary bankruptcy, one must be chiefly, but not entirely, engaged in farming or tillage of the soil.[4]

With respect to unincorporated associations, section 4 provides that "any unincorporated company" may be adjudicated an involuntary bankrupt. Section 5 further provides that "a partnership, during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." [5] The expression, "any unincorporated company," while broad enough to include all partnerships, was inserted probably for the purpose of including within the scope of involuntary bankruptcy associations other than partnerships. Apparently, therefore, the expression would include associations although not established and conducted for profit.

Not all corporations may be adjudged involuntary bankrupts. In the first place, section 4 provides that only those corporations which are "moneyed, business, or commercial corporations" are subject to involuntary bankruptcy. These three words, "moneyed," "business," and "commercial," indicate rather clearly that Congress

[3] See First National Bank of Wilkes-Barre v. Barnum (D. C.) 160 Fed. 245 (1908).

[4] See Bank of Dearborn v. Matney (D. C.) 132 Fed. 75 (1904).

[5] A leading case on the subject of partnership bankruptcy is Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706 (1913).

intended to subject all corporations which were organized and conducted for pecuniary profit to the liability of being proceeded against in involuntary bankruptcy, and that all corporations organized not for pecuniary profit, such as religious organizations, social clubs, fraternities, and the like, should be exempt from these provisions. Of course, these organizations may avail themselves of the provisions relating to voluntary bankruptcy, and it would seem that, if they are not incorporated, they could be proceeded against by creditors. In the second place, Congress has provided, in section 4, that four classes of corporations, although organized for pecuniary profit, cannot be adjudicated involuntary bankrupts—"municipal, railroad, insurance, or banking corporations." Special statutory procedures, or ordinary receiverships as worked out by courts of equity, are better suited to the purposes of liquidating or reorganizing railroad, insurance, and banking corporations; hence they are excluded from the operation of the Bankruptcy Act. There is reason to believe that, in addition to railroads, public service corporations generally should not be subject to the provisions of the Bankruptcy Act.

(2) CIRCUMSTANCES UNDER WHICH PERSONS SUBJECT TO BANKRUPTCY MAY BE ADJUDICATED BANKRUPT

Any person, except the four classes of corporations mentioned above, is entitled to the provisions of the act relating to voluntary bankruptcy. There is no requirement that such persons be insolvent or possess assets.[6]

Persons subject to involuntary bankruptcy may be adjudicated bankrupt upon proof of the following facts:[7] (1) That the person proceeded against owes debts to the amount of $1,000 or over; (2) that such person has committed an act of bankruptcy within a period of time specified in the act. There is the further requirement that there must be three or more creditors joining in the petition who have provable claims against the bankrupt which amount in the aggregate, in excess of the value of securities held by them, if any, to $500 or over, or, if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition.[8]

We may pass over, without discussion, the requirement that the bankrupt must owe debts of $1,000 or over, except to note the possibility of controversy over the question what constitutes a debt. Does the term "debt" include unliquidated claims arising from breaches of contracts or from the commission of torts? Are contingent claims, such as the obligation of an indorser of a negotiable instrument, to be regarded as debts?[9]

The requirement that the bankrupt must have committed what is

[6] In re Schwaninger (D. C.) 144 Fed. 555 (1906).
[7] Section 3.
[8] Section 59(b).
[9] See discussion in Chapter V, Section 5, as to the meaning of the term "debt," as used in the sections relating to discharge.

called an act of bankruptcy, as a prerequisite to his adjudication, is the provision which covers the greater amount of litigation. It is generally true that a person must be insolvent before his creditors may proceed against him in involuntary bankruptcy. Nevertheless, the Bankruptcy Act does not lay down the rule that all persons when insolvent may be adjudged involuntary bankrupts, nor in any case is it possible to obtain an adjudication solely upon proof that the person proceeded against was insolvent. A scheme of bankruptcy legislation which permitted creditors to proceed against a debtor upon proof of his insolvency alone probably would work very well, but it would not be so desirable as the method which has been worked out in our present act. Instead of providing that a person may be adjudged an involuntary bankrupt upon proof of his insolvency, the act provides that the petitioning creditors must allege and prove that the alleged bankrupt committed some specific act, called an act of bankruptcy, which act, in one way or another, affords a rather clear proof that his liabilities then exceed his assets, or that his liabilities are very likely to exceed his assets in a relatively short time. From a practical standpoint, in the great majority of cases, insolvency is the real basis for the proceeding.

Section 3 defines five specific acts of bankruptcy, although the fourth clause, as numbered in the act, in reality, enumerates three separate acts of bankruptcy. These acts of bankruptcy may be referred to generally as: (1) Fraudulent conveyances; (2) preferential transfers; (3) preferences obtained through legal proceedings; (4) (a) general assignments; (b) application for a receiver, while insolvent; (c) appointment of a receiver because of insolvency; (5) admission in writing of one's inability to pay debts.

The first act of bankruptcy is defined as follows: **Acts of bankruptcy by a person shall consist of his having conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them.**

This section is based upon a statute which, independent of our bankruptcy legislation, is in force generally throughout the United States and is a substantial re-enactment of the English act passed during the reign of Elizabeth. The statute is commonly referred to as the Statute of Elizabeth. The effect, in general, of the act is to make void, as to creditors and sometimes as to subsequent purchasers, conveyances of property which are defined by the act as fraudulent. Under this state legislation a creditor of a fraudulent grantor may treat a fraudulent conveyance by his debtor as if such conveyance had not been made; that is, the creditor may have the property thus fraudulently conveyed sold under judicial process to satisfy his judgment. The claims of the grantee, if he were not a bona fide purchaser for value, would be treated as non-existent. Congress has, therefore, simply provided, generally, that those conveyances which are fraudulent under the various state statutes

which re-enact the Statute of Elizabeth, shall also amount to acts of bankruptcy. The principal difficulty which arises in connection with the interpretation of a fraudulent conveyance act is to determine what constitutes an intent to defraud. A discussion of this question would carry us beyond the scope of this section, but a few of the more common situations may here be noted very briefly.

It is possible for one to make a transfer of his property with intent to defraud although such transfer is for value, even for full value. A transfer of property in consideration of a covenant by the grantee to support the grantor for life is not an uncommon transaction and such transfer, when accompanied by the requisite intent to defraud, has been held void under the statute. The more common transaction concerns gifts of property. If A. is insolvent, or threatened with insolvency, he may decide to attempt to put his property beyond the reach of his creditors. Accordingly he may transfer by way of gift the bulk of his estate to a relative; or he may ostensibly transfer his property by way of gift, although actually there may be a secret agreement on the part of the grantee to re-transfer the property just as soon as the financial storm blows over; or it is possible that, while the transfer, as far as legal form is concerned, has been made (as, for example, to the grantor's wife), the property is for all practical purposes owned and controlled by the grantor.

The problem with which the courts are concerned in applying the statute of fraudulent conveyances to transactions of this character is to determine the circumstances under which it is proper to decide that the transfer was made with an intent to defraud. With respect to gifts of property, the courts hold that, if the donor, after the gift, has retained an amount of property insufficient to meet his debts, the transfer is void; that is, proof that the gift left the donor insolvent will be taken as the equivalent, in legal effect, of affirmative proof of an intent to defraud. Since the donee, obviously, is not a bona fide purchaser for value, creditors of the insolvent donor need not prove that the transferee had knowledge of the fraudulent character of the transfer. Retention of possession after sale is likewise held by some courts to be conclusive proof of intent to defraud, but by other courts such act of retention of possession is but prima facie evidence of intent to defraud.

The rights of subsequent creditors to attack a fraudulent conveyance are not the same in all jurisdictions. In some states, subsequent creditors may set aside a conveyance only upon proof of fraud by the grantor to defraud subsequent creditors. In other states, the rule is that, if a conveyance may be set aside by a prior creditor, any subsequent creditor may set it aside, provided there still exists some prior creditor who has not been paid. Still other states hold that if a conveyance is fraudulent in fact—that is, not deemed fraudulent under the rules that a gift by an insolvent and a retention of possession after sale are fraudulent as a matter

of law—any creditor, prior or subsequent, may set the conveyance aside.

The above brief comment was made to give some indication of the types of specific acts which constitute the first act of bankruptcy. Two important statements remain to be made with reference to fraudulent conveyances as acts of bankruptcy: (1) It is to be noticed that in the definition of a fraudulent conveyance in section 3 (a), as above quoted, the condition of insolvency is not made an element. But section 3 (c) makes the absence of insolvency a defense to an involuntary proceeding predicated upon the first act of bankruptcy. But this provision does not apply to any other act of bankruptcy.[10] (2) It is to be emphasized that proof of the commission of the first act of bankruptcy does not necessitate proof that the transferee of the fraudulent conveyance is not a bona fide purchaser. It makes no difference whether such transferee is a bona fide purchaser. The proof is made out by the creditors' showing (a) that a transfer was made; (b) that it was made with intent to defraud; and (c) upon the failure of the defendant to establish his solvency at the time of the filing of the petition against him. One may commit the first named act of bankruptcy, although it may be impossible for the trustee in bankruptcy to recover the property for the benefit of creditors. This will always occur when the transferee was a bona fide purchaser for value.

The second named act of bankruptcy is a preferential transfer. It is defined in section 3 (a) (2) as follows: **Acts of bankruptcy by a person shall consist of his having transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors.** It is to be noticed that this section places the burden of proving the condition of insolvency of the bankrupt upon the petitioning creditors, while, under the first act of bankruptcy, no such burden rests upon the petitioning creditors. The act places the burden upon the bankrupt to prove that he was solvent if he seeks to defeat the proceeding upon this ground. Under the second act of bankruptcy, failure of the creditors to prove insolvency will defeat the petition.

The second act of bankruptcy is like the first act of bankruptcy in that each deals with transfers of property, but there are important differences. The first act of bankruptcy does not deal exclusively with transfers, but also with concealments, of property. The second act of bankruptcy concerns transfers only. The transfer or concealment which is an element of the first act of bankruptcy must be made **with intent to defraud.** The transfer which constitutes the second act of bankruptcy must be made, not with an intent to defraud, but **with an intent to prefer.** This raises the question: What is a preference?

Section 60 (a) defines a preference as follows: **A person shall be deemed to have given a preference if, being insolvent, he has**

[10] West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098 (1899).

*** * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.** The definition of a bare preference does not include the element of an intent to bring about the result described in the definition, but the second act of bankruptcy consists in making a preference **with intent** to do so. The broad distinction between a fraudulent conveyance and that kind of a preference which constitutes the second act of bankruptcy is not so much in the effect which the transfer has upon creditors, because in many cases the effect will be the same, but rather in the nature of the intent which accompanies the transfers. An intent to defraud, except where such intent is found in the act of retention of possession after sale and in gifts by insolvent persons, is an affirmative, a positive desire to prevent creditors from obtaining payment of the money due them by making the transfer. An intent to prefer consists in the desire to treat the creditor preferred better than the transferor can treat other creditors. He may make a preference and still remain an honest man.

An insolvent person may not desire to prevent a single creditor from collecting his money. He may even desire most heartily to pay all of them in full. He may have some money, and he may really feel that he ought to pay his grocer rather than to divide the amount among all of his creditors. Accordingly he may prefer his grocer. A preference, therefore, is not a fraudulent conveyance; but, when it is made with an intent to bring about this result, it does constitute an act of bankruptcy. Notice, further, that a preference consists in paying a debt. A purchase of property for cash by an insolvent is not a preference given to the seller. If A., being insolvent, has $100, and with this money buys property of this value, no preference results, because his estate has not been diminished. A preference is the payment of an antecedent debt, usually a debt which came into existence as the result of a purchase of goods on credit. This rule that payments on cash sales do not operate as preferences is carried farther, and made to include payments on a running account, where new sales succeed payments and the net result is to increase the value of the estate.[11] This rule is of considerable importance to dealers who have had frequent dealings with the bankrupt, consisting in sales of property to the bankrupt at different times and the receipt from him of numerous payments on account, for the trustee in bankruptcy will not be able to recover the payments as he may many preferences.

The third act of bankruptcy is also a preference, but it differs from the kind of preference just discussed, in that it does not necessarily arise from a voluntary act of the person who made it.

[11] **Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717 (1903).**

Section 3 (a) (3) defines this act of bankruptcy as follows: **Acts of bankruptcy by a person shall consist of his having * * * suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference.** Section 60 (a) defines what shall constitute a preference in this situation as follows: **A person shall be deemed to have given a preference if, being insolvent, he has, * * * procured or suffered a judgment to be entered against himself in favor of any person * * * and the effect of the enforcement of such judgment * * * will be to enable any one of his creditors to obtain a greater percentage of his debt than any other creditor of the same class.**

This act of bankruptcy is like the second act of bankruptcy, in that the effect of the act upon creditors is the same; and they are also alike, in that, in each, insolvency is an element, and the burden of establishing its existence is upon the petitioning creditors in both cases. But there are two important differences with respect to the nature of the act or acts which bring the common result into existence: (1) The second act of bankruptcy involves a voluntary transfer of property. The third act of bankruptcy does not necessitate the voluntary action of the bankrupt. Creditors may force an insolvent person to commit the third act by obtaining a judgment against him, levying upon his property, ordering a sale thereof, and waiting for the time specified in the section to elapse. (2) Intent is an element of the second act of bankruptcy, while intent is not an element of the third act.

The use of the words "suffered or permitted," etc., may seem to indicate that to constitute the third act of bankruptcy the alleged bankrupt must consent to the entry of the judgment; but this is not the interpretation which has been placed upon these words. Within the meaning of this section, one may suffer or permit a judgment to be entered against one, although one may have done everything within one's power to prevent it. This interpretation leads to this important distinction between the second and third acts of bankruptcy: Proof of the commission of the second act of bankruptcy must include proof of intent to prefer, while proof of the third act of bankruptcy does not require proof of an intent to prefer.[12] In a great many cases, therefore, it will be much easier for creditors to obtain an adjudication in bankruptcy by forcing their debtor to commit the third act of bankruptcy than for them to rely upon the first or second acts; for the proof will be more easily made. It is sometimes very difficult to prove an intent.

It should be noticed that the third act of bankruptcy is not committed at the moment a judgment is obtained against an insolvent person. If creditors proceeded no further than to obtain judgment,

[12] Wilson Brothers v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147 (1901); Citizens' Banking Co. v. Ravenna National Bank of Ravenna, Ohio, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352 (1914).

the judgment debtor never would commit the third act of bankruptcy. The judgment creditor must go further and take out an execution upon the judgment. Following that he must levy upon specific property of the judgment debtor and then obtain an order for the judicial sale of such property on a day certain. Even then the third act of bankruptcy has not been committed, for this section provides that the act is not complete until "at least five days before a sale or final disposition of any property affected by such preference." The judgment creditor is not required to wait until the sale actually occurs, but he must wait until five days before the day arrives on which the judicial sale is to take place.

The fourth class of acts of bankruptcy, consisting of three independent acts, is defined in section 3 (a) (4), as follows: **Acts of bankruptcy by a person shall consist of his having * * * made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States.**

A general assignment for the benefit of creditors is a transfer by the assignor, usually of all of the transferor's property to a person called the assignee, who accepts the same and agrees to care for and dispose of the property as directed, usually in a formal document. State statutes sometimes regulate general assignments for the benefit of creditors. A general assignment is usually the result of insolvency, the debtor adopting this procedure for settling with his creditors. While, as a matter of fact, a general assignment will rarely be executed by a person unless he is insolvent, the Bankruptcy Act, in declaring that the execution of a general assignment shall constitute an act of bankruptcy, does not require petitioning creditors to prove that the assignor was insolvent, nor is solvency a defense to a petition which sets out this act of bankruptcy.[13]

The remaining acts of bankruptcy specified in section 3 (a) (4), on the other hand, do involve insolvency. In the first, if a person is in fact insolvent and applies for a receiver on any ground, such act constitutes an act of bankruptcy. Under the last clause of this subsection, the condition of insolvency is involved but in a somewhat different way. If the appointment of a receiver was because of insolvency, then and only then is this act of bankruptcy committed. Receivers may be appointed for many reasons other than because of insolvency. It is only when the appointment of the receiver is because of insolvency that the court having jurisdiction of the property may be ousted and the administration of the estate transferred to the federal courts.[14]

The fifth and last act of bankruptcy is committed when a person

[13] West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098 (1899).
[14] In re Spalding, 139 Fed. 244, 71 C. C. A. 370 (1905).

has "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." This is really a substitute for voluntary bankruptcy. There may be situations where, for purely sentimental reasons, one may prefer to be adjudicated an involuntary bankrupt rather than to file a voluntary petition. In such a case it would likely not be difficult for such person to induce three of his creditors to file an involuntary petition, where they are given, as in this instance, all the proof necessary to an adjudication. The fifth act of bankruptcy also has this practical effect: Where one obtains a discharge from his provable debts in a voluntary proceeding, section 14 (b) (5) provides that a person will not be entitled to a discharge if "in voluntary proceedings [he has] been granted a discharge in bankruptcy within six years." There is no provision which prevents a bankrupt adjudicated in an involuntary proceeding from obtaining a discharge just as often as he is adjudicated. It would seem, therefore, that if one is adjudicated on the fifth act of bankruptcy, as a practical matter, he may avoid the provision limiting discharges in voluntary proceedings to once in six years.

A good deal has been said above concerning insolvency. There are at least two conditions of affairs with which the law is concerned, each of which is called insolvency; but they are not alike. For example, in the law of sales, as now defined in the Sales Act, section 76: **A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they fall due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.** The Bankruptcy Act (section 1, clause 15) gives this definition: **A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.**[15] Insolvency in bankruptcy proceedings means, therefore, an excess of liabilities over assets, while in the law of sales and in some other branches of the law insolvency, in addition to this condition, includes within its meaning any actual suspension of payments in the ordinary course of business. The bankruptcy definition is obviously more favorable to the debtor.

In the preceding discussion of the several acts of bankruptcy, our attention has been directed to the nature of the act and to the circumstances surrounding its commission. There is also a time element to be considered. Not every act which satisfies the requirements heretofore outlined will be sufficient to obtain an adjudication in bankruptcy, but only those acts which were com-

[15] **In re Hines, (D. C.) 144 Fed. 142 (1906).**

mitted within a certain specified time. This period of time is four months; that is, an act which falls within the definitions above stated will be an act of bankruptcy for a period of four months but after that period has elapsed the act loses its force as an act of bankruptcy. With respect to this matter, section 3 (b) provides as follows: **A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act.** If this were the only provision on this matter, however, it would be possible for a person to render ineffective the provisions of the Bankruptcy Act in many cases where it is not now possible. To illustrate: Statutes of the various states provide generally that the rights of grantees and mortgagees of land under deeds and mortgages will not be complete and indefeasible as against the claims of judgment creditors and subsequent bona fide purchasers from the grantor unless such deed or mortgage is recorded. If a person, desiring to make a fraudulent conveyance or a preference of his land, and also desiring to avoid a bankruptcy proceeding, executed the transfer and induced the grantee not to record the deed or mortgage until after the four months' period from the date of the transfer had expired, he would then be able to defeat a petition in bankruptcy filed against him.

In order to prevent this and other frauds upon the Bankruptcy Act itself, the act provides that the four months' period will not begin to run from the date of the delivery of the deed or mortgage if it is necessary to record it, and that such period will not begin to run until the date of actual recording. This provision thus removes the motive for withholding instruments from record; and also the act provides that where required in any sense, that the four months' period will not begin to run until the transferee has obtained actual possession. This prevents a person from avoiding a proceeding in bankruptcy by making a transfer and retaining possession of the property thus transferred until after the four months' period has expired. The language of the act, in section 3 (b), is as follows: **A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.**

The question that presents difficulty here is to determine when recording is required or permitted within the meaning of the act.

The lower federal courts have not been in agreement upon their interpretation of these words. The interpretation has been settled by the Supreme Court of the United States to this extent: That the words "required or permitted" refer to a statute which makes the recording of an instrument a condition precedent to the protection of the grantee or mortgagee against the claims of creditors and not subsequent purchasers. If a statute merely requires or permits recording to make the transfer good against subsequent purchasers, that is not the kind of a statute which requires or permits recording within the meaning of the section above quoted.[16]

A difficult question is also presented when the recording of an instrument conveying or mortgaging the property occurred before the four months' period next prior to the filing of the petition, but the act of taking possession occurred within the four months' period. This often happens where there has been a mortgage in terms covering after-acquired property. Whether the act of taking possession or the execution of the instrument is the act of bankruptcy depends upon the view of the state courts where the instrument was executed as to the legal effect of the instrument; that is, a state court is privileged to hold that the act of taking possession under a prior mortgage is not a transfer; that the real legal transfer occurred as of the date of the execution and delivery of the instrument.[17]

(3) ADMINISTRATION OF THE ESTATE

The steps taken in a bankruptcy proceeding under the provisions commented upon above are all preliminary to that which follows, namely, the administration of the bankrupt's estate. The procedure which has been outlined terminated in the entry of the order of adjudication. Thereafter, in the fullest sense of the term, the person proceeded against is a bankrupt. The adjudication works a revolution in the relations which the bankrupt theretofore sustained with respect to his property and with respect to his creditors. The rights of his creditors likewise have undergone vital changes. The powers of all courts, other than the court possessing jurisdiction over the estate, are, for most purposes, destroyed. After the first meeting of creditors, at which the trustee is usually elected, the real administration of the estate begins. By the expression "the administration of an estate" is meant the assumption, performance, and discharge of all the duties pertaining to the collection of the bankrupt's property, to its sale, and to the distribution of the proceeds arising therefrom among creditors. Two general lines of work are involved: (1) The trustee must obtain control over all property owned by the bankrupt,

[16] Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, L. R. A. 1917A, 295 (1916).

[17] Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577 (1905).

and must recover all sums of money due the bankrupt. (2) The trustee must see to it that such property is made to yield the highest possible return, and that it is distributed in accordance with the provisions of the bankrupt act among the various classes of creditors. Of course, all of these acts must be done under the supervision and by the authority of the federal court, or, as is commonly the case, under the immediate control of an officer of the federal court called the referee in bankruptcy.

A casual survey of the work which must be accomplished by the trustee might indicate that the legal problems connected therewith would be relatively simple and perhaps few in number. Such is not necessarily the case. There are many bankruptcy proceedings which are rushed through with but little difficulty, but there are others where the legal aspects become numerous and very involved. Note the situation which may be presented: A large business enterprise is suddenly stopped in the administration of its affairs. All the legal ties which connected the owner to all other persons with respect to the properties are cut, or, if not completely severed, they are materially altered. An attempt is then made to introduce another person, the trustee, not only into the position which the bankrupt occupied, but also, to some extent, into the position occupied by creditors. All of the elaborate provisions of the Bankruptcy Act are simply devices for bringing about such a condition of affairs that the ultimate ends of the proceeding may be realized. If a bankrupt owed only simple contract debts, and his property was not incumbered, and if he had not theretofore made fraudulent conveyances or preferential transfers, and if he had no incomplete business transactions outstanding, settlement of the estate would be relatively easy. But this situation is not always present. The bankrupt's property may be mortgaged. He may have borrowed money and pledged property as security. He may have various kinds of sureties. He may have been fighting bankruptcy for some time, and accordingly may have made many preferential transfers and even fraudulent conveyances. Various creditors may have obtained judgments against him, and the proceedings thereunder may be in various stages of development. Innumerable incomplete transactions, of purchases and of sales of property, may be discovered by the trustee. The properties, the creditors, and various business transactions still pending, may be scattered over many states. There can be little doubt, therefore, but that the settlement of some bankrupt estates may not only call for a high order of business judgment, but also for a knowledge of a wide range of the law in some of its most intricate phases. Very little may here be attempted in discussing the problems that may arise during the administration of a bankrupt estate. A few of the more prominent points, however, will be treated.

The position of the trustee with respect to the administration of the bankrupt estate may be dealt with conveniently under three heads: (a) Methods of obtaining control over the bankrupt's

property; (b) extent of the right of the trustee to recover property which may be, wholly or partially, under the control of other persons; (c) payment of claims.

(a) TITLE TO BANKRUPT'S PROPERTY VESTS IN THE TRUSTEE

In order to confer upon the trustee the power to control and to dispose of all of the bankrupt's property, the Bankruptcy Act operates to take the ownership of the property from the bankrupt and vests it in the trustee. Section 70 provides as follows: **(a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.**

It is necessary, of course, that the statute shall fix the precise moment at which title to the bankrupt's property shall vest in the trustee, and the date fixed is the date on which the court enters the order of adjudication. However, at that moment there will never be a trustee in bankruptcy who can take title, because the trustee will not be appointed until the first meeting of creditors, which meeting will not occur until several days later. Accordingly, it is held that, after adjudication and until the trustee is appointed and qualified, the bankrupt still retains the title, although it is a title held in trust for creditors.[18]

The remaining portion of the section specifies in detail certain kinds of property and then employs clauses of sweeping character for the purpose of including all other kinds of valuable things and vesting the title thereto in the trustee. Clause 5 is the principal

[18] Johnson v. Collier, 222 U. S. 538, 32 Sup. Ct. 104, 56 L. Ed. 306 (1911).

one. Instead of attempting to enumerate all of the various kinds of property and of interests in property, Congress selected language here which already had a definite meaning in the law. It is perfectly obvious that courts frequently have been called upon to decide what kinds of interests in property could be transferred and what kinds of interests could be sold by judicial process. Generally, but not always, any interest capable of transfer was likewise capable of sale under execution but not always under common law execution. The two phrases taken together are probably as all-inclusive and as satisfactory from a standpoint of policy as could well be devised. The use of these clauses makes it unnecessary to specify the numerous kinds of divided interests in property, as, for example, the respective interests of mortgagor and mortgagee, pledgor and pledgee, bailor and bailee, the interests of tenants in common, future interests in property, etc. There are some kinds of future interests, or rather possibilities, that are so contingent that they are not transferable, nor may they be levied upon. Such interests, of course, would not pass to the trustee. The clause, however, may be taken as including practically every interest relating to property which one deems valuable from a business standpoint. It is not to be supposed that the clause is so definite in meaning that no controversy arises in regard to its interpretation, for frequently such questions are presented. For example, the question whether a seat in a stock exchange was property within the meaning of this section was carried to the Supreme Court of the United States for settlement, and it was decided that such a right was property and that such right passed to the trustee.[19] And there are many other questions of like difficulty that have arisen. It follows, also, that the trustee will not take title to property held by the bankrupt as trustee for other persons.[20]

Where the bankrupt does not have complete ownership in property, persons who possess interests in it are, of course, protected to the extent of their respective rights. Third parties who hold liens upon the bankrupt's property are protected under some circumstances. Section 67 (d) provides: **Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to import notice, shall, to the extent of such present consideration only, not be affected by this act.**

Section 70 (a), clause 6, includes valuable rights that are not true rights with respect to property. For the most part they are contract rights. It is under this clause that the trustee proceeds to collect debts due the bankrupt. Notice that the clause gives to the trustee the right to recover for some, but not all, kinds of

[19] Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318 (1903).
[20] In re Coffin, 152 Fed. 381, 81 C. C. A. 507 (1907).

torts. The right to sue for damages to the person does not pass to the trustee.

Clause 4 confers upon the trustee a right which was not possessed by the bankrupt. While a fraudulent conveyance may be treated as if it had not been made by creditors of the fraudulent grantor as against all persons not innocent purchasers, the fraudulent grantor cannot recover his property. Clause 4, therefore, gives to the trustee rights with respect to fraudulent conveyances which creditors possessed under state statutes. Section 70 (e) further amplifies this provision as follows: **The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication.**

The title acquired by the trustee is not only the title possessed by the bankrupt, but his rights are farther extended by the provisions of section 47 (a) (2) as follows: * * * **And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.**

(b) RECOVERY OF PROPERTY AND DISSOLUTION OF LIENS

There are three general situations where legal proceedings are likely to be necessary in order to recover possession of property or to remove attaching liens: (1) Fraudulent conveyances; (2) preferences; (3) liens other than those which operate as preferences. The trustee is not empowered to recover all property fraudulently conveyed nor all preferences. Nor may the trustee take property of the bankrupt free from all liens. The general principle is that all bona fide purchasers of property fraudulently conveyed, and of property transferred as preferences and bona fide holders of liens may retain their interests free from the claims of the trustee, even when such interests were acquired within the four months' period, and all such transferees who were not bona fide purchasers will lose their interests if acquired within the four months' period, but if such interests arose before the four months' period began to run the trustee cannot recover such interests even though the holders thereof were not bona fide purchasers. Interests acquired bona fide during the four months' period are protected. Interests acquired not bona fide during the four months' period may be dissolved by action of the trustee. Interests acquired not bona fide before the commencement of the four months' period cannot be recovered by the trustee. These results are accomplished by the following sections:

Section 67 (e): That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

Section 60 (b): If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and, if at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Section 67 (f): That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved

by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

(c) PAYMENT OF CLAIMS

The nature and extent of the rights and powers of the trustee with respect to the bankrupt's property have been outlined in the above paragraphs. When these rights have been exercised to their fullest extent, the trustee then has in his possession all of the property to which creditors may look as a source of payment. By reason of the title to such property which the law vests in him, the trustee has a complete power of disposition of the property, subject only to the approval of the court. We have yet remaining for consideration the question of the duty of the trustee with respect to the payment of claims.

Provable claims are divided into three classes: (1) Claims having a priority; (2) secured claims; (3) unsecured claims. Claims entitled to priority of payment are specified in section 64 as follows:

(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

(b) The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due workmen, clerks, traveling or city salesmen, or servants which have been earned

within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority.

A secured creditor is one who, either directly or indirectly, has a right with respect to specific property belonging to the bankrupt, either by way of mortgage, pledge or other lien. If such right was acquired by the secured creditor bona fide or if in any event it was acquired before the four months' period commenced to run, such creditor will be paid the value of this right and as to the balance of his claim, he will share pro rata with unsecured creditors. Section 57 (h) provides: **The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.**

After secured creditors have been paid, the value of their securities they and all general creditors are paid pro rata out of the remaining assets of the estate. Creditors are allowed one year subsequent to the date of the adjudication within which claims must be filed. Creditors who have received preferences, fraudulent conveyances and liens which, under sections previously discussed, may be avoided by the trustee, must, under section 57 (g) surrender such rights as a condition precedent to their right to receive dividends from the estate. If such preferences, conveyances and liens are not recoverable by the trustee, because the claimant is a bona fide purchaser or has acquired such interests before the beginning of the four months' period, they need not surrender such rights, but may participate with all other creditors for the full amount of their respective claims. If a creditor of a bankrupt whose claim is secured by the individual undertaking of another person does not prove his claim, the surety is given the right by section 57 (i) to prove in the name of the creditor.

SECTION 11.—RECEIVERSHIPS

A receiver is a person appointed by a court, upon whom are conferred certain rights and duties with respect to property which is the subject of litigation. His chief duty is to preserve such property from loss pending the outcome of the suit. There exists, obviously, a great variety of situations where two or more parties are interested in the same property. When these interests become sharply antagonistic, and litigation between the contending claimants results, the property may be so situated that the very fact of its being the subject of a judicial proceeding will make its

protection by a disinterested party necessary. The possibility of a fraudulent disposition of the property during the pendency of the suit often serves as a ground for the appointment of a receiver. So also, in the absence of a possible fraudulent disposition of the properties involved, the fact that they are being employed in some productive enterprise will be sufficient to warrant the appointment of a receiver. The mere fact that the property affected by the litigation is yielding income may make it advisable that a receiver be appointed and directed to care for the principal and income until the controversy is terminated. Broadly speaking, therefore, the court will appoint a receiver to assume the possession of property over which the court has acquired jurisdiction whenever, as a business proposition, it seems necessary or desirable to do so, in order to insure its preservation and proper employment during the time that the litigation is pending.

It thus appears that the application for the appointment of a receiver generally will not be an independent suit, for it is not the ultimate remedy sought by the complainant. The appointment of the receiver, for the most part, is incidental to some other relief sought. Accordingly, in suits to foreclose mortgages, or by beneficiaries of a trust against the trustee, by stockholders against directors or against third parties in the name of the corporation, by creditors to reach equitable assets of their debtor, or in connection with the settlement of decedents' estates, in bankruptcy proceedings after the filing of the petition and before the appointment and qualification of the trustee, receivers may be appointed by the court to assume control over the property which is involved in the action. The remedy, perhaps, is most frequently invoked by creditors, but it is not exclusively a creditors' remedy.

We shall not attempt to survey the extent of a receiver's powers, rights, and duties with respect to the property entrusted to his care, or to define his relations toward the parties involved and to the court. It is sufficient to observe that the receiver assumes possession of the property and is directed to manage and protect it, and to perform any other acts which the court may deem necessary to protect the interests of all parties concerned. A receiver does not usually take title to the property, as does a trustee in bankruptcy. Generally the position of the receiver is not defined so particularly as that of a trustee in bankruptcy. There is but one kind of trustee in bankruptcy, and, in every bankruptcy proceeding, the ultimate end sought is substantially like that of every other bankruptcy proceeding. This is not the case with respect to receivers. There are various kinds of receivers, and the suits in connection with which their appointment may be had may be widely variant in the ultimate relief sought. Courts possessing the jurisdiction of courts of equity have worked out a fairly well defined system of rules with respect to receiverships. Statutes which deal with special matters very commonly contain provisions with reference to the appointment of receivers. The position of a

receiver appointed under a special statute, in some respects, would differ from that of a receiver appointed under the general jurisdiction of courts of equity. But in all cases the receiver is chiefly the business representative of the court, and is usually selected for that position because of his known capacity in dealing with business situations like that then before the court.

One of the most important uses of a receivership proceeding is in connection with the foreclosure of corporate mortgages and the reorganization of corporations through judicial proceedings. It is in this respect that a receivership bears closer resemblance to a bankruptcy proceeding than is true in other cases of appointments of receivers. There is this important distinction: A bankruptcy proceeding more frequently results in an actual and permanent suspension of the business of the bankrupt concern, and its tangible properties are sold for what they will bring on the market. In a reorganization proceeding, usually associated with the foreclosure of mortgages or other suits instituted by creditors, the primary object is to preserve the business as a going concern, and to this end all of the various steps in the proceeding are directed. The bankruptcy proceeding is chiefly relied upon and is better suited to the winding up of an insolvent business, which is involved in such financial straits that it has passed beyond the point of successful reorganization. A receivership proceeding, on the other hand, as an incident to creditors' suits, by reason of its flexibility, is more suited to the reorganization of the business enterprise than a proceeding in bankruptcy. The receivership proceeding, in its relation to the procedure of reorganization of going business concerns will be taken up in more detail in connection with our study of the law of corporations in Part 6.

CHAPTER XI

SPECIAL TYPES OF CONTRACTS

Section
1. Introduction.
2. Bailments.
3. The Contract of Carriage.
4. The Contract of Pledge.
5. The Contract of Suretyship.

SECTION 1.—INTRODUCTION

In this chapter a few cases have been inserted dealing with certain special types of contracts. It is not to be understood, however, that the contracts of bailment and of suretyship are so far special that they are governed by rules of law different from the rules applicable to contracts generally. The general principles of the law of contracts which we have already stated do apply to these contracts. But there are some special circumstances which must be taken into consideration. The contract of bailment, for example, involves a transfer of possession of personal property from the bailor to the bailee. The law of property, therefore, contributes something to the sum total of legal relations between the parties. An owner of property or a party in rightful possession thereof possesses a great many rights, privileges, and powers with respect to such property which are not dependent upon contract. Parties may add to or subtract from these relations. The situation, therefore, between a bailor and bailee, is a composite one, created out of the law of property and of contracts. Similarly, with respect to the contract of suretyships, the surety has loaned his credit to another person. He has assumed a duty to discharge that which, from a business standpoint, is purely a duty of another person. The law must take this aspect of the transaction into consideration. There is every reason to suppose that a person who has assumed the obligation of discharging another person's duty would be entitled to greater consideration than the principal debtor. This the law does accord to him. The business situation creates a legal situation, which does not find its counterpart in contracts which arise out of other kinds of transactions. In this sense the contract of suretyship is a special type of contract. In working out the relations of the parties, the doctrines first recognized by courts of equity play a more active part than they do in many other kinds of contracts. The purpose, therefore, in giving independent treatment to these important types of commercial contracts, is to ascertain the nature and extent of the rights and duties of the parties thereto. Such rights and duties are rarely de-

fined in the formal contract, but they have been developed by a course of judicial decisions, as resulting from promises implied in fact or in law.

SECTION 2.—BAILMENTS

A bailment is a transaction involving the transfer of possession of personal property by one party, called the bailor, to another party, called the bailee. Bailments are usually classified according to the primary object for which the bailment was created. Accordingly, we may have (1) a bailment for the benefit of the bailor; (2) a bailment for the benefit of the bailee; (3) a bailment for the benefit of both parties. One object of such a classification of bailments is to make possible a distinction between the degree of care which a bailee in each type of case owes with respect to the care of the property. It is obvious that, if A. borrows B.'s umbrella, A. should exercise a higher degree of care than he should where B. obtains A.'s permission to leave his umbrella in A.'s store. The cases following point out some of the distinctive aspects of a bailment, and discuss the extent of the duty of the bailee with respect to the care of the property.

BRETZ v. DIEHLE et al.

(Supreme Court of Pennsylvania, 1888. 117 Pa. 589, 11 Atl. 893, 2 Am. St. Rep. 706).

CLARK, J. The defendants in this case are judgment creditors of William D. Newman, a miller operating a steam flouring mill in the town of Bedford. Having issued executions, they levied on some 80 or 90 barrels of flour and some bran, found on the floor of Newman's mill. The plaintiffs claimed the property levied upon, alleging that it was the product of grain by them delivered to and held by Newman as their bailee. * * * The plaintiffs, who are farmers residing in the vicinity of Bedford, brought their grain to this mill. No special contract or arrangement was made with the miller by any of the plaintiffs when they delivered their wheat; but in accordance with the practice of the mill in all cases, except where wheat was at once paid for, a receipt or memorandum was given in the following form:

"Crystal Mills, Bedford, Pa., September 12, 1884.

Received from D. W. Lea		Price.	Am't.
Four hundred and fifty-five 14–60	bushels	wheat	455.14
	"	rye	
	"	corn	
Two hundred and fifty-five 12–32	"	oats	255.12
	"	buckwheat	

"For use of self. W. D. Newman."

The mill was not arranged to keep the several lots of grain in separate parcels. It was so constructed that all the grain delivered into it was hoisted to the second floor, emptied into a sink on the first floor, and from thence carried by elevators into a bin on the third floor, where, at times, there was a large accumulated mass of wheat. Newman also purchased wheat in considerable quantities, from time to time, which was delivered into the mill, and disposed of as the

other wheat. This promiscuous commingling of the grain into a common mass was in accordance with the known usage of the mill, which was supplied for grinding from the mass of the wheat, without any discrimination as to the several lots or parcels in which it was received. The miller was, of course, under no obligation to restore to the plaintiffs the specific or identical wheat which he received, nor the product of it in flour; indeed, this, owing to the manner in which the business was conducted, was practically impossible.

The fundamental distinction between a bailment and a sale is that in the former the subject of the contract, although in an altered form, is to be restored to the owner, while in the latter there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it. In the one case, the title is not changed; in the other, it is—the parties standing in the relation of debtor and creditor. Thus, in Norton v. Woodruff, 2 N. Y. 153, a miller agreed to take certain wheat and to give one barrel of superfine flour for every four 36–60 bushels thereof; the flour to be delivered at a fixed time, or as much sooner as he could make it. As the miller's contract was satisfied by a delivery of flour from any wheat, the transaction was held to be a sale. But in Mallory v. Willis, 4 N. Y. 76, wheat was delivered under a contract "to be manufactured into flour," and one barrel of the flour was to be delivered for every four 15–60 bushels of wheat. This transaction was by the same court held to be a bailment. If a party, having charge of the property of others, so confounded it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it. Where, however, the owner's consent to have their wheat mixed in a common mass, each remains the owner of his share in the common stock. If the wheat is delivered in pursuance of a contract of bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment, and the bailee of the whole mass, of course, has no greater control of the mass than if the share of each were kept separate. If the commingled mass has been delivered on simple storage, each is entitled on demand to receive his share; if for conversion into flour, to his proper proportion of the product. * * *

It makes no difference that the bailee had in like manner contributed to the mass of his own wheat, for, although the absolute owner of his own share, he still stands as a bailee to the others, and he cannot abstract more than that share from the common stock, without a breach of the bailment, which will subject him, not only to a civil suit, but also to a criminal prosecution. But where * * * the understanding of the parties was that the person receiving the grain might take from it, or from the flour, at his pleasure, and appropriate the same to his own use, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depository, and the transaction is a sale, and not a bailment. In Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311, the distinction is thus stated: "If the dealer has the right at his pleasure, either to ship and sell the same, on his own account and pay the market price on demand, or retain and re-deliver the wheat, or other wheat, in the place of it, the transaction is a sale. It is only when the bailor retains the right from the beginning to elect whether he will demand the re-delivery of his

property, or other of like quality and grade, that the contract will be considered one of bailment. If he surrenders to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property as stipulated. The distinction is, can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale." This distinction is drawn, of course, with reference to cases where grain is deposited in a mass, as in grain elevators, etc. There are cases in which the doctrine of bailment has been carried much beyond the rule recognized in the cases we have cited. * * *

But in the case at bar we are not called upon to say what would be the effect upon the transaction if Newman had authority, in the regular course of dealing, to ship or sell the wheat of his customers on his own account. Undoubtedly he had a right to sell of the grain or flour to the extent of his own share, that is to say, what he contributed to the common stock and the tolls to which he was entitled. But the jury has found that he had no authority whatever to sell or to abstract from the common stock beyond the amount to which he was himself entitled. In the general charge, and also in the answers to the points submitted, the learned court instructed the jurors, in the clearest manner, that if they should find from the evidence that Newman, by the nature of his dealings with the several plaintiffs, had acquired such dominion over their wheat as authorized him, at his pleasure, not only to grind it into flour, but also to sell the same for his own use, the transaction must necessarily be treated as a sale; and that, in that event, the plaintiff could not recover. This instruction was repeated with marked emphasis several times during the progress of the charge, and it seems quite impossible that the jury could have labored under any misapprehension as to the nature of the inquiry they were to make. The verdict of the jury was for the plaintiff, and we must assume the facts which, it is plain, the jury in arriving at such a verdict must have found, viz., that Newman had no authority to sell the grain delivered into his mill under the arrangement with the plaintiffs; that is to say, their share of the common stock, nor the flour which was the product thereof. It was the plain duty of Newman, however, to see to it that at all times the mill contained wheat or flour sufficient in amount to answer all demands under the bailment. Failing in this, he was derelict in duty, and liable under the law for the appropriation and conversion into his own use of property which did not belong to him. * * *

The learned court defined a bailment and a sale, marking the distinguishing features of each, and as the nature of the transaction depended, not wholly upon the written receipt, but in part on verbal evidence as to the method of conducting the business, the question was undoubtedly one proper to be submitted to the jury. The court instructed the jury, that if certain facts existed the transaction was a sale, otherwise it was but a bailment. And the question was proper for the jury whether or not, under the instructions of the court, according to the facts as the jury might find them, the transaction was a bailment or a sale.

On a careful review of the whole case, we find no error, and the judgment is affirmed.

PRESTON v. PRATHER.

(Supreme Court of the United States, 1891. 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788.)

FIELD, J. By the defendants it was contended below in substance, and the contention is renewed here, that the bonds being placed with them on special deposit for safe-keeping, without any reward, promised or implied, they were gratuitous bailees, and were not chargeable for the loss of the bonds, unless the same resulted from their gross negligence, and they deny that any such negligence is imputable to them.

On the other hand, the plaintiffs contended below, and repeat their contention here, that, assuming that the defendants were in fact simply gratuitous bailees when the bonds were deposited with them, they still neglected to keep them with the care which such bailees are bound to give for the protection of property placed in their custody, and further, that subsequently the character of the bailment was changed to one for the mutual benefit of the parties. * * *

Undoubtedly, if the bonds were received by the defendants for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. An utter disregard of the property of the bailor would be an act of bad faith to him. But what will constitute such reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. The care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. The general doctrine, as stated by text-writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. * * * The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own employés and officers, though their employment embraced a supervision of the property; such acts not being deemed within the scope of their employment.

Thus in Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, the bank was, in such a case, exonerated from liability for the property intrusted to it, which had been fraudulently appropriated by its cashier, the Supreme Judicial Court of Massachusetts holding that he had acted without the scope of his authority, and, therefore, the bank was

not liable for his acts any more than it would have been for the acts of a mere stranger. * * *

As stated above, the reasonable care which persons should take of property intrusted to them for safe-keeping without reward will necessarily vary with its nature, value and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons therefore depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor.

It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their neglect, upon being notified of the speculations in stocks of their assistant cashier, who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court to its conclusion that they were guilty of gross negligence. It was shown that about a year before the assistant cashier absconded the defendant Kean, who was the chief officer of the banking institution, was informed that there was some one in the bank speculating on the Board of Trade at Chicago. Thereupon Kean made a quiet investigation, and the facts discovered by him pointed to Ker, whom he accused of speculating. Ker replied that he had made a few transactions, but was doing nothing then and did not propose to do anything more, and that he was then about a thousand dollars ahead, all told. It was not known that Ker had any other property besides his salary. His position as assistant cashier gave him access to the funds as well as the securities of the bank, and he was afterwards kept in his position without any effort being made on the part of the defendants to verify the truth of his statement, or whether he had attempted to appropriate to his own use the property of others.

Again, about two months before Ker absconded, one of the defendants, residing at Detroit, received an anonymous communication, stating that some one connected with the bank in Chicago was speculating on the Board of Trade. He thereupon wrote to the bank, calling attention to the reported speculation of some of its employees, and suggesting inquiry and a careful examination of its securities of all kinds. On receipt of this communication Kean told Ker what he had heard, and asked if he had again been speculating on the Board of Trade. Ker replied that he had made some deals for friends in Canada, but the transactions were ended. The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed. Upon this subject the court below, in giving its decision (Prather v. Kean, 29 Fed. 498), after observing that the defendants knew that Ker had

been engaged in business which was hazardous and that his means were scant, and after commenting upon the demoralizing effect of speculating in stocks and grain, as seen in the numerous speculations, embezzlements, forgeries and thefts plainly traceable to that cause, and the free access by Ker to valuable securities, which were transferable by delivery, easily abstracted and converted, and yet his being allowed to retain his position without any effort to see that he had not converted to his own use the property of others, or that his statements were correct, held that it was gross negligence in the defendants not to discharge him or place him in some position of less responsibility. In this conclusion we fully concur.

The second position of the plaintiffs is also well taken, that, assuming the defendants were gratuitous bailees at the time the bonds were placed with them, the character of the bailment was subsequently changed to one for the mutual benefit of the parties. It appears from the findings that the plaintiffs, subsequently to their deposit, had repeatedly asked for a discount of their notes by the defendants, offering the latter the bonds deposited with them as collateral, and that such discounts were made. When the notes thus secured were paid, and the defendants called upon the plaintiffs to know what they should do with the bonds, they were informed that they were to hold them for the plaintiffs' use as previously. The plaintiffs had already written to the defendants that they desired to keep the bonds for an emergency, and also that they wished at times to overdraw their account, and that they would consider the bonds as security for such overdrafts. From these facts the court was of opinion that the bonds were held by the defendants as collateral to meet any sums which the plaintiffs might overdraw; and the accounts show that they did subsequently overdraw in numerous instances.

The deposit, by its change from a gratuitous bailment to a security for loans, became a bailment for the mutual benefit of both parties, that is to say, both were interested in the transactions. For the bailor it obtained the loans, and to that extent was to his advantage; and to the bailee it secured the payment of the loans, and that was to his advantage also. The bailee was therefore required, for the protection of the bonds, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect, though not amounting to gross negligence. * * *

It follows, therefore, that whether we regard the defendants as gratuitous bailees in the first instance, or as afterwards becoming bailees for the mutual benefit of both parties, they were liable for the loss of the bonds deposited with them. And the measure of the recovery was the value of the bonds at the time they were stolen.

Judgment affirmed.

RUBIN v. HUHN.

(Supreme Judicial Court of Massachusetts, 1918. 229 Mass. 126, 118 N. E. 290, 4 A. L. R. 1190.)

Action by Myer Rubin against Samuel I. Huhn. There was a finding for plaintiff, and the case was reported to the appellate division of the municipal court of the city of Boston, which dismissed the report, and defendant appeals.

PIERCE, J. The defendant assumed at most the obligation of a gratuitous bailee when, in the lobby of a theater crowded with people, he received from one Wyner a pair of diamond earrings in a box and at the request of Wyner then and there undertook to inspect, examine and appraise them without reward. * * * The duty which the law imposes on gratuitous bailees is that the bailee shall act in good faith; that is, shall use the degree of care in the performance of the undertaking which is measured by the carefulness which the depository uses toward his own property of similar kind under like circumstances. * * *

In an action of contract or of tort for breach of duty imposed by law, the mere fact "that the defendant dropped one of the earrings and it was lost," is not sufficient evidence of his gross negligence to warrant a finding for the plaintiff. The ruling of the judge "that the defendant, in handling and dealing with the earrings did not exercise such care as a reasonably prudent man would have exercised under the circumstances," imposed upon the defendant, a gratuitous bailee, a standard of care which measures the duty of a bailee for hire. This was manifest error. * * *

It follows that the order of the municipal court, "Report dismissed," must be affirmed. * * *

BECK v. WILKINS-RICKS CO.

(Supreme Court of North Carolina, 1920. 179 N. C. 231, 102 S. E. 313, 9 A. L. R. 554.)

Action for damages for the destruction of an automobile while in the defendant's garage for repairs. The plaintiff took his car to the garage for certain minor repairs. During the night the building was destroyed by fire and the car with it. At close of plaintiff's evidence the court sustained a motion for judgment as of nonsuit, and the plaintiff excepted and appealed.

CLARK, C. J. The defendant as bailee assumed liability of ordinary care for the safe-keeping and the return of the machine to the bailor in good condition. The bailee did not assume liability as insurer, and therefore did not become liable for the return of the property in good condition if he observed the ordinary care devolved upon him by reason of the bailment. If the machine had been injured or stolen or destroyed by fire while in his custody, the defendant would not be liable if such care had been observed. On the other hand, the mere fact that the property had been destroyed by fire or stolen did not absolve him from responsibility, any more than he would have been absolved if it had been injured in his custody, unless he had shown that he had used the care required of him by virtue of his bailment. The burden of proving negligence was on the plaintiff, and this

burden does not shift; but when it was shown, or admitted, that the machine was not returned by reason of its being destroyed or stolen, or that it was returned in injured condition, it was the duty of the defendant to "go forward" with proof to show that it had used proper care in the bailment. Therefore it was error for the court to withdraw the case from the jury and thus to hold, as a matter of law, that the defendant had exercised proper care. * * *

It is sufficient to say * * * that the failure of the bailee to return the property, with the admission that it has been burned, made out a prima facie case, which devolved upon the defendant the duty of going forward with proof that it had discharged its duty of proper care while intrusted with the custody of the plaintiff's automobile. Upon the evidence, this was the proper subject of inquiry which the plaintiff was entitled to have investigated by the jury.

The judgment of nonsuit is reversed. * * *

SECTION 3.—THE CONTRACT OF CARRIAGE

The contract between shipper and carrier is a bailment with the added obligation upon the bailee to transport and deliver the property bailed. Carriers are of two kinds, common carriers and private carriers. A common carrier is a carrier either of goods or passengers, or both, who holds himself out as one engaged in the business of furnishing transportation for all those who may request such service. A common carrier serves the public generally. The common instances of common carriers are the railroads, the street railways, steamship lines, express companies, and fast freight lines.

The contract of the common carrier to transport goods differs from the contract of the private carrier in that, for reasons of public policy, certain obligations have been imposed by law upon the common carrier, irrespective of the carrier's assent, which are not imposed upon the private carrier. Stated in its broadest form, the common carrier is an insurer for the safe and expeditious transportation of the goods which it has received for carriage; that is, the common carrier will be liable for loss or damage to the goods whether the loss or damage was caused by its negligence or not. This is virtually the imposition of an absolute liability. There are, however, certain common-law exceptions to this rule of absolute liability. These exceptions are taken up in the cases following. After noting the common-law exceptions it will be found in the cases, that the liability of the common carriers as a matter of practice has been cut down still further by contract between shipper and carrier. The question as to the extent of the common carrier's liability then narrows itself down to the inquiry as to the legality of these limitations of liability.

This inquiry has two aspects: First, to what extent may the liability of the common carriers be limited under common law principles? Second, to what extent have statutes of the various states and of Congress changed these common law principles? It scarcely needs to be mentioned that the body of law usually referred to

as the law of carriers, is very extensive, and, while its content is in large measure made up of rules developed by the application of general principles of the law of contract and of torts, knowledge of its subject-matter could not be gained without a study of the cases which have arisen in this field. The few cases here presented merely call attention to some of the more important aspects of the contract between shipper and carrier.

SEABOARD AIR LINE RY. v. MULLIN.

(Supreme Court of Florida, 1915. 70 Fla. 450, 70 South. 467, L. R. A. 1916D, 982, Ann. Cas. 1918A, 576.)

WHITFIELD, J. An action was brought by Mullin against the carrier to recover damages for the loss of freight injured by a flood in transit. There was judgment for the plaintiff, and the defendant took writ of error. * * *

A carload of household goods being transported in interstate commerce from Ocala, Fla., to Youngstown, Ohio, was negligently delayed en route before it reached Atlanta, Ga. After leaving Atlanta and before reaching destination the goods were injured by an unprecedented flood—an act of God—which could not reasonably have been foreseen when the negligent delay occurred. If there had been no delay in the transportation before reaching Atlanta, the shipment might have been completed without injury from the flood.

The liability of a common carrier of goods is that of an insurer; and in cases of loss of or injury to goods intrusted to it for transportation no excuse avails the carrier, except that such loss or injury was caused by the act of God, or by the public enemies of the state or by the sole fault of the shipper or his agent. 1 Moore on Carriers, 306. * * *

Where in the course of transportation goods are injured by an unprecedented flood and there is no negligence on the part of the common carrier in taking care of the goods or otherwise, the loss is attributable to the flood as an act of God, and the carrier is not liable. * * * But where the flood should have been anticipated in time to save the goods, or the carrier was negligent in not protecting the goods, or exposed the goods to the flood, or tortiously withheld the goods, or so deviated from the proper route as to amount to a conversion of the goods, or the negligence of the carrier contributes directly to the injury, or the carrier fails to provide reasonably adequate and safe facilities which directly contributed to the injury, the carrier is liable. [Citing cases.]

In Read v. Spaulding, 30 N. Y. 360, 86 Am. Dec. 426, Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45, * * * and other somewhat similar cases, the courts hold that when there is a negligent delay by a common carrier in transporting goods, and subsequently before reaching destination the goods are injured by an act of God that could not reasonably have been foreseen at the time of the negligent delay, the carrier is liable. * * * Such holdings are presumably predicated upon the theory that the delay is a concurring and proximate cause of the loss or injury, or that because of the delay the law enlarges the liability of the common carrier by withdrawing the

exemption from liability that usually exists when goods in transit are injured by an act of God.

The United States Supreme Court and the courts of a number of the states hold that a delay in transportation which places the shipment in the track of an unprecedented flood is a remote and not a proximate cause of an injury to the shipment by the flood, and the carrier is not liable merely because of the delay. Such courts base the exemption of the carrier from liability upon the ground that the delay was too remote and that the proximate cause of the injury, to wit, the destructive act of God, could not have been foreseen and provided against as a probable result of the negligent delay. In this view the carrier is held not liable even though the injury would not have occurred but for the previous delay in transportation which caused the shipment to be in the track of the flood. * * *

Actionable negligence exists when a loss or injury to one without fault results directly from another's mere negligence, or when the loss or injury sustained by one is such as results in ordinary natural sequence from the negligence, or such as naturally and ordinarily should have been regarded as a probable, not as a merely possible, result of the simple negligence of another. Conversely, when the loss or injury is not a direct result of the mere negligence, and the loss or injury is not a natural ordinary sequence or such as naturally and ordinarily should have been regarded as a probable, and not a merely possible, result of the simple negligence, the negligence is not actionable. * * * If an independent efficient cause intervenes between the negligence and the injury, and the original negligence does not directly contribute to the force or effectiveness of the intervening cause, the original negligence is not regarded as a proximate cause of the injury, even though the injury might not have occurred but for the original negligence. A proximate cause stands next in causal relation to the effect. * * * A proximate cause produces the result in continuous sequence, and without which the result would not have occurred. * * * In this case the carrier was merely negligent in delaying the shipment, there being no conversion in law or deviation from the proper route or malconduct or lack of reasonably adequate and safe facilities. There was subsequent to the delay "no negligence which in any manner contributed to the loss or damage," as is expressly stipulated. An assumption that the goods would not have been injured had the carrier not negligently delayed the shipment en route before the flood happened will not conclusively show liability of the carrier, since the negligent delay did not directly cause or contribute to the injury and had no causal relation to, and did not contribute to, the injury or to the effectiveness of the flood, the direct cause of the injury, and any character of injury to the shipment from an unprecedented flood could not reasonably be regarded as being an ordinary natural sequence or as naturally and ordinarily a probable result of the merely negligent delay during a period when there was nothing to foretell an unusual flood on the route. * * *

The Interstate Commerce Act does not render carriers liable for injuries to shipments that are caused by an act of God. * * * The delay in transportation prior to the injury was "caused by" the defendant, but the injury to the goods, was "caused by" an unprecedented flood—an act of God—the preceding negligence of the carrier

in delaying the shipment having merely a casual relation and not a causal relation to the act of God and the injury.

The judgment is reversed.

ALASKA COAST CO. v. ALASKA BARGE CO.

(Supreme Court of Washington, 1914. 79 Wash. 216, 140 Pac. 334, L. R. A. 1915C, 423.)

GOSE, J. This is an action upon a charter party for damages sustained to a steamboat, it being alleged that the charterer breached its contract in failing to return the boat in good condition.

The appellant, being the owner of the steamship Jeannie, chartered it to the respondent for voyages from Puget Sound to ports in southeastern Alaska. * * *

After the Jeannie was turned over to the respondent, it struck some unknown, submerged object in Frederick Sound in Alaskan waters, threw a propeller blade, and otherwise damaged the ship. The ship was returned to appellant in damaged condition, and this action is brought to recover the amount of such damages. * * *

The first question to be considered is: Was the accident which caused the damage an "act of God"? * * *

The facts touching the cause of the accident are these: The chief engineer testified: "I know she struck something hard, something submerged, and broke one of the blades, and put everything out of line. * * * She gave a sudden stop and then started off. * * * Struck something submerged. I don't know whether it was a log or a chunk of ice, or it might have been a rock." The master of the ship testified that the accident happened in the middle of Frederick Sound, 3 miles from land, in about 125 fathoms of water, in clear weather, with the sea "smooth as glass." He further said: "I felt a jar, but you can feel a jar when a ship loses a blade. It might be a submerged body; it probably was; I don't know. I want to say that I don't know. I just felt the jar." The accident happened in the month of September, in the daytime. It was stipulated that the chief mate would, if called as a witness, testify that he was watch officer on the bridge at the time of the accident, and that he did not see or hear of any floating objects at or near that time. The testimony does not show whether icebergs were to be anticipated at the time and place of the accident.

This is far from showing that the act could not have happened by the intervention of man. It leaves the cause of the accident to speculation. The most that can be said is that it may have been caused by the act of man. We are not required to adopt the strict rule laid down by Judge Shipman and quoted in the excerpt from The Majestic, viz., that, if it were possible that the injury was caused by the act of man, the respondent should be held. Under the authorities, it is at least required to show by a preponderance of the evidence that an "act of God" was the cause of the injury. In this it has signally failed. * * *

The case will be remanded, with directions to the trial court to ascertain the damage and enter judgment for the amount thereof. * * *

MORRISON & CO., Limited, v. SHAW, SAVILL & ALBION CO., Limited.
(Commercial Court, 1916. [1916] 1 K. B. Div. 747.)

The action was brought to recover the sum of £4013. 19s. 7d., the agreed value of 158 bales of dumped greasy wool shipped at Napier, New Zealand, in the defendants' steamship Tokomaru, for carriage to London under two bills of lading.

BAILHACHE, J. The defendants' steamship Tokomaru, bound from New Zealand to London with a valuable cargo on board, was making for the port of Havre on January 30, 1915. She was within seven or eight miles of the coast and some twelve or thirteen miles from Havre, when at about 9 o'clock in the morning she was torpedoed by the German submarine U21 and sank with her cargo. Amongst the cargo were 158 bales of greasy wool belonging to the plaintiffs, who held two bills of lading covering this shipment at Napier in New Zealand. Both bills of lading are in the same form and both are dated November 19, 1914. The agreed value of the wool is £4013. 19s. 7d., and the plaintiffs sue the defendants for this sum upon the simple and, as they allege, sufficient ground that the wool was lost while the Tokomaru was deviating from her voyage to London.

The defendants deny that there was any deviation. They assert that the Tokomaru was intending to call at Havre to discharge a parcel of frozen meat, and that her so doing was within the liberties reserved to them by the bills of lading held by the plaintiffs. Alternatively, and while admitting that deviation destroys the bill of lading exceptions, they say that they were common carriers, with the common-law exceptions of act of God and the king's enemies, and that they are thus protected, and they further say that the deviation was not the cause of the loss. It is between these conflicting contentions that I have to decide. * * *

The real question is: Were the defendants entitled to call there under the terms of their bill of lading? In deciding this question I must bear in mind that deviation has always been looked upon as a grave breach of contract. * * * In my judgment the Tokomaru was not justified, to quote their own words, "in deviating from our ordinary route without specific provision being made for it in the bill of lading." That sentence exactly expresses my view. In my judgment, when the route and ports of call of a line of steamships have become stereotyped, mere general words in their own bill of lading giving liberty to call at intermediate ports will not justify their calling at some entirely fresh intermediate port. The truth is the defendants were tempted by a high rate of freight to run risks which they recognized as possible, but regarded as improbable. Unfortunately the improbable happened.

The remaining points may be dealt with briefly. The effect of deviation is to displace the contract of carriage during and after deviation. * * * From the point of deviation, at any rate, the shipowner becomes at best a common carrier. The defendants say that he is a common carrier with the common-law exceptions of act of God and king's enemies in his favour. Let me assume that, of what use are those exceptions to the defendants in this case? As I understand it the law stands thus. When a ship deviates and loss of or damage to cargo occurs, either by act of God or, as here, by the

king's enemies, it is not open to her owners to set up either exception. Those exceptions apply and apply only to a carrier who is performing his contract, and never to a carrier who is breaking it, unless he can show that the loss or damage must have occurred in any event. * * * The most that can be said is that the Tokomaru might have been torpedoed if she had continued on her course to London, and that avails the defendants nothing. The only case that occurs to me as likely to arise in practice in which a shipowner can hope to escape liability for damage to or loss of goods during or after deviation is when the goods perish from inherent vice and would have so perished without deviation. * * *

The defendants lastly say that the deviation was not the cause of the loss, and that the plaintiffs cannot recover because they cannot show that the natural and probable result of deviating to Havre was that the Tokomaru would be torpedoed. This seems to me rank heresy. A shipowner is an insurer of the goods he carries, subject, if there is a special contract, to the contractual exceptions, and subject, if there is no special contract, to the common law exceptions of act of God, the king's enemies, and inherent vice. If the goods are lost while in his ship it is not for the goods owner, in the first instance, to prove anything but the loss. The shipowner, if he denies liability, must then set up the particular exception upon which he relies and bring himself within it.

Here the exception is the king's enemies, but the defendants are in the difficulty pointed out by Lord Watson in Hamilton, Fraser & Co. v. Pandorf & Co. (1887) 12 App. Cas. 518, 526, where he said: "When a shipowner * * * claims the benefit of the exception, the court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible." This is equally true whether the exception be contractual or implied by law. Deviation leaves a shipowner defenceless in the face of such a loss as occurred in this case. * * *

I have to add that throughout this judgment whenever I have spoken of "deviation" I must be taken to mean wrongful deviation.

My judgment is for the plaintiffs for £4013. 19s. 7d. and costs.

FAUCHER v. WILSON.

(Supreme Court of New Hampshire, 1895. 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.)

The defendant was engaged in the business of trucking goods for hire from the railway freight station in Manchester to different stores in the city. On one of the warmest days in the summer of 1891, he transported a hogshead of molasses from the freight station to the plaintiff's store, on Elm street, a distance of a little over half a mile. By reason of the fermentation of the molasses, the hogshead burst while being unloaded. The plaintiff's loss was not caused by any want of ordinary care on the part of the defendant.

CHASE, J. * * * [Even] if the defendant was a common carrier, he is not liable for the plaintiff's loss, since it happened from the operation of natural laws, which a common carrier does not insure against.

* * * In Farrar v. Adams, 1 Bull. N. P. 69, it is said that "if an action were brought against a carrier for negligently driving his cart, so that a pipe of wine was burst, and was lost, it would be good evidence for the defendant that the wine was upon the ferment, and, when the pipe burst, he was driving gently." It being found that the plaintiff's loss was not due to any want of ordinary care on the part of the defendant, there must be judgment for the defendant. * * *

McCARTHY et al. v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama, 1893. 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29.)

Action by McCarthy & Baldwin against the Louisville & Nashville Railroad Company for failure to deliver a consignment of terra cotta tiling in good condition. From a judgment for defendant, plaintiffs appeal.

McCLELLAN, J. * * * In October, 1890, the Pioneer Fireproof Construction Company delivered to the Chicago, Burlington & Quincy Railroad Company at Ottawa, Ill., four car loads of terra cotta for carriage, and consigned to plaintiffs at Birmingham, Ala. The defendant was also a common carrier operating a connecting line of railway on the route from Ottawa to Birmingham; and as such received the consignment from the initial carrier, "and undertook to deliver the same to plaintiffs at Birmingham for a reward." This undertaking was not performed, the complaint avers, but, to the contrary, the defendant "did not deliver all of said goods to them (the plaintiffs), and did not deliver said goods to the plaintiffs in good or proper condition, or in the condition they were in when shipped and consigned to plaintiffs, but that said goods when delivered were badly broken and injured, and a large part thereof rendered wholly unfit for use." The damage to the goods is laid at $400, which the complaint seeks to recover.

It is manifest that the case made by the averment of these facts tendered no issue of negligence vel non on the part of the defendant. The contract averred is an unconditional common-law contract of carriage without reservations or exceptions. By its terms the defendant insured the safe delivery of the goods to the consignee, and assumed liability for any loss or injury resulting from any cause except such as afforded the carrier a defense at common law. The strictest proof of all possible care on the part of the carrier in the transportation and delivery of the goods would have been no defense, and, of course, proof of the carrier's negligence was in no wise essential to a recovery. The defenses which a carrier under such a contract may interpose to an action for failure to deliver in good condition are commonly mentioned as two only, namely, that the loss or injury was due either to the act of God, or to the act of a public enemy. But there is in reality a third, resting on the fault of the owner of the goods or his agent. This latter defense, while the fault involved in it may consist merely of negligence imputable to the plaintiffs, is in no sense, and bears little analogy to, the defense of contributory negligence available in actions against common carriers of passengers, sometimes in actions against carriers of live stock, and even, it may be, in actions against carriers of goods—inanimate things—under contracts of affreightment which limit liability to loss or injury occasioned by the carrier's negligence. Nowhere in the books can any reference be

found to the defense of contributory negligence against the common-law liability of common carriers of goods; and, in the nature of things, there can be no such defense, to speak with any approach to legal accuracy. * * * The rule governing this class of cases cannot be more perspicuously stated, perhaps, than by comparing it with and differentiating it from the doctrine which obtains in respect of causes of action resting primarily on defendant's negligence in the carriage of persons. In these latter cases the contributory negligence of the plaintiff neutralizes and renders innocuous the causal negligence of the defendant, and destroys a cause of action resting upon it. But in the other class of cases—that to which the case at bar belongs—negligence upon either hand is regarded from an entirely different standpoint, and accorded an entirely different and contrary effect and operation, so to speak, on the rights of the parties. The unaided, uncontributed-to negligence of the plaintiff producing the injury is a defense; but where there is negligence also on the part of the defendant, without which, notwithstanding plaintiff's fault, the injury would not have happened, this fault of the defendant neutralizes and eviscerates the negligence of the plaintiff as a ground of defense. In the one case, plaintiff's contributory negligence destroys the cause of action; in the other, defendant's concurring negligence destroys the defense.

The evidence tended to show that the goods for injury to which this action is prosecuted were improperly and negligently packed or loaded by the consignor who sold the goods to plaintiffs, and it afforded an inference, or rather, room for an inference, that but for this fault of the seller and consignor, the injury would not have occurred. But, though the jury had found in line with this tendency of the evidence, and deduced the conclusion therefrom that plaintiffs, or those for whose acts or omissions in the premises plaintiffs were responsible, were at fault, and that such fault had a causal connection with the injury, it was yet their duty to indulge the presumption that the defendant was also negligent in and about the transportation and delivery of the goods, and that this negligence aided plaintiffs' negligence to the result complained of, there being no evidence whatever on the part of the defendant, upon whom the burden in this regard rested, nor, indeed, any averment, to the contrary. It follows, on this state of case, the evidence without conflict showing the injury, and the defendant having failed both in averment and proof to bring itself within the exception under which it in some measure attempted to shield itself from liability, that the jury should have been instructed, as requested in writing, to find for the plaintiffs if they believed the evidence. * * *

Reversed and remanded.

ADAMS EXPRESS CO. v. CRONINGER.

(Supreme Court of the United States, 1913. 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257.)

This was an action in the circuit court of Kenton county, Kentucky, against the Express Company to recover the full market value of a small package containing a diamond ring which was delivered by the plaintiff below to the Express Company at its office in Cincinnati, Ohio, consigned to J. W. Clendenning at Augusta, Georgia. The package was never delivered.

The Express Company made defense by answer. The plaintiff demurred to the answer as not containing a defense, which demurrer

was sustained. The company declined to further plead, whereupon the circuit court gave judgment for the sum of $137.52, being the full value of the ring and interest.

LURTON, J. The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the federal question and gives this court jurisdiction.

Under the law of Kentucky this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, "unless sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law."

The original Interstate Commerce Act of February 4, 1887, 24 Stat. 379, c. 104, was extensively amended by the act of June 29, 1906, 34 Stat. 584, c. 3591 (U. S. Comp. St. §§ 8604a, 8604aa). We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in section 20, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as the Carmack Amendment. * * *

This amendment came under consideration in Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, but the opinion and judgment were confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

The significant and dominating features of that amendment are these:

First. It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one state to a point in another."

Second. Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it."

Third. It is also made liable for any loss, damage, or injury to such property caused by "any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass."

Fourth. It affirmatively declares that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States, Hart v. Pennsylvania Railroad, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; or that determined by the supposed public policy of a particular state, Pennsylvania Railroad v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; or that prescribed by statute law of a particular state, Chicago, etc., Railroad v. Solan, 169 U. S. 133, 18 Sup. Ct. 239, 42 L. Ed. 688.

Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in Southern Pacific Co. v. Crenshaw, 5 Ga. App. 675, 687, 63 S. E. 865, where the court said:

"Some states allowed carriers to exempt themselves from all or a part of the common-law liability, by rule, regulation, or contract; others did not. The federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the federal statute where applicable to the fact in such cases as shall come before them."

That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. * * *

What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common law duty as a common carrier. * * *

We come now to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of fifty dollars, as shown therein. This limiting clause is in these words:

"In consideration of the rate charged for carrying said property,

which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations; and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of fifty dollars, was twenty-five cents, while for the same package if its value had been declared to be one hundred and twenty-five dollars, the amount for which the plaintiff sues as the actual value, the lawful charge according to the rate filed and published would have been fifty-five cents. It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type: "This company's charge is based upon the value of the property, which must be declared by the shipper."

That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. * * * The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. * * *

That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried.

Neither is it conformable to plain principles of justice that a ship-

per may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in Hart v. Pennsylvania Railroad, supra:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the States. * * * The exemption forbidden is, as stated in Bernard v. Adams Express Co., 205 Mass. 254, 259, 91 N. E. 325, 327, 28 L. R. A. (N. S.) 293, 18 Ann. Cas. 351, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld, the court saying:

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes."

In Greenwald v. Barrett, 199 N. Y. 170, 92 N. E. 218, 35 L. R. A. (N. S.) 971, the same conclusion was reached as to the nature of the liability imposed and the purport of the exemption forbidden, the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of the property were distinctly upheld by the Supreme Court of the United States in Hart v. Penn. R. R. Co., 112 U. S. 331, 341, 5 Sup. Ct. 151, 28 L. Ed. 717." * * *

That a carrier rate may be graduated by value and that a stipulation limiting recovery to an agreed value made to adjust the rate is recognized by the Interstate Commerce Commission, see In re Released Rates, 13 Interst. Com. Com'n R. 550.

We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.

The demurrer to the answer of the defendant below should have been overruled.

For this reason the judgment is reversed, with direction to overrule the demurrer, and for such proceedings as are not inconsistent with this opinion.

In re CUMMINS AMENDMENT.

(Interstate Commerce Commission, 1915. 33 Interst. Com. Com'n R. 682.)

BY THE COMMISSION. For many years, if not, indeed, from the origin of railroad transportation in this country, common carriers by railroad have sought, by provisions in shipping contracts, bills of lading, tariff publications, etc., to limit their common-law liability, not only as insurers against loss or damage to property received by them for transportation, but also as tort-feasors for loss or damage caused by their negligence. * * *

By adoption of the "Carmack Amendment" (U. S. Comp. St. §§ 8604a, 8604aa), so called, to the Act to Regulate Commerce, approved June 29, 1906, the Congress provided that a common carrier receiving property for transportation from a point in one state to a point in another state should issue a receipt or bill of lading therefor and be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier to which such property might be delivered, or over whose lines such property might pass, and declared that no contract, receipt, rule, or regulation should exempt such common carrier from the liability thereby imposed. It was provided that nothing in that amendment should deprive any holder of such receipt or bill of lading of any remedy or right of action which he had at that time under existing law.

Since that time, beginning in 1913, with Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, the Supreme Court of the United States has decided in a number of cases, all of which followed Hart v. P. R. R., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, that where the shipper has his choice of two rates, the higher carrying unlimited carrier's liability, and in "a fair, just, and reasonable agreement" declares or agrees that the value

of his shipment is a certain sum and thereby secures a reduced transportation rate, he is bound by that declaration or agreement, estopped from claiming or recovering more than that value in case of loss of or damage to the property, and conclusively presumed to have known the governing tariff.

On March 4, 1915, * * * the [first] Cummins Amendment was approved. * * * It is perfectly plain that the purpose of this law is, except as otherwise provided therein, to invalidate all limitations of carrier's liability for loss, damage, or injury to property transported caused by the initial carrier or by another carrier to which it may be delivered or which may participate in transporting it. * * *

The so-called uniform bill of lading, which has been in use in official and Western Classification territories, contains, and has contained, a provision that claims for loss or damage must be presented to the carrier within four months, but until the Croninger Case, supra, was decided by the Supreme Court, no effort was made by the carriers generally to enforce or to observe that provision. After the Croninger Case was decided the carriers adopted an entirely different course and took the position that this provision was in the bill of lading, the terms of the bill of lading were in the rate schedules, and therefore it was unlawful to depart from that requirement. This created a general controversy, and the sudden change from ignoring a rule to literally enforcing it necessarily created multitudes of unjust discriminations. The question was presented to and considered by the Commission, and as the fair and only means of composing the situation and avoiding endless controversy and litigation, the Commission issued its report. In the Matter of Bills of Lading, 29 Interst. Com. Com'n R. 417.

The Cummins Amendment makes it unlawful for the carrier to fix a period for giving notice of claims shorter than ninety days, for the filing of claims shorter than four months, and for the institution of suits shorter than two years. The law does not indicate the time or date from which these several periods of time shall be computed. * * *

It is to be remembered that the Cummins Amendment is not a separate statute, but is an amendment to the act. It must, therefore, be construed as a part of, and in connection with other portions of the act, and in such a way as to give effect to the whole statute. There does not seem to be any indication of legislative intent to change any provision of the act other than that part known as the Carmack Amendment. * * *

The legislation is aimed at specified contracts and declares them to be unlawful. The lawful rates on file at this time, therefore, are the rates providing for the limited liability. The Cummins Amendment, by making contracts limiting liability for loss caused by the carriers unlawful, does not destroy these rates, but they remain in effect and are lawfully applicable, for the 10 per cent. increased rates are merely additional and can not stand in and of themselves.

Applying correct rules of interpretation, the Cummins Amendment does not automatically bring into effect the increased rates named in the classifications and tariff publications as applicable to shipments which are not made subject to the terms of the uniform or carrier's bill of lading.

May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment? * * *

The Cummins Amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment.

Does the amendment to the act apply to export and import shipments to and from foreign countries not adjacent to the United States?

This must be answered in the negative, in view of the fact that, while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a nonadjacent foreign country, or from a nonadjacent foreign country to a point in the United States.

In the proviso, "that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods," what is the proper interpretation to be placed upon the words "and the carrier is not notified as to the character of the goods"? * * *

The word "character" as here used clearly relates primarily to value, or to those qualities affecting value, and when the entire proviso is considered the meaning seems to be that if the qualities affecting value of the goods are hidden from the carrier's view, or are not known to the carrier, the proviso applies. * * *

When the goods are not hidden from view, and the carrier is advised as to their character, all contracts or agreements purporting to limit the liability of the carrier for loss or damage caused by it are made void. A carrier, after the Cummins Amendment goes into effect, may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that under the amendment a contract or a tariff may lawfully limit to a reasonable maximum the liability of a carrier for losses which it does not

cause. It follows further that the rates provided by such tariff may be proportionate to the risk assumed.

This provision of the statute as to goods concealed from view and of the character of which the carrier is not advised clearly prescribes the right of carriers under the direction or approval of the Commission to provide for a graduation of rates in accordance with the declared value of the property transported. The liability provided by the rates so established by the Commission is applicable no less to instances of loss or damage chargeable to the negligence of the carrier than to those occasioned by causes beyond the carrier's control. But the carriers may not contract to limit their liability for loss, damage, or injury caused by them to property the character of which is manifested by the shipment itself or otherwise disclosed.

In this connection it has been suggested that the carrier might provide that in the event the shipper refused to declare the value the higher rates would apply. This suggestion cannot be approved. If the rate is lawfully conditioned upon the value as declared by the shipper, it is as much the shipper's duty to declare the true value of the shipment as it is his duty to declare the name of a commodity tendered for shipment as to which there are no different rates.

It is important to keep in mind that the carriers are not prohibited from making different rates dependent upon the value of different grades of a given commodity; that, except as covered by the Cummins amendment; and that if, in any instance, the shipper declares the value to be less than the true value in order to get a lower rate than that to which he would otherwise be entitled, he violates, and is subject to the penalty prescribed in, section 10 of the act. The carrier would also be subject to the same penalty in such a case if, having knowledge that the value represented is not the true value, it nevertheless accepts the shipper's representation as to value for the purpose of applying the rate.

Do the terms of the Cummins Amendment apply to the transportation of baggage? This must apparently be answered in the affirmative. Transportation of baggage is a part of the contract for transportation of the passenger. * * *

The necessity for revision of the bills of lading, live stock contracts, and other similar contracts of carriage, as well as of certain parts of the carriers' classifications and rate schedules, is manifest. * * *

If, in a proper manner and a proper proceeding, it shall be made to appear that, with regard to any commodity or commodities, the existing rates do not afford the carriers proper compensation for the services they perform and the risk which is imposed upon them, it could hardly be denied that the rates on such commodities might properly be increased in a sufficient amount to properly compensate the carriers for their added risk and liability. Where rates are lawfully based upon declared values the difference in rates should be no more than fairly and reasonably represents the added insurance. * * *

SECTION 4.—THE CONTRACT OF PLEDGE

HALL v. PAGE.

(Supreme Court of Georgia, 1848. 4 Ga. 428, 48 Am. Dec. 235.)

NISBET, J. It appears by the record, that the defendant, acting as agent for the plaintiff below, sold certain goods for his principal, and at the same time a small amount of goods of his own; and took in payment for the whole, a note upon six months' time. The plaintiff brought trover for the note. * * *

On the day that the goods were delivered to the defendant, the plaintiff received from him two notes, as collateral security, for the payment of the price of them. One of these notes, one hundred and thirty-five dollars in amount, was paid to him. The payment was after this suit was commenced, and subsequent to the service of a process of garnishment upon the plaintiff, sued out at the instance of other creditors of the defendant. Upon the motion for a new trial, it was claimed that the verdict was erroneous, in this: That this sum of one hundred and thirty-five dollars was not allowed as a credit to the defendant. The court, upon this point, ruled "that by the evidence this sum was held subject to summons of garnishment at the instance of Hall's (the defendant's) creditors. It is very certain that either Hall or his creditors have a right to that money. Both cannot have it, and Page (the plaintiff) cannot be delayed in his suit until the controversy between Hall and his creditors shall be ended. The jury, therefore, properly refused to abate Page's damages for that sum." The opinion of the court thus expressed, is excepted to. We cannot assent to the doctrine, that collateral securities, pledged bona fide for the payment of a debt without any trust reserved, belongs to the pledgor or his creditors; that is to say, that they belong to him or them, in any sense, which will defeat the pledgee's right to them, or which is the same thing, to money raised on them as security for his debt. That right is paramount to the rights of other creditors, and is good against the pledgor himself, until the debt is paid. The pendency of a garnishment makes no difference. The pendency of this suit assumes that the debt is due. If this action can be sustained—if that assumption be true—upon the trial, it was competent for the court to appropriate the money received on the collaterals, to the plaintiff, and of course to credit the defendant. It ought to have been so appropriated. There was no necessity to await an issue on the garnishment. The court, on the trial of this suit, had jurisdiction of the matter. It did, in fact, exercise that jurisdicton by determining that this money belonged to the defendant or his creditors. If it belonged to the defendant, it was pledged to pay this very debt. The creditors of the defendant had no rights in it, until the pledgee is paid. There could, therefore, be no controversy about it, between the defendant and the creditors, until the debt of the plaintiff is paid. But the debt, by the record, is not paid. The very question is: Shall it be now paid, to the extent of the money in hand? The plaintiff is not delayed at all. He is expedited; for a judgment that this money be allowed as a credit to the defendant, is an instantaneous payment to him. An appropriation in this way to the plaintiff would protect him on the trial of the garnish-

ment. Whether appropriated or not, his rights in this money are paramount to those of the garnishing creditors. There is nothing in this record, it may be proper to remark, which impeaches the fairness of this pledge. It is not obnoxious to the act of 1818, or any other law of the state. Upon the traverse of the plaintiff's answer to the garnishment (he answering truly, as this record discloses the facts), I apprehend that the garnishing creditors could not get a judgment against the plaintiff, until they had first proven that his debt was paid. In that event, it is true, these collaterals and this money would belong to the defendant or his creditors. But only in that event.

We examine this doctrine a little. We say that the deposit of these notes in the hands of the plaintiff, as collateral security for this debt, is a pawn or pledge. A pledge is a bailment of personal property as security for some debt or engagement. Story on Bailm. § 286. Ordinarily goods and chattels are the subject of pledges; but money, debts, negotiable instruments, choses in action, etc., may by the common law be delivered in pledge. * * *

What are the rights of the pledgee in the thing pledged generally? In virtue of the pawn, he acquires a special property in the thing, and is entitled to the exclusive possession of it, during the time, and for the objects for which it is pledged. The right of possession is exclusive—that is, it is good against all the world, for the purpose for which it is pledged—in this case, that purpose is the payment of a debt. For that purpose, the right to the thing is perfect. It yields to no other right which did not attach upon it, in the shape of a lien, prior pledge, or some claim existing prior to the pledge, and good in law. It is perfect against the pledgor. For if he wrongfully get possession, a suit in favor of the pawnee will lie against him for the thing, or for damages. He can bring an action for it, also against a stranger, or an action against the stranger for damages. * * *

He has also a right to sell the pledge, where there has been a default in the pledgor; if there is no stipulated time when the debt shall be paid, the pawnee may sell upon demand and notice. * * * He may file a bill in equity for foreclosure and sale, or upon demand and notice proceed to sell, ex mero motu, at his election. * * * These are the principal rights of the pawnee. What, specially, are the rights of the pawnee of negotiable securities? He may recover and receive the money due thereon; he may bring suit upon them in his own name. * * * He may sell them, and if he sells to a bona fide purchaser, the latter acquires an absolute property, if he buys without notice. * * *

It is not necessary to pursue this subject in detail. The pawnee is entitled to receive the money due on his collateral securities, and to hold it against his pawner and all the world, until he is paid. When a pledge is made for the benefit of the pledgee and a third person, who is also a creditor, and the fund raised is insufficient to pay both, the pledgee, being a creditor in possession, is entitled to preference. * * * If this is true as to other creditors, when there is a stipulation in their behalf, a fortiori, it is true as to creditors generally, as to whom there is no stipulation. The rights of the holder of negotiable instruments as collateral securities, in them, were considered by this court in the case of Bond v. Central Bank, 2 Ga. 106, and in Gibson v. Conner, 3 Ga. 52, 53. In the latter case we say: "The transferror parts with, and the transferee acquires, the legal title to the

negotiable paper thus transferred—the latter may sue on it in his own name, and although the original debt is not extinguished, the creditor has the right to apply the proceeds of the securities, when realized, to its extinction—nay, he is bound to do it, and whatever he does realize on them is a payment pro tanto." If it be the right of the pledgee to apply money collected on the securities, it is the right of the pledgor to consider money thus in hand as a payment. If such is the law of the case, he (the defendant) is entitled, the case being made, to have it so declared, and to have a credit on the original debt. This the court ought to do, if for no other reason than to avoid litigation. As before stated, the court had jurisdiction, in this case, of this subject-matter, and we think it erred in not ruling that this money was by law to be appropriated to the plaintiff's debt, and as a consequence, that the defendant was entitled to a credit for the amount of it.

Upon these grounds we remand the case.

SECTION 5.—THE CONTRACT OF SURETYSHIP

A surety is one who is under contract to pay the debt of another. The contract assumes various forms. At the time of a sale of goods by C. to D., S. may promise to pay if D. does not. Or D. may give his note for the purchase price to C., S. signing as indorser, or S. may sign as a joint maker with D. In all these cases, if S. assumed his obligation to enable D. to obtain credit with C., S. is a surety for D., the principal debtor. The liability of S. to C. is not identical in the three cases supposed, for in one case he has assumed a collateral or secondary obligation on a simple contract, in another he is secondarily liable on a negotiable instrument, and in the last case he is primarily liable on a negotiable instrument. But in many respects S. sustains the same relation to C. and D. in all three cases, as well as in other cases where the contract of suretyship assumes other forms.

The law of suretyship, or of principal and surety, is usually treated as a branch of the law separate and distinct from the general law of contracts. However, the relation of S. to C. and D. is contractual, and accordingly these general principles of the law of contract are applicable. In addition, we find that a number of principles of law developed by courts of equity materially affect the legal relations of the parties. We are here interested in noting, very briefly, indeed, some of the more important rights of the surety. Looking at the subject from the standpoint of the law of contracts, the problem in the main is to ascertain the terms of the contract. As will appear, some of the most important terms and conditions in the contract of suretyship are implied, either in fact or in law.

BOATMEN'S SAVINGS BANK v. JOHNSON et al.

(St. Louis Court of Appeals, Missouri, 1887. 24 Mo. App. 316.)

THOMPSON, J. The single question presented by this record is whether an indorser or surety is released by a composition agreement between the holder of the obligation and the maker, acceptor, or other principal debtor, which composition, in express terms, reserves every right and remedy which the holder, or obligee, has against other persons. The question must be answered, upon authority, that such agreement does not discharge the indorser or surety.

Two principles are universally conceded in respect of the rights of sureties, and are not disputed by the parties to this proceeding: (1) That a valid agreement between a creditor and his principal debtor, whereby the creditor, in consideration of the payment of a part of the debt, discharges the principal debtor, will, without more, operate to discharge a surety. (2) That an agreement between a creditor and his principal debtor, whereby the creditor agrees, for a consideration, to extend the time of payment, will, without more, operate to discharge a surety. But it is an exception to the former of these rules, equally well settled, that such an agreement will not operate to discharge a surety where the agreement itself contains an express reservation of the remedies of the creditor against sureties, or against all persons other than the principal debtor, who may be liable. * * *.

It is an equally well-settled exception to the second of these rules that such an agreement will not operate to discharge a surety, where the agreement itself contains an express reservation of the remedies of the creditor against sureties, or against all persons other than the principal debtor who may be liable. * * * These two exceptions to the two rules above stated rest upon the same principle. They are grounded upon the principle that, where a contract expressly reserves the remedy of the creditor against other persons (which includes sureties), the sureties are in no way prejudiced by the agreement. By entering into such an agreement, the principal debtor impliedly consents that whatever remedies his sureties have against him shall remain open to them. They are thereafter at liberty to pay the debt at once, and proceed immediately against their principal for reimbursement. An examination of many decisions shows that the principles which support these two exceptions to the respective rules above stated are precisely the same. Courts adopt the same mode of reasoning in the two cases, and cite interchangeably decisions where the agreement was for a discharge of the principal debtor, and where it was merely for an extension of time to him.

This principle has been applied in a number of cases where the agreement was merely that the creditor would not sue the principal debtor within a stated period of time. * * * In these cases, where there is a reservation of the remedies of the creditor against all other persons, or against sureties, the reasons upon which the courts refuse to discharge the sureties, are twofold: (1) The reason above stated, that the agreement in no way prejudices the surety as to any remedy which he may have against his principal. (2) The additional reason that a covenant not to sue cannot be pleaded in bar of an action, in case it is brought in violation of the covenant, the courts proceeding upon the refinement that such a covenant affords merely the ground of

an action for damages. This distinction was noticed by our Supreme Court in Rucker v. Robinson, 38 Mo. 154, 90 Am. Dec. 412.

Whether it is well or ill founded, we need not now consider. Assuming that it is well founded, the defendant's position is not helped, because, in the cases where the agreement was merely an agreement not to sue, the courts have universally rested their decisions as well upon the reason that the sureties were not prejudiced by the agreement, and hence not discharged, as upon the reason that the agreement did not prevent the creditor from suing the principal debtor at any time. An examination of numerous cases convinces us that, with one or two isolated exceptions, they afford no ground for raising the distinction, which has been attempted in this case, between agreements not to sue and agreements to discharge the principal debtor entirely, reserving rights against all other persons. * * *

We find, then, that the exception to the general rule, which supports the plaintiff's claim in this case, has been thoroughly settled in England, and in this country, by the most authoritative courts; and as we have no jurisdiction to change the law, we must hold that the circuit court erred in the view that the defendant was not liable, and in nonsuiting the plaintiff. * * *

The judgment will be reversed, and the case remanded. * * *

UTTERSON v. ELMORE et al.

(Springfield Court of Appeals, Missouri, 1911. 154 Mo. App. 646, 136 S. W. 9.)

GRAY, J. This is a suit brought by the plaintiff against D. R. Elmore & Son, and Sam Jones and M. Beckman, for $321.71. In July, 1908, the plaintiff made a contract with said Elmore & Son to build a residence for him. At the time the contract was made, a bond was executed by the contractors to the plaintiff, with the defendant Jones and Beckman as sureties, in the sum of $1,000, for the completion of the building according to plans and specifications. The contractors failed to complete the building according to the contract or the plans and specifications, and also failed to pay bills for material, so that the plaintiff, in addition to the contract price, was compelled to pay the above sum.

This suit was instituted against the contractors and the sureties. The cause was tried before the court without a jury, resulting in a judgment in favor of the plaintiff and against the contractors for $259.45, but in favor of the sureties. The plaintiff appealed from that judgment to this court, and the only question for decision here is whether the trial court was right in excusing the sureties on the bond.

The written contract for the completion of the building, entered into between the plaintiff and the contractors, expressly authorized changes in the work and in the plans and specifications. The bond, however, was conditioned for the performance of the contract, but read as follows: "If the said D. R. Elmore & Son shall duly perform said contract by completing the building as described by the plans and specifications and deliver it up free from liens or claims then this obligation shall be void." The contract provided the work should be done within a specified time and a penalty of a certain amount per day was added for the failure so to do. The plans and specifications

made no provision for any changes, and contained no clause requiring the work to be done within a specified time, or a penalty for failure to do so. The sureties claim that without their consent the plaintiff and the contractors made alterations and changes in the building, and on account thereof they were released.

The only testimony relating to the changes was given by the plaintiff. He testified that the doors were made six inches larger than called for in the plans, and he paid the contractors therefor $2.50; that another change was made in a door, and he paid therefor 50 cents; that a change was made in the way of attaching rafters, resulting in extra plastering, amounting to $17.75; that a change was made in the balcony, by leaving out one window and moving one, and that he paid the contractors extra therefor the sum of $18; that shingles were substituted for ridge poles at the extra expense of $2.25. He also testified to a number of other changes made under an agreement between himself and the contractors without the consent of the sureties, but that said changes in no wise increased the cost of the building.

Had the bond been conditioned that the contractors should construct the building according to the contract, then the changes made under an agreement between the plaintiff and the contractors would not release the sureties. The contract expressly provided that changes might be made, and where the contract so reads and the bond is conditioned for its faithful performance, then the surety is liable, notwithstanding the changes. * * * The bond in this case does not provide for the completion of the contract by the contractors in all its details. It simply provides for the completion of the contract "by completing the building as described by the plans and specifications."

It must be accepted as the settled law of this state that there is no implied obligation on the part of a surety that he has undertaken more or other than that expressed in his contract, and it is only to the extent and in the manner and under the circumstances pointed out that he is bound. * * * It is also well settled that any substantial change made in the contract by the principal and the contractor, without the consent of the surety, will release the latter regardless whether the alterations were injurious or beneficial to the surety. * * *

In this case the sureties' undertaking, when strictly construed, only required the performance of the contract to the extent of completing the building according to the plans and specifications. Their liability, therefore, is not to be measured by obligations requiring the completion of the building according to a contract in which are provisions for changes and alterations. * * *

The second count of plaintiff's petition is based upon the fact that the contractors did not complete the building within the time specified in the contract. The contract provided liquidated damages of $3 per day for each day the work remained incomplete after the time specified for its completion in the contract. At the beginning of the trial the defendants objected to the introduction of testimony on said count, for the reason that it did not state a cause of action against the sureties. The court sustained the objection as to the sureties, and plaintiff acquiesced in such ruling by making no point thereon in his motion for new trial.

As we have stated, the condition of the bond was not for the full performance of the contract in every particular, and therefore the sureties were not liable for the failure to perform that part of the contract. This part of the opinion is written solely for the purpose of illustrating the other issue in the case. Inasmuch as the bond is not conditioned for the performance of all the terms of the contract, the liability of the sureties must be limited to the parts of the contract mentioned and described in the bond, to wit, by completing the building as described by the plans and specifications.

The contention of appellant is that the changes were so immaterial that they should be ignored. There is much merit in this contention. If we were free from controlling decisions in this state, we might adopt appellant's view. But in Beers v. Wold, 116 Mo. 179, 22 S. W. 620, the contract price for the work was over $31,000. The real expense and cost of changes amounted to a little over $221. The contention was that they were so immaterial that they should be ignored. The Supreme Court, speaking through Black, J., said: "Can it be said these changes, taken as a whole, were so small that the law will take no notice of them? We think not. No case to which we are cited will justify any such conclusion. To a suit to recover the expense brought about by these alterations, it would be no answer to say that they were immaterial. These changes destroyed the identity of the contract, and that is sufficient to discharge the sureties." This case is in point, and we are bound by it.

In addition to the changes heretofore enumerated and which were made at an increased cost, there were numerous changes made by agreement between the plaintiff and the contractors. Some of them in no manner affected the actual cost of the building, and a number of them decreased the cost thereof. But when all the alterations are taken together, they substantially changed the contract, and under the rule in this state that the surety has the right to stand on the very letter of his contract, and that any material change in the same, without his consent, releases him, we are of the opinion that the trial court did not err in holding the sureties were not liable in this case, and the judgment will be affirmed. * * *

BLANCHARD v. BLANCHARD.

(Court of Appeals of New York, 1911. 201 N. Y. 134, 94 N. E. 630, 37 L. R. A. [N. S.] 783.)

Action by Esther F. Blanchard, as administratrix of the estate of Flint Blanchard, deceased, against Amos F. Blanchard. Appeal by defendant from judgment in favor of plaintiff.

COLLIN, J. The defendant on May 12, 1900, made his negotiable promissory note for $1,100.15, payable with interest to the order of Flint Blanchard and to mature August 12, 1900. Flint Blanchard indorsed it for the accommodation of the defendant, who then delivered it to and received thereupon from Daniel Griswold the sum of $1,100.15. Flint Blanchard on July 9, 1900, waived demand of payment and notice of the nonpayment thereof. The defendant made no payment upon the note. Flint Blanchard made two small payments thereon, and after his death, February 17, 1906, and plaintiff's appointment, March 5, 1906, plaintiff paid February 19, 1907, to Griswold upon his demand $1,101.50, the amount unpaid thereon; the statute

of limitations being then invocable by the defendant, but not by the plaintiff, because the 18 months next succeeding the death of Flint Blanchard were not a part of the time limited for the commencement of an action upon his indorsement against his administratrix. Code Civ. Proc. § 403. The action, commenced October 8, 1907, rests upon the payment of moneys for the use of the defendant and the contract, implied by law, of the defendant to repay them. The defendant's counsel takes the position that the making, indorsement, and delivery of the note created an express contract between the defendant and Flint Blanchard, which was not annulled or changed through the payments to Griswold, the existence of which prohibits or bars an implication, and plaintiff is confined to an action upon the note, to which the statute of limitations is a perfect defense, and that the consequent loss of plaintiff is the result of the failure of her intestate and herself to take up and sue the note within the six years from August 12, 1906.

The doctrine of implied contract is firmly placed in our system of jurisprudence. With whatever reason or logic it and the legal fiction which it in part, at least, is may be characterized as a mythical creation or an usurpation, it is too inveterate and useful to be either shattered or discarded; nor are we called upon to justify its existence by writing of the beneficial part it has worked in the historical development of the law. The law is practical and has as a purpose to adjudge, through just and general principles and continuity, the actual disputes growing out of the conduct and transactions of those under its jurisdiction. If it is not in all respects logical and conformable to pure reason, no more are the conduct and transactions which are the causes of those disputes.

This action is ex contractu and has no support other than a contract to be by the law implied from the facts and conditions established herein. In case the law refuses to declare the contract, the action fails. The note of the defendant must be eliminated as the basis of a recovery. Under the facts, does the law imply a contract on the part of the defendant to pay the plaintiff the amounts paid by herself and her intestate by reason of his indorsement?

Those payments were not voluntary. As to Griswold, the indorsement was the agreement of Flint that on due presentment the note should be paid according to its tenor, and that, if it were dishonored and the necessary proceedings on dishonor were duly taken he would pay the amount thereof to the holder, * * * which at the time of the payments had become certain and obligatory. * * *

The relation as to the debt between the defendant and Flint, in so far as it is involved in this action, was that of principal and surety. * * * The defendant, when he procured the indorsement, impliedly engaged that he would indemnify Flint and reimburse him in case he was not compelled to pay. This engagement was not created by the note. * * * The failure of the defendant to pay the note did not constitute a cause of action in favor of Flint against the defendant, but a payment by Flint did. A cause of action accrued when he paid, and the statute of limitations then began to run. Each of the payments made by Flint or the plaintiff was within the six years next before the commencement of the suit, and was not barred by the statute of limitations. * * *

The judgment should be affirmed, with costs.

GIESEKE v. JOHNSON.

(Supreme Court of Indiana, 1888. 115 Ind. 308, 17 N. E. 573.)

ZOLLARS, J. J. H. Gieseke and appellee executed a promissory note to the First National Bank of Vincennes in which was a stipulation for the payment of attorney's fees for collection.

Although not shown upon the face of the note, appellee was surety for Gieseke. Before the maturity of the note Gieseke died, and appellant was appointed administrator of his estate. After the maturity of the note appellee paid it, but paid no attorney's fees. Subsequently he filed his claim against the estate of Gieseke, stating therein the amount thus paid, setting out a copy of the note, and claiming attorney's fees for its collection. The court below allowed the claim, and included in its judgment $15 as such attorney's fees.

Is appellee entitled to recover such attorney's fees? That is the only question for decision here.

We are satisfied that he is not. One sufficient reason why he is not is that he is entitled to recover the amount paid to the bank, with interest, and no more. His right of action is for indemnity only, and rests upon an implied promise on the part of the principal. Hence it is that a surety cannot maintain an action against his principal until he has paid something, and then only for the amount paid, with interest. In this state the rate of such interest is regulated by statute. * * *

By the terms of the note the makers agreed to pay to the bank reasonable attorney's fees for its collection; but the principal maker of the note did not thereby agree to pay to appellee, as his surety, such attorney's fees, nor any other amount. As already stated, the rights of the surety and the obligation of the principal, as between themselves, in a case like this, rests upon an implied promise on the part of the principal maker which arises under the law for the indemnity of the surety.

The action by appellee, the surety, against the principal maker, is not upon the note, but upon the implied promise of indemnity. And hence it is that his right of action is not limited by the statute of limitations applicable to the note, but by the statute of limitations applicable to accounts and contracts not in writing, which, in this state, is six years. * * *

Upon any view that may be taken of the case, the attorney's fee should not have been allowed, and to that extent the judgment is too large. * * *

BINGHAM v. MEARS et al.

(Supreme Court of North Dakota, 1894. 4 N. D. 487, 61 N. W. 808, 27 L. R. A. 257.)

CORLISS, J. The defendants were sureties on an undertaking given on appeal to this court from a judgment. Their only defense to this action against them on the undertaking is that the principal on whose behalf they signed the undertaking assigned to the plaintiff, as collateral to the claim on which such judgment was rendered, certain promissory notes secured by real estate mortgages, and that such collateral security is sufficient to pay such judgment and all expenses; that they have notified the plaintiff that he must resort to such collater-

al to collect his claim, but that he has failed to do so. Under the circumstances of this case, these facts do not constitute a defense. The general rule is that the surety has no right to insist that the creditor shall first proceed against the principal debtor, or any security which such debtor may have given him. Upon default the surety may at once be sued. 1 Brandt, Sur. § 97. It is true that in cases characterized by exceptional features, equity may compel the creditor to resort first to the property of the principal debtor where this will occasion no inconvenience or delay to the creditor. * * * But the facts of this litigation do not call for the application of this rule. * * *

[Judgment for plaintiff affirmed.]

On Rehearing, 1895.

The earnestness with which counsel for defendants have pressed upon us their application for rehearing constrains us to go more fully into the discussion of the exceedingly interesting question presented on this appeal. In their main features, the English common law and the Roman civil law differed radically from each other touching the right of the surety to require the creditor to proceed against the principal debtor or the security coercing payment by the surety. In the earlier period of Roman jurisprudence, the right of the surety to compel the creditors to resort first to the principal to collect his demand appears to have been well established; but the rule was gradually departed from. Justinian, however, restored it, and from his time the doctrine was universally recognized throughout the empire. It has been incorporated in the jurisprudence of many of the nations of Europe. * * * But it never secured a footing in England. There the contrary doctrine has prevailed from the earliest times. The common-law rule is that the surety must pay and seek reimbursement from the principal or out of the securities the latter has given the creditor. This was always the rule in courts of law. But in equity and in bankruptcy proceedings a rule somewhat analogous to that of the civil law grew up. This rule, however, was less sweeping in its effects upon the creditor than the rule promulgated by Justinian. It more carefully guarded his rights from prejudice. The English law regarded the promise of the surety as am absolute promise, unless it was in terms conditional. The surety was under the same obligation as the principal to pay the debt. The courts of law therefore ignored the equities between the principal and the surety when the creditor was seeking to collect his claim of the latter.

In equity, also, the promise of the surety was looked upon as an unconditional promise; but equity, unlike the law, would not under all circumstances, refuse to consider the rights of the surety in his relation to the principal; and whenever a case arose, special in its character, calling for the aid of equity to protect the surety from injury, that court, true to its traditions and its fundamental principles, extended relief to the surety, whenever it could do so without, on the other hand, affecting the right of the creditor to the payment of his debt according to the terms of his contract. But in all such cases equity required that the creditor should be saved from delay, from expense, and from all risk. * * * When the object of the surety's appeal to equity was to compel the creditor to exhaust the collaterals in his hands before proceeding against the surety, the foundation of equitable relief was the inability of the surety himself to enforce such collateral after paying

the debt, or the possibility that the creditor by some act had impaired its value or destroyed its legality. The mere fact that the creditor held security for the debt did not entitle the surety to appeal to equity for a decree that the creditor look first to such security for his pay. In such a case the surety could protect himself by paying the claim, and being subrogated to the creditor's rights to the security. But if, after payment by him, he could not enforce such security, or if grave doubt existed as to its legality because of some act of the creditor with respect to it, then a special case was presented, necessitating the interference of equity to prevent injustice to the surety. * * *

The general rule that some peculiar equity must exist in favor of the surety—that the case must be an exceptional one to entitle the surety to relief—applies as fully when the surety is seeking to compel the creditor to first sue the principal as when he is insisting that the creditor shall first exhaust the security he holds. These rules of the common law constitute the law of this state, so far as they have not been changed by statute. We will shortly come to that subject. Now, it is obvious that defendants' answer discloses no special equity in their favor. The security which they ask the court to compel the creditor to exhaust they can secure absolute control of by themselves paying the claim they owe. As between the creditor to whom a debt is owing and the surety who owes it, equity very properly declares that the creditor ought not to be compelled to enforce, for the benefit of the surety, the security he holds, but that the surety himself should pay the debt, and enforce such security for his own benefit. * * *

The rehearing is denied. The judgment is affirmed. All concur.

FREW v. SCOULAR.

(Supreme Court of Nebraska, 1917. 101 Neb. 131, 162 N. W. 496, L. R. A. 1917F, 1065.)

ROSE, J. This is an action for contribution between sureties. * * * The bond matured May 15, 1894, and was secured by a mortgage on land in Scotland, where all the parties resided except defendant, a resident of Nebraska. * * * It is alleged further that the laws of Scotland do not bar an action on the bond for 40 years. The suit is brought against George Scoular to compel contribution in the sum of $2,999, his alleged liability as one of three solvent sureties. Defendant pleaded that he signed the bond in Nebraska, that he was then, and has since been, a resident thereof, and that the action is barred here by the statute of limitations—a five-year period. * * *

Should defendant's plea of the statute of limitations be sustained? The question may be stated thus: May a surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation and who has been compelled to pay the debt of his principal, exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid? While the decisions appear to be in conflict, the better reason and the weight of authority seem to support the rule requiring contribution. * * *

In Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669, it was contended, as in the present case, that, since the statute of limitations had barred an action by the creditor against the defendant before the plaintiff paid the debt, defendant received no benefit from such payment and

was not liable for contribution. In answer to this argument the court said:

"If the right of a cosurety to claim contribution rested upon the doctrine of subrogation to the rights of the creditor, the proposition might be true. The doctrine of subrogation has its origin in the relation of principal and surety, whereby a surety who pays the debt of his principal, is in equity, substituted in the place of the creditor, and is entitled to all the rights which the creditor may have against his principal. But the doctrine of contribution has its origin in the relation of cosureties or other joint promisors in the same degree of obligation. It is not founded upon the contract of suretyship. * * * It is an equity which springs up at the time the relation of cosureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt. * * * From this relation the common law implies a promise to contribute in case of unequal payments by cosureties. But equity resorts to no such fiction. It equalizes burdens and recognizes and enforces the reasonable expectations of cosureties because it is just and right in good morals, and not because of any supposed promise between them. This equity, having once arisen between cosureties, this reasonable expectation that each will bear his share of the burden is, as it were a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden. Neither the creditor, the principal, the statute of limitations, nor the death of a party, can take it away." * * *

The question is not whether the statute of limitations runs against a surety's claim for contribution, but when does the cause of action for contribution accrue? Ordinarily the statute of limitations does not commence to run until the cause of action accrues. The right of a surety to contribution does not arise until he has paid more than his proportion of the debt or until his liability has been determined by judgment. * * *

"In considering the questions involved, it should be borne in mind that this is an action for contribution. Contribution does not rest upon contract, but on the broad equitable principle that equality is equity. Justice and fair dealing demand that where one or more parties sign the same obligation and become equally obligated in precisely the same degree thereby, and stand upon the same footing as to their liabilities thereunder, one of the number shall not be compelled to assume the whole burden for his associates, but may compel them to share equally with him any loss that may occur as the result of their joint liability. In actions for contribution, therefore, the principle seems now to be well established that parol evidence is admissible to show the true relations existing between the several parties bound by a written obligation. * * * Such evidence is not offered to contradict or vary the contract contained in the writing, but simply to show the actual relations subsisting between the joint makers of the note and the real nature of the contract between them. Such facts are not a part of the contract and do not affect its terms, but are wholly collateral to it. To support his claim for contribution, therefore, the plaintiff clearly had the right to show his true relations to the note, and this without regard to the knowledge of the defendant." Bulkeley v. House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247.

If defendant was not one of the sureties, he is not liable for con-

tribution. The trial court therefore erred in excluding evidence on this issue.

It follows that the judgment is reversed, and the cause remanded for further proceedings.

ASSETS REALIZATION CO. v. AMERICAN BONDING CO. OF BALTIMORE et al.

(Supreme Court of Ohio, 1913. 88 Ohio St. 216, 102 N. E. 719, Ann. Cas. 1915A, 1194.)

NEWMAN, J. * * * It is well settled that, where one of two or more sureties for the same obligation has paid more than his share of the debt, he is entitled to contribution from his co-sureties to reimburse him for the excess paid over his share in order to equalize the common burden. Numerous authorities have been cited in support of this proposition, but it is to be observed that they speak of a common burden, and it is where parties are bound to discharge a common obligation that they are to be treated as cosureties. It is uniformly held, as we understand it, that the relation of cosuretyship exists only where there is a right of contribution. In the case under consideration this right is wanting. Not one of the bonding companies was bound to equalize the loss with the others in case of default. When one company paid its portion of the loss (the portion fixed by its bond), no claim arose in its favor against any of the other companies and no further demand could be made against it. Its obligation was fully discharged and the liability terminated.

Our attention has been directed to many cases and we shall refer briefly to a few of them bearing upon the question under consideration. * * *

In B. & O. R. Co. v. Walker, 45 Ohio St. 588, 16 N. E. 481, the court quotes from 2 Wait's Actions & Def. 288, as follows: "The doctrine of contribution rests upon the broad principle of justice that, where one has discharged a debt or obligation which others were equally bound with him to discharge and thus removed a common burden, the others who have received a benefit ought in conscience to refund to him a ratable proportion. It depends rather upon principles of equity than upon contract."

It seems, then, that the test of cosuretyship is, as stated by counsel, common liability upon the same obligation. In the case at hand there was no common liability. Each surety by its bond obligated itself for a fixed portion of the debt. The authorities uniformly hold that the doctrine of contribution has its origin in the relation of cosureties and is not founded upon the contract of suretyship; that it is an equity which springs up at the time the relation of cosureties is entered into and ripens into a cause of action when one surety pays more than his portion of the debt. It equalizes burdens and recognizes and enforces the reasonable expectations of cosureties, because it is just and right in good morals, and not because of any supposed promise between them. This equity having once arisen between cosureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each and remains for his protection until he is released of all his liability in excess of his ratable share of the burden. * * *

The bonding companies in this case did not obligate themselves to discharge the whole debt of the depositary in case of default but an aliquot part thereof. There was no common burden to discharge. Therefore there was no such thing as equalizing the discharge. There was no such thing as one of the companies performing the duty of all the companies or the payment of the whole debt; but, to repeat, when one of the companies paid its portion, that was a termination of its liability, and no right arose in its favor against any of the other companies. * * *

WASCO COUNTY v. NEW ENGLAND EQUITABLE INS. CO et al.

(Supreme Court of Oregon, 1918. 88 Or. 465, 172 Pac. 126, L. R. A. 1918D, 732, Ann. Cas. 1918E, 656.)

Action by the County of Wasco against the New England Equitable Insurance Company and others, wherein the named defendant and the French & Co. Bank were interpleaded. From a decree in favor of the bank, the named defendant appeals.

Wasco county brought this suit in interpleader so that the court could decide whether the sum of $920 held by the county should be paid to the New England Equitable Insurance Company, a corporation, hereinafter referred to as the bank.

On June 14, 1915, Henry Cromer entered into a contract to construct a certain highway for the county. A bond, signed by the contractor as principal and the insurance company as surety, was delivered to the county, as required by chapter 142, Laws 1913, and was filed in the office of the county clerk on June 17, 1915. The contract obligated the contractor, as required by statute, to pay all persons supplying labor or material for the prosecution of the work, chapter 61, Laws 1913. The written contract also provided that "* * * the partial payments under this contract and the final payment thereon shall be as provided by" chapter 142, Laws 1913. The bond was given to secure the performance of the contract and payment to all persons supplying labor or material for the prosecution of the work provided for in the contract. Cromer entered upon the performance of the contract and constructed a portion of the highway. Monthly estimates were made of the work done by Cromer, and the county paid him 75 per cent. of the amount earned, as shown by such estimates, and retained the remaining 25 per cent., as stipulated by the written contract between Cromer and the county and as required by chapter 142, Laws 1913, then in force. Cromer continued in the performance of his contract until about September 10, 1915, when he was obliged to quit because his equipment had been attached by creditors. A voluntary petition in bankruptcy was filed by Cromer on October 7, 1915, and he was subsequently adjudged a bankrupt. Negotiations between the county and the insurance company resulted in an agreement, on October 25, 1915, terminating the contract with Cromer and releasing the insurance company from its obligation to complete the highway upon payment by it of all the outstanding labor and material claims against the contractor. The insurance company paid claims made against Cromer, and approved by him, totaling $3,907.22.

On August 5, 1915, the bank loaned $200 to Cromer and took his promissory note for that amount, and at the same time Cromer signed and delivered to the bank an order, directing the county to "* * *

pay to French & Co., bankers, all money due on August estimate for work done on the J. T. Harper road contract. Please also pay all retained percentage upon completion of contract." The order was presented to the county and filed in the office of the county clerk on August 6, 1915. Cromer borrowed an additional $800 from the bank on August 11, 1915, upon his note for that amount. Cromer "got this money from French & Co. on the representations that it was to pay bills for labor and material for the construction of the road." The money loaned to the contractor upon the two notes was placed to his credit in the bank, and was checked out by him for labor performed upon and material furnished for the road. When the $200 note was given, it was understood between the bank and Cromer that he was "to have $800 more"; and the order upon the county "was given to reimburse them (the bank) for the money gotten on both of these notes." When Cromer discontinued work the county had in its hands the sum of $920 which it had retained out of the monthly estimates made during the progress of the work. The complaint filed by the county was accompanied with a tender of $920 to the clerk of the court. The insurance company and the bank each answered, and each asserted the right to receive the money. The decree of the court was for the bank and the insurance company appealed.

HARRIS, J. * * * The question for decisions is whether the insurance company or the bank is entitled to receive the $920 which the county had reserved from the monthly estimates. The insurance company resorts to the doctrine of subrogation to support its claim, while the bank contends that countervailing equities preclude the application of the rule of subrogation. Subrogation is not a matter of strict right, nor does it necessarily rest on contract, but it is purely equitable in its nature; and, since it is a creature of equity, it will not be enforced where it will work injustice to the rights of those having equal equities. * * * In Spencer on Suretyship, § 133, the author says: "The right of subrogation may be generally described as the equity by which a person who is secondarily liable for a debt and has paid the same is put in the place of the creditor so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration or indemnification as against the principal debtor."

A clear enunciation of the nature of subrogation appears in the much-quoted opinion delivered by Chancellor Johnson in Gadsden v. Brown, Speers' Eq. (S. C.) 37, where it is said that: "The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been enabled to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract, in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract, would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty. Sureties, for example, who have before become bound are amongst the especial objects of its care. Thus, if a surety pays

the debt of his principal, he is entitled to stand in the place of the creditor, and to have the benefit of all securities, funds, liens, and equities, to which the creditor was entitled."

While in some of its phases the doctrine of subrogation seems to have been expanded in recent years, it is not now necessary, nor would it be proper in the instant case, to attempt to fix the exact limits of its application, but it is sufficient to say that, as between the insurance company, the contractor, and the county, the surety is in a position to claim the benefits of subrogation because it has paid debts due to third persons, and when paying such debts it acted on compulsion and not as a mere volunteer. * * *

The fact that the insurance company is a compensated surety does not affect its right to claim the benefits of subrogation. It is true that the rule of strictissimi juris, which is generally available to those who are sureties without compensation, is usually relaxed when applied to a paid surety. In this jurisdiction the rule is that a hired surety must show that his rights have been injuriously affected before he can defeat his contract of suretyship. * * * A court of equity grants the right of subrogation because the surety has paid the debt of the principal, and the right of subrogation is not dependent upon whether the surety was or was not paid to sign the bond. It is enough that the surety was obliged to pay and did pay the debt. * * *

The bank relies upon the rule that subrogation will not be allowed where it will work injustice to the rights of those having equal equities. * * * The bank contends that the written order signed by Cromer, directing the county to pay to the bank all money due on the August estimate and "all retained percentage," operated as an equitable assignment of the fund, and entitles the bank to be paid in full out of the fund to the exclusion of the surety and all general creditors of the contractor. * * * The money which Cromer borrowed from the bank was actually used to pay for labor and material furnished during the prosecution of the work; and the bank contends that the surety received the benefit of the bank's money, and that therefore it would be inequitable to permit the surety to be subrogated to the rights of the county, and thus permit the surety to reap where the bank has sown. All parties would probably concede that the insurance company would be entitled to claim the benefits of subrogation in the absence of the bank, and hence the question for decision is whether the written order, plus the fact that the money which was loaned upon the faith of the written order was actually used to pay for labor performed upon and material furnished for the work, wrought such an equitable assignment of the fund as to preclude the surety from claiming the benefits of subrogation. The inquiry naturally involves an examination of the relative rights of the parties to the fund and a consideration of the fundamental reasons upon which those rights are based.

By his written contract Cromer agreed to pay all claims for labor and material furnished during the prosecution of the work, and also to complete the road. By its bond the surety obligated itself to pay all labor and material claims not paid by Cromer, and to complete the contract if Cromer did not. The law required this bond to be given, and directed that it should contain these provisions. The written con-

tract also provided for monthly estimates of the work, and that 75 per cent. of the amount earned each month should be paid to Cromer, while the remaining 25 per cent. should be retained by the county "until the completion and acceptance of said work"; and the law also required this provision to be written into the contract. Chapter 142, Laws 1913. Since the bank was bound to know the law, it is deemed to have known that the contract with Cromer provided that 25 per cent. of each monthly estimate should be reserved by the county, that a bond was given, and that the bond obligated the surety to pay all claims for labor and material. Moreover, the bank did in truth know that the county had retained, and would continue to retain, a percentage of each monthly estimate because the very language of the written order imports such knowledge. It must be remembered, too, that the money in controversy includes nothing but the 25 per cent. reserved out of the monthly estimates.

The percentage reserved by the county out of each monthly estimate served to secure the county against any loss it might sustain on account of the nonperformance of the contract; and when Cromer abandoned his contract the county had a right to hold this fund to secure itself against any damages that might have resulted from a nonperformance of the contract by Cromer. * * * The right of the county to retain a specified percentage dates from the time the contract was entered into, and it must be conceded that, until the claims for labor and material are paid, the county's right to the fund is superior to that of the bank, claiming by an equitable assignment from the contractor.

When the insurance company fulfilled its obligations and paid the debts incurred by Cromer for labor and material, it was entitled to call upon a court of equity and be subrogated to the rights which the county could have asserted against the fund. * * * The right of subrogation dates back to the time when the insurance company entered into the contract of suretyship. * * * If the right of the county to hold and to apply the moneys is superior to the claim of the bank, and if by paying the claims for labor and material the surety is subrogated to the right of the county, as of the date of the contract of suretyship, it necessarily and inevitably follows that the right asserted by the surety is superior to the claim made by the bank. * * *

When the bank loaned its money it knew that before Cromer entered upon the performance of his contract he had given a bond signed by a surety, and that the law required the county to reserve 25 per cent. of each monthly estimate. From the date of the contract of suretyship the bank was bound to know that the insurance company had an equity in the funds to be reserved; and when the bank loaned its money it did something that it was not obliged to do, and it must be deemed to have acted with a full knowledge of the right of the surety. The contractor and the bank could not create a lien in favor of the bank upon the reserved fund and make it paramount to a prior and then existing lien of the surety. * * *

It follows that the insurance company is entitled to be subrogated to the right of the county. The decree of the circuit court is reversed, and a decree will be entered, awarding the $920 to the insurance company. * * *

PART II

AGENCY

Chapter

Introduction.
I. Source and Scope of the Agent's Power.
II. Relations of the Principal and Third Persons.
III. Termination of the Relation.
IV. Relations of the Principal and Agent.
V. Relations of the Agent and Third Persons.

INTRODUCTION

The law of agency deals with the problems which arise out of the business relationship of employer and employee. The terms "employer" and "employee" are used loosely to describe various relationships, some of which are differently constituted, have different objects, and produce different results. To illustrate: (1) One may employ a laborer to mow one's lawn, a chauffeur to care for one's automobile, or a delivery boy to deliver goods. (2) One may employ a landscape gardener to lay out a garden, an operator of a garage to keep and repair a car, or a transfer company to move household goods. (3) A. may employ B. to purchase goods for him from C., or to act as a general manager of his store. (4) Or one may employ a telegraph company to deliver a message to another, containing an offer to buy goods from the person to whom the message was sent. All of these situations have some elements in common. In general, they may all be called relationships of employer and employee, but in some respects there are differences.

Employments listed under groups (1) and (2) possess this common aspect: That in none of them is it likely that the performance of the assigned duties will result in bringing the employer into new contractual relations with any third party. But there is this important difference between the cases referred to in (1) and (2): In the first class of cases the employer possesses the right to direct the manner of executing the work to a greater extent than is true in cases of the second class. A. has a greater measure of control over his own personal chauffeur than he does over the driver of a Yellow taxicab. This difference in the facts produces different legal results. For example, the owner of the car will be liable for torts committed by his chauffeur while acting within the course of his employment, but the employer will not, as a general rule, be liable for the torts committed by the driver of the taxicab. The relation of employer and employee which falls within the first group is more narrowly designated as that of master and servant, while in the second group the relation is that of employer and independent contractor.

Employments falling within classes (3) and (4) have this in common: The act of the employer may result in creating new contractual relations between the employer and the employee. In this respect employments in groups (3) and (4) differ from the employments in groups (1) and (2). Employments in groups (3) and (4) are dissimilar, in that in group (3) the employer has the right to control the employee's manner of performing his duty to a much greater extent than he does in the case referred to in group (4). Accordingly, employments in group (3) produce the relationship of principal and agent. No special terms are used to describe the relationship between the parties to the type of contract set forth in group (4). The telegraph company could be called an independent contractor and the sendor of the message the employer.

It is not to be inferred that we have one set of legal principles applicable to masters and servants and another set of principles applicable to employers and independent contractors. Many doctrines apply equally to both relations. But in the master and servant relationship the parties are in a fiduciary relation, which creates duties not present in the other cases. So, also, with respect to the relation of principal and agent, as compared with other employments, such as that of a telegraph company to transmit and deliver a telegram, many rules of law are alike applicable to both; but, again, there is a fiduciary relation between the principal and agent, which is the basis for rights and duties not found in the other case. Also the employee's dealings with the third parties will not produce the same legal consequences.

The cases in the following five chapters do not deal with the two kinds of relations which have been described as those of employer and independent contractor. Indeed, there is no necessity for so doing, because all we have here is a simple contract between two persons, of whom one has agreed to perform personal services in return for some consideration from the other party—usually money. The law of contracts governs the formation of the contract, fixes its rights and duties, defines what constitutes a breach, etc. In other words, it is merely one type of a simple contract, and accordingly is governed by the law of simple contracts.

The cases in the following chapters in Part II deal with the relations of principal and agent and master and servant. These two relations have this important element in common: There is a fiduciary relation between the parties; that is, the employer, whether he has employed another to mow his lawn or to go out and buy goods for him, has necessarily reposed in the employee a certain trust and confidence. He has intrusted him with the performance of certain acts. Obviously this very fact will operate as a source of correlative rights and duties, which are not expressly agreed upon by the parties, but imposed upon them by law. Perhaps many of such rights and duties may properly be regarded as originating in mutual promises implied in fact, but at any

rate many of them are not made the subject of actual discussion by the parties. There is no particular necessity or advantage in attempting to distinguish between the relations of master and servant and those of principal and agent. In fact, it is doubtful whether a real distinction in legal effect can be drawn. It is sometimes said that a servant does not make contracts, but performs menial work, while an agent makes contracts for his principal, and is therefore on a more dignified plane. This would place architects, engineers, and others similarly employed, as regards many of their duties, on a lower plane than that occupied by the waiter in the restaurant, who is the medium through which his employer makes contracts with the patrons of the café.

The use of the expressions "master and servant" and "principal and agent" is often convenient, but any attempted distinctions of this sort, when drawn for the purpose of discovering or producing different legal effects from specified acts, is largely unprofitable. There is a difference, of course, in employing one to spade one's garden and employing another to buy goods for one on credit. So, also, is there a difference between pine trees and mahogany trees. But both kinds of trees are used in the manufacture of furniture, and when the trees or the furniture are sold the resulting contracts are governed by the same rules of law. The rights, duties, and powers of the bell boy are fixed by the same principles that define the like relations of the general manager to the corporation which employs him and to third parties with whom he comes in contact.

Coming now, more specifically, to the questions with which we shall be concerned in the following chapters, it is apparent that we have three sets of relations with which to deal: (1) The relations between the employer and third parties, which come into existence as a result of the employment; (2) the relations between the employer and the employee; and (3) the relations between the employee and third persons, with whom he has come in contact because of his employment.

When will an act done by the employee, whether called an agent or a servant, bring into existence correlative rights and duties between the employer and third persons? Where the employee is hired to spade the garden, the chance of his having any dealings with third parties is not great; but it is possible that he may overturn the sod on a neighbor's lot. If he does so, by accident or otherwise, will his employer be liable? Stated broadly, under what circumstances may an employee render his employer liable for torts committed by him? Again, when the employer has sent his employee out to sell or buy goods for him, under what circumstances will the act of the employee result in a contract between the employer and the third party? This is the question raised in Chapter I; that is, in this chapter we shall be seeking for the rules of law which indicate the source and extent of an agent's power to bind his principal on a contract.

The cases in this topic contain a great deal of discussion as to the agent's **authority**. This is not the entire question. A contract between the principal and third party will result from an act of the agent when, and only when, the agent possessed **power** to enter into it. Authority is one source of power, but it is not the only source. Authority is the power which the principal, either expressly or by implication of fact, confers upon the agent. But sometimes the law provides that an agent will possess **power** to bind his principal, not only when the principal did not in fact confer authority upon the agent to do the specific act, but actually instructed him not to do so. The terminology which one meets in this line of cases tends to complicate the problem, and tends to exaggerate the difficulty in the real situation. The courts discuss express authority, implied authority, apparent authority, ostensible authority, incidental authority, authority by necessity, authority arising from custom and usage, and authority arising from estoppel. Sometimes the term "power" is used interchangeably with the term "authority." It seems preferable to use the word "power" to describe the agent's relation to his principal, whenever by his own voluntary act he may create, alter, or extinguish his principal's relation to a third party. The term is broad enough, therefore, to describe the creation, modification, or extinguishment of contract relations between the principal and a third party, and also it will include the imposition of a legal liability upon the principal arising from the commission of some torts by the agent.

There are only two real sources of power: (1) The power which arises from the principal's consent; and (2) the power which arises by operation of law, in the absence of the principal's consent. Consent, of course, does not necessarily mean actual mental consent. The law looks for facts. When discovered, if to the court it appears that the facts justify the inference that the principal gave consent, the power is said to exist in the agent. Express power would be based upon the actual words spoken or written by the principal to the agent. Implied power would be based, not on language, but on conduct. When P. employs A. to act as general manager of his store, it is often said that A. is thereby given apparent authority to do what general managers of similar stores are accustomed to do. This is true. But this apparent authority is real power. It is not absolutely necessary to employ the word "apparent." By appointing A. as a general manager, P. confers power upon A., the source of which is the consent of P., and the limits of the power are fixed by resort to custom and usage. P. knows these usages, or, if in fact he does not know them, justice demands that his rights and duties be fixed just as if he were aware of their existence.

To put the matter in another way, the extent of the agent's power will be ascertained by a process of interpreting the words, "A., I appoint you as general manager of my store." This will be accomplished by resort to custom and usage, to the conduct of the

principal and the agent, and to the course of dealing between them. Incidental authority and authority arising from necessity, upon analysis, will usually appear to rest upon the consent of the principal; the nature and extent of such authority being fixed by a similar process of interpretation of the words or the conduct by the principal and the agent.

The term "ostensible authority" is frequently used as synonymous with "estoppel." An estoppel is a rule of law which, when applied, prevents a person from telling the truth. Usually, of course, one's rights and duties should be fixed only after a discovery and a utilization of the truth. But sometimes, if all truth were taken into consideration, injustice would result. If P. says to A., "Act as general manager of my store, but do not buy goods on credit from X.," and A. accepts and buys goods on the credit of P. from X., there will be many cases where P. would be estopped from stating that he did not confer power on A. to enter into such a contract. With reference to the source and scope of authority, the principal point to note is that, whatever terms may be used in describing the situation, an agent's power originates and is bounded by the consent of the principal, or it originates without his consent, even in actual opposition to his intention, solely because the law deems it just to do so. The most important series of problems, therefore, is to determine the circumstances under which contractual rights and duties will be created between the principal and a third party, by reason of the act of the agent. The first three chapters deal with various phases of this problem.

Two problems remain: (1) That which concerns itself with the relations between the principal and agent; (2) that which deals with the relations between the agent and third persons. In both we are dealing with rights and duties which arise from contract, and which arise by operation of law in the absence of contract. The relation between principal and agent is largely contractual, but may exist where many of the important features of an ordinary contract are wanting. The relation of principal and agent has been defined as follows:

"Agency is a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other." [1]

The relations between the agent and third party will usually be those which are imposed by the law, irrespective of contract; but, in some instances, there will result true contractual relations between the agent and third party with whom he has dealt.

[1] Professor Warren A. Seavey, The Rationale of Agency, 29 Yale Law Journal, 859 (1920).

CHAPTER I

SOURCE AND SCOPE OF THE AGENT'S POWER

Section
1. Powers Arising from Express, Implied, and Incidental Authority, Necessity and Estoppel, Considered Generally.
2. Illustrations.

SECTION 1.—POWERS ARISING FROM EXPRESS, IMPLIED, AND INCIDENTAL AUTHORITY NECESSITY AND ESTOPPEL, CONSIDERED GENERALLY

ST. LOUIS GUNNING ADVERTISING CO. v. WANAMAKER & BROWN.
(St. Louis Court of Appeals, Missouri, 1905. 115 Mo. App. 278, 90 S. W. 737.)

Action by the St. Louis Gunning Advertising Company against Wanamaker & Brown. From a judgment in favor of plaintiff, defendant appeals.

GOODE, J. This is an action to recover rentals alleged to be due for six months' advertising on billboards at different stations in the city of St. Louis. Both plaintiff and defendant are incorporated companies, the former engaged in business in the city of St. Louis and the latter in Philadelphia. The advertisements were ordered by a written contract signed: "Wanamaker & Brown, A. Lurie, Selling Agent." The defense is that Lurie had no authority to bind the defendant. Plaintiff relies on both an original authority to Lurie, and, in default of such authority, ratification by the defendant. The advertisements were painted and displayed at the different stations in accordance with the contract, and the aggregate rentals of $50 a month, for six months, were earned. Lurie formerly represented the defendant, a merchant tailor, in Kansas City. He opened a store of the same sort at Tenth and Olive streets, in St. Louis, in the early part of 1903, under an arrangement by which he was to bear the rent and other expenses. The defendant furnished Lurie with some $600 worth of goods for display purposes and samples; he giving a bond to indemnify defendant against loss from having furnished the goods. Lurie took orders for men's clothing, and the suits were manufactured in Philadelphia and shipped from there to St. Louis for delivery to customers. He was charged for clothing shipped to him, whether accepted or rejected by the customer, and his profit was the difference between the price he paid and what he got. He was carried on the books of the company as an agent, and the stationery used by him ran in the name of Wanamaker & Brown.

A sign hung above the store containing the name of Wanamaker & Brown; but there is a dispute as to whether the words "A. Lurie, Selling Agent," were on it. Defendant knew the sign, whichever way it read, was there, as it had a photograph of the store showing the sign. Lurie was entirely in charge of the St. Louis business and gave the order to the plaintiff for the advertisements which constitute the subject-matter of this action. The order was given July 16, 1903, and on November 20, 1903, before the expiration of the term for

which the signs were ordered, and when three months' rent was due, plaintiff wrote to Wanamaker & Brown in Philadelphia, stating that Lurie, as defendant's representative had ordered the bulletin board advertisements for six months, what rent was due, and that he had not made payment, but, in excuse, said he had received no check from the home office. In the letter plaintiff requested the defendant to take the matter up, and have at least a partial payment made. The defendant wrote to Lurie on the subject, protesting against the expense, but did not write the plaintiff in answer to its letter, though an answer was requested. * * * Defendant wrote Lurie the following letter: "November 25, 1903. Mr. A. Lurie, St. Louis, Mo.—Dear Sir: We have had so much trouble with the business in St. Louis that we have finally lost all patience and shall discontinue any connection forthwith. The last thing to come to our notice is the contract made for six months' billboard advertising and the concern has appealed to us for payment. * * * We have placed the settlement of all matters with the attorneys who will hand you this letter. * * * Yours truly, Wanamaker & Brown." * * *

A verdict for $300 was returned in favor of the plaintiff, and, judgment having been entered on it, the defendant appealed. * * *

The silence of a principal, after receiving notice that his agent has assumed to bind him by an unauthorized act, may be a fact to be weighed on the issue of whether the principal ratified the act, or may raise a presumption that he ratified it, according to circumstances. If the controversy between the agent and the third party is completed before the principal is notified, so that no detriment can result to the third party from the silence of the principal, his failure to repudiate the act is evidence, to be considered with other facts in the case, that he adopted it as his own or ratified it. * * * But if the transaction is still in progress, and the silence of the principal after notice induces the party dealing with the agent to pursue a course which would be detrimental to him, if the principal is not held bound, a ratification of the unauthorized act will be presumed. This result will obtain when the person dealt with is induced to alter in any way his position to his detriment, as by parting with money or property on the assumption that the agent's act was valid, or omitting to take steps against the agent, or otherwise to improve his position. * * * An examination of numerous cases has shown that in every instance wherein the presumption of ratification was raised because of a principal's silence some change in the position of the parties concerned occurred subsequent to notice to the principal which would have resulted in injustice to the party dealt with by the agent if the principal had been excused on the score of want of authority in the agent. We cite illustrative decisions on the point. * * *

The real ground on which the principal is held liable under such circumstances is that of estoppel, though it is often said that the principal ratified what was done by his agent by remaining silent. * * * In its genuine sense ratification depends on intention. It is the voluntary assumption, on full information, of any unauthorized act or agreement by the party in whose behalf it was done or made. The intention to ratify may be manifested by express words or by conduct. Either may establish that the principal elected to adopt the act or agreement as his own; and the election once made with knowledge of the facts becomes irrevocable. Besides a true ratification in-

tentionally made, the law recognizes a constructive one where none was intended. The latter sort of ratification is a legal presumption, raised against the principal because he has behaved in such a way that the party dealt with by the agent would be injured if the transaction was repudiated. It is really an equitable estoppel, and is regulated by the law of estoppel. The estoppel may arise from the fact that the principal was silent when he ought to have declared his intention not to be bound by the agent's act, provided, as said above, his silence leads the party dealt with to alter his position for the worse. This is identical with the principles governing estoppel by acquiescence in instances not involving the relation of principal and agent. The question often arises directly between an agent and his principal in cases where the latter tries to hold the former responsible for acting without authority. In such litigation, if the principal does not promptly repudiate the transaction, but waits until doing so will cause loss to the agent, or until it appears that the transaction will cause loss, instead of profit, to himself, he will be estopped to deny responsibility. A large class of cases which frequently present the matter for decision is where a broker or commission merchant has bought or sold property for a principal contrary to instructions. In such instances the principal is not permitted to remain silent after notice in order to watch the course of the market and determine whether he will adopt or repudiate the deal according as it may prove profitable or the reverse. * * *

In the present case it is certain the advertising to November 20th was not done by plaintiff in reliance on defendant's failure to answer the letter of that date; and hence defendant's silence is not ground to estop it from denying liability for installments of rent which had accrued previously. In other words, the presumption that it ratified the contract Lurie made with plaintiff ought not to be raised merely from its silence when notified of the contract. But it is estopped to disclaim liability for the rent of the bulletin boards accruing subsequent to the date it had notice. Plaintiff requested a reply to its letter, and, in view of the fact that Lurie was conducting business in defendant's name, a reply should have been made. In commercial affairs prompt answers to such notifications are rather strictly insisted on by the law. Plaintiff supposed it had a contract with defendant and was furnishing the advertising service on that supposition. Hence the presumption is fair that, if defendant had repudiated the contract, plaintiff would have terminated the service at once. The advertising tended to increase defendant's sales, and was beneficial to it, as well as to Lurie. Therefore defendant was interested in its continuance. * * *

The proposition is advanced by plaintiff's counsel that the defendant is liable because Lurie's contract for advertising fell within the scope of his authority as selling agent, and the trial court should have been directed a verdict for their client on that ground. * * * It must be kept in mind that in what is said concerning the apparent powers pertaining to Lurie as agent we mean such powers or authority as would have appeared to belong to him if, in fact, he had been appointed agent by the defendant—such authority as a man would seem to possess if designated as selling or sales agent and placed in charge of a stock of merchandise for the purpose of selling. * * * The facts on which hangs the answer to this question stand undisputed, and are these: The defendant's main business office or establishment

is in Philadelphia. The evidence goes to show defendant is a tailoring concern of prestige and reputation. It had intrusted Lurie with a considerable stock of goods suitable to be manufactured into men's clothing. He was commissioned to open an establishment in defendant's name, in a large city, and procure orders for tailor-made garments by showing the goods in his custody and ostensibly selling cloth off the bolts. The garments were manufactured in defendant's Philadelphia establishment according to orders and measurements taken by Lurie in St. Louis and transmitted, but the impression gathered from the evidence is that this fact was not known to the customers, nor intended to be. Lurie was permitted to display defendant's name on signs and stationery, with his own name beneath, and followed by the title "Selling Agent." That the character of his agency was special, and not general, was denoted by his title of selling or sales agent, and as such plaintiff dealt with him. Those are the facts on which the authority in him to make the contract for advertising in defendant's name is affirmed and denied. To the public eye the business Lurie conducted must have appeared to belong to the defendant, and to be a branch establishment under the management of an employé. The title by which that employé was designated signified that he was not a vice principal or general manager, but one appointed to perform a particular duty and therefore of restricted powers, among which the primary power was to make sales. The public had the right to assume he was authorized to sell—to take and fill orders for men's garments; for that act was within the main purpose of his commission as signified by the title "selling agent." He had no express power to incur expense in defendant's name for advertising, either on bulletin boards or in other modes. This does not mean that he had neither real nor apparent power to do so; but simply that the power was not expressed in the words of his commission. The power was not explicitly conferred. Whether or not it was implicitly conferred, or whether, in view of the character and circumstances of the agency, it appeared to have been conferred, we must determine.

It has proved difficult, and, we may say, impossible, to reach a confident conclusion on these points, which, as will appear below, we deem to converge into a single point when narrowly scrutinized. The books teem with adjudications about what acts of various sorts agents may or may not do beyond the express words of their commissions; but no case very analogous to this one has been found in an exhaustive search for precedent. Therefore we have been compelled to resort to elementary principles and rules. But among the general rules by which the authority of agents is controlled are two that, in their struggle for enforcement, conflict in close cases; and which of the two ought to control the decision in this controversy, as likely in many others, is hard to say. One rule seeks to protect principals against wrongful assumptions of authority by agents; and to do this gives special weight to the doctrine that a man has the right to extend or to restrict the powers of his agent as his judgment dictates. The other rule seeks to protect the public against losses due to the appearance of power in an agent; and therefore emphasizes the maxim that where one of two persons, both free from a fraudulent motive, must lose in consequence of the act of one of them, he whose innocent act entailed the loss must bear it.

This principle lies at the root of most of the rules concerning the apparent authority of agents. Story on Agency, § 127, and note. The perplexity in particular cases, and in this one, is to know whether the third party, by failing to inquire as far as prudence demanded concerning the agent's authority to do the contested act, brought about a situation from which the loss must occur, or whether the situation was due to the principal's having unwittingly lent to his agent the semblance of right to do the act. That problem arises when there is no doubt that the authority the agent assumed to have was never intentionally conferred on him. But it is by no means always easy to say whether or not the authority for a given act was conferred, either by design or inadvertence.[a] It is usually plain that it was or was not within the language of the agent's commission; the language being undisputed. In the present case it is plain that express authority to advertise was not given; for no authority but to sell was expressed. But it is not, for that reason, plain that Lurie was not authorized to advertise as a measure essential to the performance of the duty to sell; no positive restriction against advertising having been imposed on him. As intimated above, real authority may be implicitly, as well as explicitly, contained in a commission. Hence it is to be ascertained if Lurie was impliedly commissioned to contract for advertising or appeared to be.

Text-writers are accustomed to enumerate categorically the sources of an agent's authority; and it will be useful to examine those sources for light on the point in hand. Putting aside authority expressly vested, which Lurie lacked, authority by ratification which has been considered above, and that springing from the right to assume powers to avoid loss in an emergency, which is not germane to the facts, there remain the authority derived from custom or general usage, that derived from a principal's conduct in permitting an agent to act outside the scope of his commission as expressed in the language used, and that authority called "incidental," which accompanies express authority. One ground of liability on the part of a principal which is akin to, or a corollary of, the two sources of authority last stated, may be found in the following rule recognized by the books: Where a man has placed an agent in such a position that a person of ordinary prudence, conversant with the usages of the business and the nature of the particular business, is led to believe the agent has a certain authority, and, without negligence, deals with him on that assumption, the principal is estopped to repudiate the agent's act or agreement. * * *

No proof was adduced in the present case to show what are the customary powers of agents like Lurie, and we know not that there is a custom attaching any power to them. Neither was there proof that the defendant had recognized contracts made by him in its name, or tolerated a course of business which would entitle the plaintiff to believe in his right to make the contract in issue. If defendant had done what gave plaintiff the right to presume in favor of Lurie's authority, so as to estop it from denying responsibility, it is because his being in charge of an establishment conducted by him as sales agent, in defendant's name, would so naturally raise the belief in a prudent mind that he was authorized to make the agreement in dispute that, according to the law of estoppel, the defendant ought to be held. If defendant is exonerated, it is because the words "selling agent" were

such notice to plaintiff of the limit of Lurie's authority that it was put on inquiry, and contracted at its peril if it failed to inquire. * * *

But, aside from this matter of estoppel, Lurie may have had actual authority for the contract, because to advertise was necessary in order to sell. The law presumes a principal intends to vest an agent with power to do auxiliary acts which are essential to the discharge of the agency, unless they are forbidden. And even when they are forbidden, but the party dealt with was unaware of the fact, the same presumption arises. Though all apparent authority is actual authority in legal effect, sometimes it is real as proceeding from the intention of the principal, and sometimes fictitious as legally presumed. Now, when the validity of an agent's agreement or act is drawn into question and depends on an incidental authority, the rule that he may do all things necessary to accomplish the purposes of the agency, and the rule that the principal is bound by an estoppel if he has attached such circumstances to the agency as to induce reliance on the agent's power to agree or act in a matter, would seem to converge and be, in effect, only different methods of giving effect to one principle, to wit, that an incidental authority must spring from necessity. In other words, third parties will not be held justified in assuming power in a special agent to do a given act as incidental to his agency, unless the act is necessary to the execution of the appointment. Does this rule mean that the thing done must have been absolutely indispensable or appropriate, or merely convenient? If it is indispensable, in what respect? Indispensable in order to start the business of the agency or to make it a success? And who shall decide upon the necessity—the court or the jury? Is it an issue of law or of fact?

As to the first question, we find a diversity of rules, or, at least of statements. It has been declared to be the duty of third persons dealing with an agent, when the nature of the agency is known (i. e., that it is special), to ascertain the extent of the authority the agent may exercise; and that the principal will not be bound by any act not warranted expressly by, or fairly and necessarily implied from, the terms of the authority delegated. * * * Advertising is an appropriate means for attracting custom and making sales; and, if the authorities just cited state the rule accurately for special agents, undoubtedly Lurie had the power to incur moderate charges for advertising. But to bind a principal by any contract made by a special agent, which a court or jury may deem appropriate to the purpose of the appointment, would encroach greatly on the doctrine that holding an agent out as special warns the public to inquire concerning the scope of his authority. Much of the protection to principals afforded by that doctrine would be lost, and lax dealings with agents by third parties encouraged. Under the guise of powers appropriate to the chief duty of an agent, principals could be involved in contracts and enterprises foreign to their intention, and which they never authorized. It is a reasonable view that a special commission, such as Lurie held, is given in order to retain in the principal control over the business or transaction confided to the agent, except in so far as the latter is empowered to act either by the terms of his commission or usage or necessity. In our judgment it is best to be conservative in making one person responsible for what another does. Much injustice results daily from unduly extending such responsibility, both in cases of principals and agents and masters and servants. It is true that the business of this

age requires manifold agencies unknown to the past; and true that the transaction of affairs with the celerity demanded by the spirit of the times requires that principals, especially incorporated companies, should be bound by the doings and agreements of their agents more than they formerly were. But it is true, too, that the facilities for ascertaining the authority conferred on agents have been vastly increased. Where once a slow mail might be weeks or months in bringing an answer to an inquiry, now the railroad or telegraph will bring it in a few hours or minutes. There seems to be no good reason for relaxing the rules on this subject, whose justice has been proved by long experience.

The few cases we have found, which treat of the powers of an agent in charge of goods, have justified incurring expense for the principal only when it was absolutely necessary, as opposed to expedient, to do so, like renting a storeroom or borrowing money to pay freight on the goods so as to get them from a carrier. * * * The word "necessary," in common usage, connotes different degrees of necessity. * * * It sometimes means indispensable; at others, needful, requisite, incidental or conducive. * * * In its primary sense it signifies a thing or act without which some other thing or act cannot exist or be done. * * * Lurie's authority was special. Now, as Lurie was not given entire control over the particular business, but only the right to do specific acts (make sales), he was a special agent. * * * Therefore the natural inference is that as to policies and expedients to promote the business, but not indispensable to its successful management, and about the wisdom of which opinions might differ, the defendant intended to reserve the decision to itself; and for that reason gave Lurie a title which denoted restricted authority. Hence our opinion is that the word "necessary," as applied to determine in this case the agent's power to do an incidental act, should be held to mean an act or measure requisite to enable him to discharge his main duty—something more urgently required than is signified by the words "appropriate," "suitable," or "expedient." It should not be held to mean an act without which the agent could not move at all toward achieving the main object of the agency; or without which, at a given stage, efforts to perform must absolutely cease; but one requisite for the achievement of it according to the desire and intention of the principal—an act necessary in the sense that the main scope and object of the agency must fail unless it is done. We speak, of course, in view of the fact that no usage on the subject is shown. We think an instruction in the present case defining the word in the sense we have indicated would be correct. The tailoring business can be carried on without extensive advertising on bulletin boards, or otherwise; but advertising is used as a means to increase business in cities where competition is keen. It is a good means to build up custom and sometimes may be necessary, according to the meaning of the word we have pointed out as the proper one to adopt in the present case, though not necessary in the sense that the business is absolutely impracticable without it. * * *

Text-writers give long schedules of acts which the courts have decided agents may do or not as incident to their duty; such as, the incidental powers of cashiers, adjusters of insurance losses, factors, managers of plantations, superintendents of mines, and other kinds of agents. Most of these adjudications turn on usage having vested the agent with the right he exercised. No doubt around many agencies

which are of wide and ancient vogue, for instance bank cashiers, custom has so firmly crystallized many acts as incidentally authorized that the courts are justified in judicially noticing and enforcing the custom. As said, the existence of the usage is a question of fact, and its effect on a contested transaction a question of law. * * *

It appears to accord with the definition of apparent authority commonly given in text-books that it is such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. Much of the apparent authority of an agent, whether asserted as incidental, or on usage, or on the agent's previous course of dealing rests on the principles of the doctrine of estoppel. The question is rather what third persons had the right to believe concerning the agent's powers than what powers the principal intended to confer. * * *

To give effect in the present case to sound principles, we think the jury should be instructed that before they can hold the defendant liable on the ground that Lurie had authority, as an incident of his duties as selling agent, to contract in defendant's name for advertising, they must find the advertising was reasonable in amount and necessary, in view of all the circumstances in which Lurie was placed, and not merely appropriate or useful, and that, if they so find, the plaintiff was justified in relying on Lurie's apparent authority to contract for it, unless plaintiff had knowledge that he did not possess the authority, or the facts were such that a prudent man, in the exercise of ordinary diligence, would not have relied on his apparent authority.

The judgment is reversed, and the cause remanded.

SECTION 2.—ILLUSTRATIONS

FABER-MUSSER CO. v. WILLIAM E. DEE CLAY MFG. CO.

(Supreme Court of Illinois, 1920. 291 Ill. 240, 126 N. E. 186.)

CARTER, J. Appellant, the Faber-Musser Company, a corporation engaged in business at Peoria, Ill., brought suit in assumpsit in the circuit court of Sangamon county against appellee, the William E. Dee Clay Manufacturing Company, an Illinois corporation, whose factory is located at Mecca, Ind., to recover $20,000 damages for failure to deliver fire brick contracted for by appellant from appellee through appellee's agent, Matthew M. Dee. * * * At the close of appellant's case the court gave a peremptory instruction directing a verdict for appellee. * * * The cause is brought here by appeal.

The evidence shows that appellant is a dealer in building materials and that appellee is a manufacturer of fire brick and clay products. Appellee maintains an office at Springfield, Ill. (the only office it has in this state), which is in charge of its agent, Matthew M. Dee. The contract sued on consists of an order and letter attached thereto, bearing date May 14, 1917, addressed to appellee and signed by appellant. Opposite the signature of appellant to the order appears: "Accepted —Wm. E. Dee Clay Mfg. Co., per Matthew M. Dee." The evidence shows that Matthew M. Dee was, and had been for several years, in charge of the office of appellee at Springfield. As we understand the

record, the evidence shows that the signs on this office indicated that it was the sales office of appellee. * * *

The evidence also tends to show that the Springfield agent of appellee had frequently solicited orders from appellant, but that prior to May 14, 1917, he had been unable to obtain any order; that on April 18, 1917, the appellant wrote a letter to William E. Dee at Springfield asking him to quote prices on fire brick; that Matthew M. Dee, the agent then in charge of the Springfield office, complied with the request and quoted prices by a letter written on stationery bearing the printed letter head above set forth, designating the Springfield office as the Western sales office; that on May 14, 1917, in response to a telephone call from appellant, Matthew M. Dee went to Peoria and the order in question was then prepared in duplicate; that on the duplicate copy retained by appellant appear the words: "Accepted—Wm. E. Dee Clay Mfg. Co., per Matthew M. Dee." * * * May 16, 1917, appellee, by letter from its principal office in Indiana, refused to accept the order. * * *

Appellant argues that appellee held Matthew M. Dee out to the world as its agent, and that as such agent he was authorized to make contracts such as the one sued on. * * * The law is well settled that a principal is bound equally by the authority which he actually gives his agent and by that which by his own acts he appears to give. * * * "A general agent, unless he acts under a special and limited authority, impliedly has power to bind his principal by whatever is usual and proper to effect such a purpose as is the subject of his employment, and in the absence of known limitations third persons dealing with such a general agent have a right to act on the presumption that the scope and character of the business he is employed to transact measures the extent of his authority, and to hold the principal responsible for the agent's acts within such authority." 2 Corpus Juris, 581. See, to the same effect, 21 R. C. L. 854. * * *

The evidence shows, without contradiction, that appellee is an Illinois corporation; that since its organization the only office it has had in Illinois is the Springfield office, and that Matthew M. Dee, the agent who took this order, has been in entire charge of that office for seven or eight years. The evidence of William E. Dee, the president of the appellee corporation, is to the effect that his brother, Matthew M. Dee, was a traveling salesman, whose duty it was to solicit orders for appellee with his authority, limited to the approval and acceptance by appellee at its principal office in Indiana. It would be a somewhat unusual proceeding for a state to require that every corporation organized in the state for pecuniary profit should have a principal office in some county in the state, and yet to assume that such office could be a principal office and not have some one in charge who could bind the corporation in business matters. A person of ordinary prudence, conversant with business usages and the nature of business affairs, it would seem, would be justified in presuming that a person in charge of such principal office in this state would be authorized to bind the company in any business transaction within the scope of its ordinary business.

There can be no question that Matthew M. Dee accepted the order. * * * There is no question on this record as to the agency of Matthew M. Dee for the appellee company. The only question in that re-

spect is as to the extent of his agency, and under the authorities just cited the letter heads used by appellee's agent at the Springfield office were admissible in evidence to show the extent of such agency. * * *

We think the evidence in this record was of such a nature on the question of the extent of Matthew M. Dee's agency that the contract here under consideration should have been submitted to the jury and that the trial court erred in giving a peremptory instruction to find for appellee. * * *

The judgments of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court for further proceedings in harmony with the views herein stated.

GORE v. CANADA LIFE ASSURANCE CO.

(Supreme Court of Michigan, 1898. 119 Mich. 136, 77 N. W. 650.)

Action by Henry H. Gore against the Canada Life Assurance Company. There was a judgment for plaintiff, and defendant brings error.

HOOKER, J. The plaintiff brought an action against the defendant, and recovered a judgment for a balance claimed to be due him for commissions upon insurance premiums obtained from policies written for defendant's patrons upon his solicitation. The defendant has brought the case to this court by writ of error.

At the threshold of the case is the question whether the plaintiff sustained contract relations with the defendant. His claim is that he was employed on behalf of the defendant by one Glass, with the subsequent approval of Bucknell, who was called the "manager of the Michigan branch." The defendant asserts that it made a contract with some men named Cox, living in London, Ontario, by which they had control of its business in Michigan and some other states, upon a commission of 50 per cent. upon new business, they to employ and pay their own subordinates; and that they established a branch office for Michigan, which they maintained under the charge of Bucknell, who was called "manager of the Michigan branch of the Canada Life Assurance Company," who was paid by a share of the commission on Michigan business and an allowance made by the Coxes. It is claimed that Glass was engaged by them upon similar terms; that he was designated "inspector of agencies"; that he was not authorized to employ any agents for the company, but was at liberty to divide his own commissions, as he pleased, with any whom he should see fit to engage to help him. * * *

[After reviewing certain evidence, the court continued:] We think it evident that the arrangement made with the Coxes, and through them with others, did not contemplate authority to pledge the credit of the company in the employment of agents, and that neither Cox nor Bucknell understood that he had such authority. Glass, who was employed as superintendent, or inspector of agencies, or, as he says, given exclusive right to work the south half of Michigan, had no greater authority. We think, therefore, that the plaintiff's claim must fall, unless it can be said that he had a legal right to understand that he was to look to the defendant for his pay by reason of its holding out Bucknell and Glass as its agents with authority to bind it in such matters.

The plaintiff, Gore, testified that he entered the employment of the defendant upon terms made by Mr. Glass, whose position was inspector of agencies. On being asked to state his arrangements with Mr. Glass, he said: "Mr. Glass, when I first arranged with him, told me that forty per cent. was the amount paid all agents. I was to solicit insurance and whenever it was necessary I was to call upon him to go with me, to assist in closing up any insurance I might get in process of working. I was to work in Detroit. He told me a written contract was not necessary." On cross-examination he said: "I did not know anything about his arrangements with the company, except such as he had told me. It was later that I made a contract with him, and then I came to Detroit. The day I reached Detroit I talked it over with Mr. Glass. * * * He said he was the authorized agent of the company, and I was to work for the Canada Life, and I could advertise as such. * * * As long as Glass was there, I was with him. It was as late as May any way, and I think quite a little after that. * * * I was not under Bucknell until Glass left."

There are two theories upon which the plaintiff might recover his compensation from the company: First, that Glass actually had authority to make a contract that it should pay him; and, second, that the company's conduct was such as to justify his belief that Glass had such authority, though in fact he was not authorized to do so. Under the uncontradicted testimony we must say that the company never authorized Glass to make such a contract. If the plaintiff is to recover, it must be by reason of a holding out by the company of Glass as having such authority. To sustain the theory, the agreement of Glass has no force. It was admissible for the single purpose of showing the plaintiff's understanding upon the subject, but it was no direct evidence of authority. Mechem, Ag. § 276. "Persons dealing with agents must ascertain their authority. In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental principles which must not be lost sight of. Among these are, as has been seen, that the law indulges in no bare presumptions that an agency exists; it must be proved or presumed from facts; that the agent cannot establish his own authority, either by his representations or by assuming to exercise it; that an authority cannot be established by mere rumor or general reputation; that even a general authority is not an unlimited one, and that every authority must find its ultimate source in some act of the principal. Persons dealing with an assumed agent, therefore, whether the assumed agency be a general or a special one, are bound at their peril to ascertain not only the fact of the agency, but the extent of the authority; and, in case either is controverted, the burden of proof is upon them to establish it." There was nothing in Glass' relation to the company which gave the plaintiff to understand that he had such authority. Glass says that he was an inspector of agencies. Plaintiff's counsel says that he was superintendent of agencies. There is nothing in the testimony to show that an inspector or superintendent of agencies was given such authority, and there is no such legal presumption. If, as the word imports, his business was to superintend or inspect the work of agents, it does not imply the right to appoint agents, and make contracts with them upon behalf of the company. So that at the time he made the contract with Glass

he had no right to assume that Glass had such authority from anything except the statements and acts of Glass. * * *

The claim is made that Bucknell was held out as a general agent, and therefore that Gore had a right to assume that he was authorized to employ him, or ratify the act of Glass. Bucknell had charge of the Michigan branch or office for Cox, who had a contract to work the territory. The Coxes were the ones who were held out as general agents, if there were any general agents, and we do not find anything showing that Bucknell was a general agent, of the company. Gore himself testified that he did not know what his arrangement was. There is nothing to show that he was misinformed by the company, or that he even tried to ascertain. He may, perhaps, have known that the circulars of the company contained his name as manager of the Michigan branch, but that is all. We do not intend that it shall be understood that we are of the opinion that a general agency, so called, necessarily carries with it the authority to appoint special agents for the company. Manifestly, any agency, general or special, is no more than the principal chooses to make it, unless he undertakes to limit the effect of the power which others have a right to suppose he has conferred, when he will be estopped to deny such power. * * *

Bucknell was advertised as manager of the Michigan branch, and neither Glass nor Bucknell, nor even the Coxes themselves, had authority to issue a policy, but merely to obtain and submit applications to the head office, as the witnesses call it, of the company. The true test after all, is not a real or imaginary distinction between the general or special agents. It is a question whether the agent, general or special as the case may be, has acted within the apparent scope of the authority confided. * * * There is no testimony in this case that warrants the conclusion that Bucknell had general authority to appoint agents and conduct defendant's business in Michigan. * * * He was manager of the Michigan branch, but that does not justify a guess by court or jury that binding the company by the appointment of agents for it was within the general scope of the authority actually given him. In 1 Pars. Cont. p. 43, it is said: "We think the distinction between a general agency and a special agent useful, and sufficiently definite for practical purposes, although it may have been pressed too far and relied upon too much in determining the responsibility of a principal for the acts of an agent. It may, indeed, be said that every agency is, under one aspect, special, and under another, general. No agent has authority to be in all respects and for all purposes an alter ego of his principal, binding him by whatever the agent may do in reference to any subject whatever; and therefore the agency must be special so far as it is limited by place or time, or the extent or character of the work to be done. On the other hand, every agency must be so far general that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it. Of late years, courts seem more disposed to regard this distinction, and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency, namely, that a principal is responsible, either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to this agent this authority." We cannot say that this evidence tends to prove that the appointment of agents usually and rationally belongs to the doing of the business

confided to Bucknell, and we certainly cannot say it as a matter of law. * * *

The judgment is reversed, and a new trial ordered.

BRAGER v. LEVY et al.

(Court of Appeals of Maryland, 1914. 122 Md. 554, 90 Atl. 102.)

Action by Adolph Levy and another, copartners trading as Levy & Markowitz, against Albert A. Brager. From a judgment for plaintiffs, defendant appeals.

THOMAS, J. This suit was brought on the common counts in assumpsit to recover the contract price of goods claimed to have been sold by the appellees to the appellant. The defendant (appellant) pleaded the general issue plea, and the trial in the court below resulted in a judgment for the plaintiffs, from which the defendant has appealed.

The evidence shows that the defendant conducted a large department store in Baltimore city, and, in the conduct of that business, employed a "buyer" for each department of the store. One of the duties of the "buyer" was to make out orders for goods required in his department and submit them to the manager or proprietor for his approval or confirmation. The "buyer" was not authorized to purchase goods, but his authority in that connection was limited to selecting and making out the orders for the goods needed in his department and submitting them to the manager or proprietor, for his approval and signature. * * *

In May, 1911, the defendant employed William S. Winstein as "buyer" for the boys' and children's clothing department of his store, and he was given one of the order books referred to, and used it in making out orders for goods needed in his department. The plaintiffs, who were engaged in business in New York, knew Winstein, and in May, 1911, wrote their agent and traveling salesman, Samuel Markowitz, to go to see Winstein. Markowitz had never sold goods to or had any dealings with the defendant, and had never sold goods in Baltimore. He went to the defendant's store to see Winstein on the 31st of May, 1911, and he states that Winstein introduced him to Carey, the assistant "buyer" for the department in which Winstein was engaged, and told him that Carey was the "head man." Later on the same day Winstein and Carey met him by appointment at the Howard House, where he exhibited to them his samples, and Winstein gave him a written order for goods amounting to $1,098, to be shipped to the defendant September 1, 1911. * * * On September 2, 1911, the plaintiffs shipped to the defendant a part of the goods ordered by Winstein, to the amount of $893.50. When they arrived in Baltimore the defendant refused to accept them. * * *

The evidence further shows that the order given by Winstein to Markowitz was never signed or approved by the manager or the defendant, and that neither of them knew that the order had been given until after the goods arrived. * * *

As we have said, the evidence shows that Winstein, who gave the order for the goods, was not authorized by the defendant to purchase them. * * * The appellees contend, however, that the mere fact that he was called "buyer" for the department in which he was employed was sufficient to warrant the plaintiffs or their agent in assum-

ing that he had full authority to order the goods, and that the defendant cannot rely upon any limitations upon his authority of which the plaintiffs were not advised. * * * If Winstein had, in fact, been employed as "buyer" for the defendant, with authority to purchase goods for the defendant, or if there had been any transactions between the plaintiffs and the defendant as would have justified the assumption by the plaintiffs that he was authorized to purchase on account of the defendant, the principle relied upon by the appellees would undoubtedly apply, and the plaintiffs would not be bound by any secret instructions of the defendant to his agent.

But we know of no case holding that the mere fact that an employé is called a "buyer" clothes him with power to bind his principal by contracts wholly without the scope of his employment. The well-recognized doctrine that a general authority to an agent cannot be limited by private instructions not known to third persons dealing with him certainly cannot be applied to a case where no such general authority exists.

The general rule is that the power of an agent to bind his principal rests upon the authority conferred upon him by the principal, and persons dealing with an alleged agent are put upon inquiry as to the extent of his authority. The rule as to the apparent scope of an agent's authority is well stated in 31 Cyc. 1331, where it is said: "While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third persons ignorant thereof; and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses and which the principal is estopped to deny. The apparent authority so far as third persons are concerned is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person who, in order to avail himself of his rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by the acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority. * * *

Although these rules are firmly established, their application to a particular case is extremely difficult. The liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had under the circumstances conferred upon his agent." Applying this statement of the rule to the case under consideration, the evidence shows that the principal had done nothing to clothe Winstein with the apparent authority to purchase goods on his account, and that the plaintiffs and their agent, without any inquiry as to the extent of his authority, and in entire disregard of the es-

tablished usage and custom among department stores in Baltimore city, relied exclusively upon the bare fact that he was called the "buyer" for the department in which he was engaged. To hold a principal responsible for purchases made by an agent who was never authorized or permitted to make them, and where such purchases are wholly without the scope of his employment, would place every man in business at the mercy of his employés. * * *

Judgment reversed, with costs to the appellant without awarding a new trial.

EXCHANGE BANK v. THROWER.

(Supreme Court of Georgia, 1903. 118 Ga. 433, 45 S. E. 316.)

Action by the Exchange Bank against M. L. Thrower. Judgment for defendant, and plaintiff brings error.

Prince was the agent of the Manhattan Insurance Company for Georgia and Alabama. Brinsfield was his cashier. Two New York drafts, payable to James T. Prince, Manager, were indorsed by the latter, "James T. Prince, Manager, by Kelly Brinsfield, Cashier," and cashed by Thrower, who deposited the same with the Exchange Bank of Atlanta to his credit. The drafts were paid, and Prince having denied the authority of the cashier to indorse, the bank refunded to him the proceeds, on his agreement to indemnify it in case of its failure to recover the same from Thrower. The bank sued for the recovery of the money, and the question involved here is as to the cashier's authority to indorse in blank and to collect the drafts.

LAMAR, J. Authority to borrow money is among the most dangerous powers which a principal can confer upon an agent. Whoever lends to one claiming the right to make or indorse negotiable paper in the name of another does so in the face of all the danger signals of business. He need not lend or discount until assured beyond doubt that the principal has in fact appointed an agent who by the stroke of a pen may wipe out his present fortune, and bind his future earnings. The very nature of the act is a warning, and if the lender parts with his money, he does so at his own peril. If the power was not in fact conferred, he must bear the loss occasioned by his own folly. A power so perilous is not to be implied from acts which in other matters less hazardous might create an agency. It must be conferred in express terms, or be necessarily and inevitably inferable from the very nature of the agency actually created. So strict is the rule that it will not be presumed even from an appointment of one as general agent, unless the character of the business or the duties of the agent are of such a nature that he was bound to borrow in order to carry out his instructions and the duties of the office. * * *

While the agent here was given the rather high title of "cashier," that, of itself, did not clothe him with the powers which might have been exercised by an officer bearing that title if employed by a bank. In view of the reluctance with which the law presumes the existence of the power to borrow, this title will be considered to indicate that he was a cash keeper, rather than a cash borrower. Nor will the fact that he was authorized to fill out the blank, and indorse drafts with a rubber stamp reading, "Pay to the order of the Third National Bank for deposit. James T. Prince, Manager, by ——— Cashier," be treated as authority to indorse in blank. On the contrary, the character of

the stamp itself indicated that the principal only authorized a restricted indorsement for the mere purpose of allowing the bank, rather than the agent, to collect. It does not import a general authority to indorse, nor does possession of the draft indicate that the agent had the right to discount the draft or collect the proceeds.

The stringent rules of agency are intended to protect a principal against unauthorized acts, but not to shield one who has in fact conferred such authority, or ratified his conduct. Here the plaintiff denied that any authority had been given further than that implied in conferring the title "cashier," and the right to use the stamp above copied. It denied that Prince had knowledge of the conduct on the part of Brinsfield, or that he in any manner ratified the indorsements or collections which were shown to have been made by him. The testimony for the defendant was to the contrary, and was to the effect that the trouble was not so much a want of authority to indorse, as the improper use Brinsfield made of the money after it was collected; that he was a general agent, indorsing drafts, handling the cash, paying out money, occasionally drawing checks, and in full and complete charge of the business during the frequent and necessary absences of the principal; that he had discounted another draft with Thrower some months before, for $394, which was paid without objection; that on these and other like drafts, indorsed in the same way, of which Prince denied knowledge, Brinsfield had collected some $8,500, which he had appropriated to his own use; that he originally wrote the indorsements in his own handwriting before the stamp above referred to was prepared; and that there were other stamps in the office used by him, on which the words "for deposit" were wanting, apparently contemplating that he had authority to indorse in blank and to collect. The evidence, while conflicting, was sufficient to sustain the verdict for the defendant. We have no power to interfere where the judge of the lower court has re-examined the evidence on the motion for a new trial, and by his refusal to set it aside expressed himself as fully satisfied with the verdict.

Judgment affirmed.

CHARLES MOE CO. v. J. H. LOGUE CO.

(Appellate Court of Illinois, First District, 1903. 108 Ill. App. 128.)

BALL, P. J. October 18, 1901, Logue, the president of appellee, gave a diamond to one Stein, to show to a prospective customer. It was not given Stein to sell. He was to return it at 2 p. m. of the same day, as another customer had the refusal of it. Instead of carrying out this agreement Stein pawned the stone to appellant for $100. Logue made demand on appellant for its return. The latter refused to comply unless the sum it had loaned upon the diamond was repaid. Thereupon appellee brought replevin, and recovered a judgment for $160, from which judgment this appeal was taken. * * *

It is an elementary rule of the law of personal property that no man can be deprived of it without his consent, or by operation of law. Another fundamental rule is that no one can sell a right which he does not have; that the purchaser takes nothing more than the rights of his vendor. With us the exceptions to this last rule arise only where the property is money or negotiable paper. In all other cases the purchaser cannot retain the property as against the owner unless it appear that the seller, by sale and delivery to him, though induced

by fraudulent pretenses, had the indicia of title. Possession of personal property is indicative of title, but it is not title; and that alone will not protect the purchaser from the effects of a demand by the real owner. * * *

The judgment of the circuit court is affirmed.

SMITH PREMIER TYPEWRITER CO. v. NATIONAL HARTEL LIGHT CO.

(Supreme Court of New York, Appellate Term, 1911. 72 Misc. Rep. 405, 130 N. Y. Supp. 136.)

SEABURY, J. This action was brought to recover $100 alleged to be the agreed price of a typewriter sold and delivered to the defendant corporation. The evidence is insufficient to establish that the defendant purchased or ratified the alleged purchase of the typewriter. It appears from the record that the defendant had in its employ a bookkeeper. On November 10, 1910, the defendant's bookkeeper, under the express direction of an officer of the defendant, signed an order for one typewriter. This typewriter was delivered and paid for. On December 1, 1910, the same bookkeeper signed a second order for an additional typewriter. The typewriter was delivered to the defendant. Upon receiving the typewriter, the defendant promptly repudiated the order given by the bookkeeper, and requested the plaintiff to remove the typewriter from the defendant's place of business.

The record affirmatively shows that the bookkeeper had no actual authority to make the purchase. While it is true that authority of an assumed agent to make a purchase will be implied, where the alleged principal has repeatedly recognized and approved of similar acts, still a single act done under express authority is insufficient to justify the inference that the assumed agent has the apparent authority to subject the alleged principal to liability upon subsequent purchases made without actual authority. * * * As the bookkeeper was without actual or apparent authority to make the purchase, the defendant was not bound by his act in attempting so to do. * * *

[Judgment reversed; new trial granted.]

McCULLOUGH v. HITCHCOCK.

(Supreme Court of Errors of Connecticut, 1899. 71 Conn. 401, 42 Atl. 81.)

Suit for specific performance by Mary J. McCullough against Melville C. Hitchcock. There was decree for defendant, and plaintiff appeals.

Upon the trial of the cause, the plaintiff, to prove the averment of her complaint, offered in evidence a certain letter, as follows (it was admitted that the defendant was the owner of the land, and that Anderson & Mead were real estate agents or brokers):

"Ansonia, Conn., Nov. 23, 1896. Messrs. Anderson & Mead, Bridgeport, Conn.—Gentlemen: I have a building lot on William St., E. D., that I would like to sell, if I can do so at any advantage. It is located next to the residence of S. W. Hubbell, 268 Wm. St. As I am not a resident of Bpt., I do not know the value of said lot; but could you not look at the lot, and give me an idea of its value, and, if possible, find a purchaser for same? Yours, truly, M. C. Hitchcock."

"For lot next to 268 William St. Anderson & Mead, per T."

ANDREWS, C. J. * * * Anderson & Mead had no authority to

make a written contract binding on the defendant to convey the land in question, unless it can be found in the letter of November 23, 1896. That letter does not, in terms, purport to give any such authority. The contention of the plaintiff is that such authority is implied from the request in the letter to find a purchaser; that it is a custom of the real-estate business that a broker authorized to find a purchaser for lands may sign a binding contract for the sale of that land. We do not understand any such custom to exist in this state. A custom can exist only as a matter of fact. * * *

There is no finding that any such custom prevails in Connecticut, and there is no case cited which recognizes any such rule. A real-estate broker or agent is one who negotiates the sales of real property. His business, generally speaking, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters besides the fixing of the price. The delivery of the possession has to be settled; generally the title has to be examined; and the conveyance, with its covenants, is to be agreed upon and executed by the owner. All of these things require conferences, and time for completion. These are for the determination of the owner, and do not pertain to the duties, and are not within the authority, of a real-estate agent. For these obvious reasons, and others which might be suggested, it is a wise provision of the law which withholds from such an agent, as we think it does, any implied authority to sign a contract of sale in behalf of his principal. * * *

There is no error. The other judges concurred.

PICKERT v. MARSTON et al.

(Supreme Court of Wisconsin, 1887. 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876.)

CASSODAY, J. The evidence is undisputed that the fish were in good condition when shipped to the defendants from Boston, and worthless when they reached the defendants at La Crosse. The defendants made the contract of purchase at La Crosse with the plaintiff's traveling salesman, who resided at Chicago. There was evidence tending to prove that the fish shipped were not the fish ordered; and also that, by the terms of the contract, the fish ordered were guarantied by the traveling salesman to reach the defendants in La Crosse in good merchantable condition. The evidence on the part of the plaintiff was to the effect that the traveling salesman had no authority to make such guaranty, nor any assurance as to the condition in which the fish should be on reaching La Crosse; and that he so informed the defendants about a month prior to the taking of the order in question. The issue made does not arise between the principal and agent, but between the principal and the defendants who made the contract of purchase with the agent. The agency, and the right to contract for the sale, are admitted. But the authority to make the guaranty or warranty is denied. Beyond question, an agent may bind his principal, if he does not exceed the power with which he is ostensibly invested, notwithstanding he has secret instructions from his principal to the contrary. * * *

Assuming that the traveling salesman had no actual authority to

make such guaranty or warranty of the fish, then it became important to determine whether his authority to sell, or contract for the sale, clothed him with an implied authority to make such guaranty or warranty. "The general rule is, as to all contracts, including sales," said a late learned author, "that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If, in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." 2 Benj. Sales, (4th Amer. Ed.) § 945, p. 824. * * *

Thus, in Dingle v. Hare, supra [97 E. C. L. 145] Erle, C. J., observed: "The strong presumption is that, when a principal authorizes an agent to sell goods for him, he authorizes him to give all such warranties as are usually given in the particular trade or business;" and Byles, J., added: "An agent to sell has a general authority to do all that is usual and necessary in the course of such employment." So in Smith v. Tracy, supra [36 N. Y. 79], Porter, J., speaking for the court, said: "The rule applicable to such a case is stated with discrimination and accuracy in our leading text-book (Parsons) on the law of contracts: 'An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty.'"

Here the plaintiff offered to prove, by different witnesses having the requisite knowledge, the general custom of the trade, as known and universally followed by dealers in fish, as to their being warranted or guarantied against spoiling or turning red in transit; but it was excluded, and, as we think, erroneously, under the rules of law above stated. It would seem, however, that, to be binding upon the defendants, such custom should be known to them, or exist in their section of the country. Thus, in Graves v. Legg, supra [2 Hurl & N. 210], it was said by Cockburn, C. J.: "The only question is, whether, when a merchant residing in London contracts with a Liverpool merchant in Liverpool, he is bound by the usage of trade at Liverpool. We think that, as he employed an agent at Liverpool to make a contract there, it must be taken to have been made with all the incidents of a contract entered into at Liverpool, and one is that notice to the buyer's agent is notice to the principal."

The judgment [for plaintiff] is reversed, and the cause is remanded for a new trial.

SCHULTZ v. GRIFFIN.

(Court of Appeals of New York, 1890. 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825.)

ANDREWS, J. * * * The rule that an agent to sell personal property has implied power to warrant, in the absence of any restriction, where sale with warranty is usual and customary in similar cases, was declared in Nelson v. Cowing, 6 Hill, 336, substantially overruling Gibson v. Colt, 7 Johns. 390. There seems to be no well-founded distinction between real and personal property, requiring a different construction of an agency for sale in the two cases. The great preponderance of authority now is that a power, without restriction, to sell and convey real estate gives authority to the agent to deliver deeds with general warranty binding on the principal, where, under the circumstances, this is the common and usual mode of assurance. * * *

HAHNENFELD v. WOLFF.

(Common Pleas of New York City and County, 1895. 15 Misc. Rep. 133, 36 N. Y. Supp. 473.)

BISCHOFF, J. It was conceded by the defendant that the sale was made to him through the instrumentality of one Grimshaw, and it conclusively appeared from the invoice in defendant's possession, and produced by him, upon which the alleged payments to Grimshaw were receipted for by the latter, that the defendant, before such payments, knew the plaintiff, and not Grimshaw, to be his vendor. Grimshaw was employed by the plaintiff to solicit orders from customers, and did not appear to have been intrusted with the possession of the whole or any part of the merchandise sold. Under these circumstances the payments to Grimshaw were made by the defendant at his peril of the former's want of authority. It is well settled that an agent to solicit orders merely, or to sell goods, who has not the possession of the goods, has no implied or apparent authority to receive payment. * * *

Judgment reversed, and new trial ordered.

PAYNE v. POTTER.

(Supreme Court of Iowa, 1859. 9 Iowa, 549.)

Replevin for a horse. Judgment for plaintiff, and defendant appeals.

STOCKTON, J. The first assignment of error is upon the charge of the court. The rule of law is that no man is bound by the act of another, without or beyond his consent; and where an agent acts under a special or express authority, whether written or verbal, the party dealing with him is bound to know at his peril what the power of the agent is, and to understand its legal effect; and if the agent exceed the boundary of his legal power, the act, as concerns the principal, is void. * * * The power must be pursued with legal strictness, and the agent can neither go beyond nor beside it. The act must be legally identical with that authorized to be done or the principal is not bound. * * * So it is held that an agent to whom a horse is given to sell for the principal, cannot deliver him in payment of his own debt, and the owner may recover the horse from a purchaser to whom he has been so delivered. * * *

And it is held that a special authority or direction to sell, does not authorize a sale on credit, unless commercial custom has given rise to such an understanding in some particular business. The question whether in such case a discretion to sell on credit is given, must depend on the authority in the particular case. In May v. Mitchell, 5 Humph. (Tenn.) 365, a principal delivered to an agent three mules to be taken to the southern market, and to be sold for the best price that he could get, and the proceeds to be returned; the agent took them to the south and sold them on credit, and the purchaser proved insolvent; it was held that the agent was vested with a discretionary power to sell upon the best terms that could be procured according to the course of trade in that part of the country to which the mules were carried, and as this was proved to be on credit, the agent was held not to be liable to the principal.

Every general power necessarily implies the grant of every matter necessary to its complete execution. * * * In the absence of special

instruction to the contrary, and in the absence of such prescription as to the manner of doing the act, as implies an exclusion of any other manner, an authority or direction to do an act, or accomplish a particular end, implies and carries with it authority to use the necessary means and inducements, and to execute the usual legal and appropriate measures proper to perform it. And not only are the means necessary and proper for the accomplishment of the end included in the authority, but, also, all the various means which are justified or allowed by the usages of trade. Thus (says Judge Story) if an agent is authorized to sell goods, this will be construed to authorize the sale to be made on credit as well as for cash, if this course is justified by the usages of trade, and the credit is not beyond the usual period. Story on Agency, § 60.

We think it results from the rules laid down that the burden lay upon the defendant to show that the sale by the agent on credit was justified by the usages of trade, and that the credit given was not unreasonable. Without such proof the authority of the agent could not be construed into an authority to sell for cash; and in this view there was no error in the charge of the court to defendant's prejudice. * * *

Judgment reversed.

GAGE v. CALLANAN.

(Supreme Court of New York, Special Term, 1908. 57 Misc. Rep. 479, 109 N. Y. Supp. 844.)

KELLOGG, J. A chauffeur of the defendant, in driving the defendant's car from Troy to Whitehall, broke down at Saratoga, and procured the plaintiff to make temporary repairs thereon. In leaving the shop he told employés of the plaintiff to come and get the car if he broke down again, and to make all necessary repairs thereon to place it in first-class condition. He did so break down. He then sent a message to the plaintiff to come and get the car and repair it as above mentioned. The plaintiff took the car to his shop. Before repairing it he wrote the defendant several letters at his home address, telling him what had been done, and asking if he should carry out the instructions of the chauffeur. He received no reply whatever. He then proceeded to repair the car. These facts are abundantly established by the proof.

Evidently the chauffeur had no implied or apparent authority to order permanent repairs, or any repairs other than such as were necessary to enable him to proceed upon his journey. This was evident to the plaintiff himself; for he placed no reliance upon the word of the chauffeur, writing the owner himself for instructions. The owner ignored his letters. Clearly the plaintiff was in no way deceived as to the chauffeur's authority. Clearly he knew that he had no authority to order the repairs in question. The case, therefore, is precisely as if the chauffeur had not given the orders in question, merely leaving the car in plaintiff's shop for safe-keeping. If the plaintiff had then suggested repairs to the defendant, and received no response to his suggestion, he could not then have made repairs except at his own cost and risk. So in this case. The plaintiff is, therefore, not entitled to recover his repair bill.

It is otherwise as to his bill for storage. The chauffeur had the right to place the broken-down car in the plaintiff's custody for safe-

keeping. The defendant was informed that he had done so. He did not interfere with the plaintiff's custody of the car, but left it with him for a long period of time. He certainly is liable for the keep of the car. The plaintiff has placed the value of the car's storage at $537.50. I think this sum, although undisputed, is excessive. The sum of $250 would amply repay the plaintiff. Judgment is accordingly ordered in the plaintiff's favor for $250 and costs.

BANK OF BATAVIA v. NEW YORK, L. E. & W. R. CO.

(Court of Appeals of New York, 1887. 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440.)

FINCH, J. It is a settled doctrine of the law of agency in this state that, where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth, to his prejudice. * * * A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction, it arises in the case of municipal corporations whose structure and functions are sometimes claimed to justify a more restricted liability. The application of this rule to the case at bar has determined it in favor of the plaintiff, and we approve of that conclusion.

One Weiss was the local freight agent of the defendant corporation at Batavia, whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor specifying the terms of the shipment, but having no right to issue such bills except upon the actual receipt of the property for transportation. He issued bills of lading for 60 barrels of beans to one Williams, describing them as received to be forwarded to one Comstock as consignee, but adding, with reference to the packages, that their contents were unknown. Williams drew a draft on the consignee, and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. It turned out that no barrels of beans were shipped by Williams, or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and Weiss to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills. * * *

The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the bank by their representations, and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it are not accidentally injured, but have done what they who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation.

It is obvious, also, upon the case as presented, that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank, and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire? And how ascertain the fact? Naturally he would go to the freight agent who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight-house or examine the books? If the property is grain, it may not be easy to identify; and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent. * * *

The judgment should be affirmed, with costs.[2]

NATIONAL BANK OF COMMERCE v. CHICAGO, B. & N. R. CO.

(Supreme Court of Minnesota, 1890. 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566.)

MITCHELL, J. * * * A carrier, in issuing a bill of lading for property delivered to him for transportation, does not warrant the title of the shipper. But what is the rule where no property was ever delivered at all for transportation, and the agent of the carrier, either fraudulently or through mistake or negligence, issues a false bill of lading, which passes into the hands of a bona fide consignee or indorsee for value? There is an unbroken line of authorities in England that, even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading, issued by his agent, from showing that no goods were in fact received for transportation. * * * It is also the settled doctrine of the federal courts. * * * The text-writers all agree that the overwhelming weight of authority is on this side. * * * The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent au-

[2] The rule of this case has been codified in section 22 of the Federal Bills of Lading Act of 1916 (U. S. Comp. St. § 8604kk), and in section 23 of the Uniform Bills of Lading Act. The Uniform Bills of Lading Act has been adopted in Arizona, California, Connecticut, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, Alaska, and the Philippine Islands.

thority—i. e., the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake. The only states that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania. * * *

ROHRBOUGH v. UNITED STATES EXPRESS CO.

(Supreme Court of Appeals of West Virginia, 1901. 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849.)

Action by A. F. Rohrbough against the United States Express Company. Judgment for plaintiff, and defendant brings error.

POFFENBARGER, J. This is an action brought by A. F. Rohrbough against the United States Express Company before a justice of the peace of Barbour county in July, 1898, for the recovery of $200, the amount of four $50 express money orders alleged to have been issued by said company at its office in Belington, in said county, and $5 protest fees on the same. * * *

The evidence shows that the express company had its office in the railway station building at Belington, and J. V. L. Thrall was the agent of said company, and also of the Adams Express Company and of the Baltimore & Ohio Railroad Company and the West Virginia Central & Pittsburg Railroad Company. There were three other men working in the office, Darl Elliott, J. M. Parsons, and ——— Scroll. Scroll was a telegraph operator employed by the West Virginia Central & Pittsburg Railroad Company, and "a general helper in the office," and attended to the express business for Thrall. He issued money orders, and signed Thrall's name to them, in the space provided on the orders for countersigning them. The instructions and rules of the company required the agent, in countersigning money orders, to subscribe his name personally; but in this instance Thrall had permitted Scroll to attend to the business for probably a year, and to sign his name. The evidence does not show that the company had any knowledge of the fact that its business was being so transacted at that place. On the 10th day of June, 1898, the plaintiff deposited $200 at the office at Belington, and took the four money orders in question in lieu thereof, intending to send them to the bank at Grafton. Scroll received the money and issued the orders, signing Thrall's name. Whether Scroll ever put the money into the safe or the money drawer of the company is not known, but on the next day he disappeared, and the money in question, as

well as considerable other money obtained in the same way, disappeared also. It seems that he reported about the time he left that the office had been robbed. The rate of charges printed on each money order was 18 cents, making 72 cents on the four orders in question. This Scroll did not collect, and Rohrbough says he had frequently purchased money orders there, and that Scroll had never charged him any fees on them.

Upon this state of facts, the defendant insists that it is not liable for the amount claimed upon the orders, and relies upon the principles of law holding that power conferred upon an agent is based upon the special confidence or trust which the principal has in the power or authority, express or implied, cannot be delegated by the agent, so as to bind the principal. * * * A further contention is that, because the fees were not charged and collected, the act of Scroll in issuing the orders was not the act of Thrall, the agent, or the act of the company, even if Thrall could have delegated his authority, and also that the express company is not responsible for the appearance of authority on the part of Scroll caused by Thrall permitting him to attend to his business, for the reason that the company had no notice of the fact that he was so acting. * * *

In determining whether there is sufficient evidence to sustain the finding and judgment, it becomes necessary to ascertain the general principles of law governing cases of this kind. "An agent who has a bare power or authority must execute it himself, and can delegate his authority to no other." 1 Am. & Eng. Enc. Law, 368. But there is another principle of law laid down in Titus v. Railroad Co., 46 N. J. Law, 398, which allows some latitude to agents of that class, and materially qualifies and restricts the general proposition. Where a known usage of trade justifies, or necessity requires, the employment of subagents, such agents may be employed, but only to perform ministerial acts. The agent himself must determine by his own judgment and discretion what should be done, and he may then authorize persons to carry into effect the purposes of his employment. He cannot, however, turn his principal's business over to the judgment and discretion of another, and bind his principal by the acts and conduct of the latter. "The agent is bound to follow faithfully the instruction of his principal, and act within the scope of his authority." 1 Am. & Eng. Enc. Law, 369. But this rule has its qualification, also. "Where a deviation from the strict performance of his authority is due to necessity or unforeseen emergencies, which are themselves not due to the agent's default," the rule must yield. And "where the agent is commissioned to do any act, nothing being said as to the mode of performance, he will have an implied power to perform his duties in accordance with any recognized usage or mode of dealing." 1 Am. & Eng. Enc. Law, 370, 371.

This court lays down the following proposition with reference to insurance agents, whose duties are very similar to those of express companies, in point 7 of the syllabus in Deitz v. Insurance Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908: "No insurance agent can be expected by his company to attend to all the details of his business in person. The company must and should be construed to anticipate the employment of clerks to attend to the office when the agent is absent or sick. When the agent's clerk is authorized and intrusted to

examine property and write out a policy thereon, his contract and knowledge are the contract and knowledge of the agent, and any accidental mistake which he may make is the mistake of the agent, and will be corrected in a court of law in an action on the policy." A general proposition of law laid down in 1 Am. & Eng. Enc. Law (2d Ed.) 978, and well supported by decided cases, is that "when an agent is engaged to perform acts of a purely ministerial or mechanical character, or acts which do not call for the exercise of judgment, discretion, or skill, in respect to acts other than such as are ministerial, he may authorize another to perform them." At page 978 it is said: "The same principle is applicable in cases of agents empowered to execute bills of exchange, to sign subscription papers, to sign insurance policies, to contract risks, to deliver policies and renewals, to collect premiums, and to give security therefor." This is supported by Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280; Lingenfelter v. Insurance Co., 19 Mo. App. 252. In the latter case the court decided that: "An agent has no power to delegate his agency to another, or to sublet it. But he may employ clerks and subagents, whose acts, if done in his name and recognized by him either specially or according to his usual mode of dealing with them, will be regarded as his acts, and as such binding on the principal." The transaction out of which this case grows is more in the nature of banking business than express business, although it is extensively done by express companies. * * *

The express company had another agent, whose duty it was to travel over a certain territory, and inspect all the offices of the company in said territory, and check up the books and accounts of the agents. This man had from time to time inspected the Belington office. He must have known that Thrall, being the agent of another express company and two railroad companies, and having three other persons in the office, would find it necessary to intrust the transaction of more or less of the business to persons other than himself. The employment of clerks and assistants under such conditions and circumstances is usual, and seems to be necessary. Scroll was acting in the presence and under the very eye of the duly-appointed agent. He was in the office of the agent, transacting the business of the company. He did this for a year or more, Thrall himself doing very little of the business. In obtaining the four money orders in question, Rohrbough simply transacted business in that office as he had done on several prior occasions. Aside from the fact that he paid no fees, as he ought to have done, and as he must have known he should have done, there is nothing in the circumstances and facts of the case calculated to suggest to him that there was anything irregular or unusual in the mode of transacting business in that office. It is true that the company reposed its confidence and trust in Thrall, the agent, and had nothing to do directly with Scroll, but the agent in charge of the office of the company permitted these orders to go out in exchange for Rohrbough's money. Thrall had not abandoned the office or his agency. He was still in charge, and to all appearances the business of the company was conducted in obedience to his judgment, discretion, and control, but executed in its details in a ministerial way by an assistant, just as is usual in any other office in which considerable business is done.

The order says on its face that it must be countersigned by the agent, but not that he shall sign his name personally. That direction is contained in a set of rules furnished the agents by the company, which

are not made public, and of which parties dealing with them have no notice. Moreover, they relate not to what the agents may do but how they may execute their powers. If they related to the extent of the powers or authority of the agent to contract, the question would be a more serious one. The company had put Thrall in control of its business, and held him out to the public as its agent, clothed with all the authority usually pertaining to such agencies, and without notifying the public in any way that it required him to personally sign his name to the orders; and Rohrbough had no notice of the requirement. "A principal is bound by the acts of the agent, whether general or special, within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is bound by the acts of the agent within the apparent authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing." 1 Am. & Eng. Enc. Law (2d Ed.) 988. The company did not specifically hold Thrall out to the public as having authority to allow another person to sign his name to the orders; but it did so hold him out as having authority to issue the orders, and that includes countersigning them, and did not make public the specific instruction to personally sign them. If an agent disregards specific instructions as to the mode of executing his powers, his acts are nevetheless binding upon his principal, as regards third parties having no notice of such instructions. 1 Am. & Eng. Enc. Law (2d Ed.) 994. * * * So, if the case turned solely upon the failure of Thrall to personally sign the orders, and his permitting Scroll to sign his name and to do the other ministerial acts of receiving the money and issuing the orders, the case would be for the plaintiff.

There are, however, other facts to be considered. Rohrbough says Scroll charged him no fees on the money orders, and that he had been in the habit of obtaining them at that office from Scroll without paying fees. * * * The evidence shows that it was apparent to Rohrbaugh that the agent had no authority to make such a contract on behalf of his principal. * * * If Rohrbough had not been a party to the transaction, and had not known that the agent was acting in excess of his powers, he might hold the company responsible to him. But he was a party to it, and did know of the failure of the agent to act within the limits of his powers. * * * Rohrbough had knowledge of conduct on the part of Scroll which was well calculated to arouse a suspicion on the part of any ordinarily prudent man, and sufficient to deter him from transacting any business with him. He must have regarded as unusual, and as importing infidelity to the company, the conduct of Scroll in coming to him repeatedly and soliciting him to turn over money to him in exchange for orders of the company, without requiring payment of the ordinary charges thereon. * * *

The judgment must be reversed, and judgment for the defendant must be entered.

PLANKINTON PACKING CO. v. BERRY.

(Supreme Court of Michigan, 1917. 199 Mich. 212, 165 N. W. 676.)

It is sought to recover the price of two shipments of meat, consigned by plaintiff to defendant upon the order of one Roy Berry. The goods were invoiced at $193.13.

Plaintiff is a corporation, conducting a wholesale meat business at Milwaukee, Wis. In May, 1914, defendant's son, Roy Berry, bought out a retail meat business in Petoskey, which he conducted from that time until early in October of the same year, when he failed. About the time the market was opened, the defendant, Alice Berry, a resident of Petoskey, gave her son $200 to put into the business. He was then about 31 years of age, and was not residing with his mother, but was married and maintaining a home of his own. Upon receiving the $200, he at once opened a checking account with a local bank under the designation of "Alice Berry, Shop Account." Defendant did not know of this arrangement in advance; but, immediately after opening the account, Roy told her what he had done, and explained that it would be necessary for her to sign the checks. To her inquiry why he had put the account in her name, he merely replied: "Well, it's all right; you can check it out." And she let it stand that way without protest.

Within a few days defendant began to receive letters bearing the return card of various wholesale meat firms. She testified that she did not open these letters, but sent for her son and asked for an explanation, saying it did not look right for letters to come in her name from meat firms, and that he replied: "That is all right. Don't worry about that at all. That money was in your name and you have to sign those checks. Now that is all there is to it. There is nothing out of the way with it."

She claims that nothing further was said about the matter, and that she continued to turn over to him all letters from meat firms that came addressed to her, without opening them and without further inquiry. The checks on the bank account were, according to defendant's testimony, signed by her in blank and delivered to her son. She claims she did not know the amounts of the checks, nor to whom they were to be made payable. She admits that the canceled checks were returned to her by the bank, but states that she burned them without examining them to see how they had been filled out.

Plaintiff's salesman, William Schrader, called at the meat market every week and took orders for meat, and the goods ordered through him were shipped by plaintiff, consigned and invoiced to Alice Berry, and were obtained from the carriers by Roy Berry. Mr. Schrader collected each week from Roy Berry the amount due for goods received by him the preceding week, as per terms of the orders, and the payments were made by checks signed "Alice Berry, Shop Account," and delivered to Schrader by Roy Berry. Mr. Schrader testified that occasionally the check was not ready when he came, and that he would wait while Roy went over to his mother's to get a check signed. Defendant claims she had no knowledge that any goods were being purchased in her name or upon her credit, nor that Roy Berry was dealing with plaintiff.

Before the account was opened with Mrs. Berry, plaintiff, through its credit manager, made the usual investigations as to the identity and responsibility of defendant, and upon the basis of the information obtained extended credit to her, and to her alone. Neither prior to nor during the continuance of these dealings did plaintiff ever inquire of defendant herself as to the authority of Roy Berry to order goods shipped in her name and upon her credit. Mr. Schrader testified he never saw Mrs. Berry nor had any conversation, writing, or

correspondence with her, though she continued to reside in Petoskey during the entire period of these transactions. All goods ordered by Roy Berry of plaintiff were paid for, except those which came in the two shipments in question, which, together, represent the last order Berry gave. When Schrader arrived in Petoskey the week after this order was given, he found that Berry had failed and that the market was closed. This was in the early part of October, 1914. He saw Berry, however, and asked him on several occasions to pay for these goods, and Berry said that he would take care of it.

Suit was brought by plaintiff against Alice Berry before a justice of the peace, who rendered judgment in favor of defendant, and upon appeal the trial in the circuit court, without a jury, resulted in a like judgment.

KUHN, C. J. * * * This case was tried before the court, and the learned trial judge at the conclusion of the hearing made written findings of fact and of his conclusions of law. * * *

The judge made the following finding: "There is no evidence in this case of anything said or done by defendant, with knowledge on her part that plaintiff might be led to rely thereon, tending to show that Roy Berry had authority to buy any goods in her name or upon her credit."

With this conclusion we cannot agree, because we are of the opinion that this record discloses that the defendant, by her course of conduct, permitted it to appear that her son was her agent for the purpose of conducting this business, and, because of her conduct in relation thereto, she is estopped to deny such agency to the injury of the plaintiff, who in good faith and, as we believe, in the exercise of reasonable prudence, dealt with the agent on the faith of such appearances. The issuing by her of the blank checks over a period of several months, the receipt of letters from the meat packers, the knowledge that the checks were to be used, and were used, in the business of the meat market, and the failure of the defendant to examine the letters or the paid and canceled checks as returned to her by the bank, was such a course of conduct on her part, in our opinion, as to force the legal conclusion that her authority to her son to act for her as agent would be conclusively presumed so far as it may be necessary to protect the rights of the plaintiff, who relied thereon in good faith and in the exercise of reasonable prudence.

The general rule is thus stated by Mr. Mechem, in his work on Agency, in discussing this question, paragraph 246, where it is said: "Gathering together all of these elements, it may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity—whether it be in a single transaction or in a series of transactions—his authority to such other to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, pro-

vided that such act was within the real or apparent scope of the presumed authority." * * *

Upon this record the circuit judge should have entered a judgment for the plaintiff for the amount of its claim. The case will be reversed, and a new trial granted, with costs to the appellant.

WHEELER v. McGUIRE et al.

(Supreme Court of Alabama, 1888. 86 Ala. 398, 5 South. 190, 2 L. R. A. 808.)

Action by McGuire, Scroggins & Co. against Joseph Wheeler, to recover for goods sold. Verdict was rendered for plaintiffs, and defendant appeals.

CLOPTON, J. Appellees seek to recover the price of certain goods, which they allege were sold and delivered to appellant through T. A. Tatham, as his agent. The agency was not disputed, but defendant contends that Tatham was in his employ merely as a clerk, and was not authorized to purchase goods on a credit and bind him. The plaintiffs contend that Tatham was a general agent, having authority to transact all of defendant's mercantile business, or was held out by defendant, or permitted to hold himself out, as such, so as to justify the belief that he was clothed with the powers of a general agent. The question mainly controverted by the parties relates to the character of the agency and the extent of his authority.

The general rule is that one who deals with an agent is bound to ascertain the nature and extent of his authority, but in the application of the rule a distinction is observed between general and special agencies. The power to do everything necessary to its accomplishment may be included in a particular agency, so that private instructions as to the particular mode of execution, which are not intended to be communicated and are not communicated to the party with whom the agent may deal, will not be regarded as limitations on his power. But with this qualification a special authority must be strictly pursued. A general agent may exceed his express authority, and the principal, nevertheless, be bound. The scope and character of the business which he is empowered to transact is, as to third persons, the extent and measure of his authority. By his appointment the principal is regarded as saying to the public that he has the authority to transact the business in the usual and customary modes. Secret limitations on his power, or private instructions as to the mode of transacting the business, will not affect the rights of third persons who have no notice of such limitations or instructions.

When a general agent transacts the business intrusted to him within the usual and ordinary scope of such business, he acts within the extent of his authority, and the principal is bound, provided the party dealing with the agent acts in good faith, and is not guilty of negligence which proximately contributes to the loss. * * * Third persons, dealing with a person as a general agent, are not acquitted of all duty to inquire and ascertain the character and extent of his agency; but if on inquiry ascertained to be general, actually or apparently, they are not bound to inquire whether there are secret limitations or private instructions, unless they have knowledge of facts which should put them on such inquiry. As to these issues, the burden is on the plaintiffs to establish by proof that Tatham was the general agent of defendant, or that the latter, by acts, conduct, or negligence, justified

the belief that he had authority to purchase goods on credit for the store. If these issues be found in favor of plaintiffs, no subsequent misconduct of the agent, misappropriating the goods or otherwise, will affect their rights.

After having given a general charge, which in the main is in accord with the foregoing principles, the court instructed the jury, at the instance of the plaintiffs, that if defendant employed Tatham, and put him in charge of his retail store at Wheeler's Station, to conduct his mercantile business, and placed money to his credit in Louisville, Ky., and Nashville, Tenn., and authorized him to use this money, and also that taken in from cash sales, to replenish the stock, and instructed him not to purchase on credit, he was, as to innocent third persons, the general agent of defendant in that business, and had authority to do whatever was usual or customary in conducting the same; and if plaintiffs sold to Tatham, as such agent, the goods for the price of which this suit is brought, their verdict must be for plaintiffs, unless they had notice that Tatham's authority was limited to purchases for cash. In considering the correctness of the instruction, any evidence, if there be such, tending to show that Tatham was apparently clothed with the powers of a general agent, cannot be taken into consideration. The proposition of the charge is that as to third persons the facts recited therein, of themselves, without the aid of extrinsic facts and circumstances, constituted Tatham a general agent, possessing authority to purchase goods on credit. In other words, he was a general agent as to plaintiffs, though they may have known the terms of his employment, including the deposit of money with which to purchase goods, except the instruction not to purchase on credit.

The most general powers that may be conferred on an agent are necessarily limited to the business or purpose for which the agency is created. The terms of the employment of Tatham, "in charge of his retail store at Wheeler's Station to conduct his mercantile business," in connection with the limitations on his authority to purchase, limit his powers as a general agent to the transaction of the local mercantile business of defendant. In the matter of buying goods, his power was expressly restricted to the use of money specially deposited for that purpose, and to cash receipts. In appointing Tatham his agent, defendant withheld power to buy and pledge his credit under any circumstances. By the terms of the commission, Tatham may be regarded a general agent to conduct the local business of the store, with special powers to purchase. To construe it otherwise would be to establish a rule that a merchant who furnishes his clerk with funds to purchase goods and make immediate payment clothes him with power to buy on his principal's credit, and that persons dealing with him are relieved of the obligation to ascertain the nature and extent of his warrant of authority. This would press too far the application of the doctrine of general agency. * * *

[For this and other reasons, the judgment was reversed, and the cause remanded for a new trial.]

CHAPTER II

RELATIONS OF THE PRINCIPAL AND THIRD PERSONS

Section
1. Rights and Liabilities of the Disclosed Principal.
2. Rights and Liabilities of the Undisclosed Principal.
3. Ratification.
4. Master's Liability for Torts of the Servant.

SECTION 1.—RIGHTS AND LIABILITIES OF THE DISCLOSED PRINCIPAL

It appears from the preceding chapter that, if an agent enters into a contract with a third party in the name of his principal and with power to do so, either as a result of authority granted to him by the principal or because the law, under the circumstances, attaches a liability upon him in the absence of a direct grant of authority, the resulting contract is between the principal and the third party. The rights and duties of the principal and the third party, in this event, are of the same nature as they would have been, had the parties entered into a contract without the intervention of the agent. No cases are here inserted to illustrate further this fundamental principle of the law of agency. The first series of cases is concerned with the question: In what form must an agent sign his principal's name to a contract or other written instrument in order to bind the principal, and in order to avoid his own personal liability on such contract? We are assuming a case where the agent possesses the requisite power to bind his principal, and the remaining question is: Did the agent enter into the contract in behalf of his principal, or did he execute the contract in his own behalf?

The last case in the section discusses a situation which has an important bearing upon the principal's liability. Frequently one's rights and duties, particularly with respect to property, are affected by the knowledge or lack of knowledge of some fact. In the event that the agent possesses the knowledge which is material in a given transaction, are the principal's rights to be affected, just as though he, individually, possessed such knowledge? Is notice to an agent notice to the principal?

SIMONDS et al. v. HEARD et al.

(Supreme Judicial Court of Massachusetts, 1839. 23 Pick. 120, 34 Am. Dec. 41.)

This was assumpsit upon a contract in writing, dated May 4, 1837, between the plaintiffs and the defendants, for the construction of the abutments of a bridge by the plaintiffs.

The introductory part of the contract was in the following words: "Agreement between Horace Heard, Eli Sherman and Newell Heard [the defendants], committee of the town of Wayland, on the one part, and William Simonds and John Chaplin [the plaintiffs], on the other

part;" and after a specific description of the work to be done, the contract proceeded as follows: "Said Simonds and Chaplin hereby warrant the above walls to stand firmly and in good order for one year from the completing of the same, and are to take as much of the old bridge as they need for platform for said walls and also all the wall near there. Said committee are to pay said Simonds and Chaplin the sum of three hundred and seventy-five dollars, when said work is completed, provided said Simonds and Chaplin give a sufficient bond with sureties for the warranty as expressed within." The contract was signed by the defendants with their own names, simply, and by the plaintiffs.

SHAW, C. J. Two points were made for the defendants in the present case: First, that the defendants having acted as a committee of the town of Wayland, in making the contract with the plaintiffs, and that, in relation to the erection of a bridge, in which they had no personal concern, but which was the concern of the town, and being duly authorized by the town to act in their behalf, were not personally liable to an action on the contract; and, secondly, that the work had not been executed according to contract.

The latter was submitted to the jury as a question of fact, who found for the plaintiffs, that the contract had been duly executed on their part. The other is a question of law, and turns upon the construction of the contract, which is set forth in the case. It has been fully argued, and many authorities are cited on both sides.

The question, whether a contract made by persons acting, or professing to act, as agents for others, binds their principals, or themselves, or both, is often one of great difficulty. The cases run so closely into each other that whether a particular contract falls within one or the other of these lines it is not easy to determine.

Some rules are well settled; as, where an agent acts within the scope of his authority, and professes to act in the name and behalf of his principal, he is not personally liable. So, one standing and acting in a public capacity, who makes a contract in behalf of the public, is not personally liable. * * * But this rule is not applicable to the present case, it not being a contract in behalf of the public, but, at most, of a corporation capable of making contracts and liable to an action on its contracts. * * * We think also that it is manifest, from the subject-matter of the contract, and from their describing themselves as a committee, that they were acting under some authority from the town.

But without going into all the distinctions on this very prolific subject, there is one rule, well established by authorities, and defined with a good degree of certainty, which is applicable to this case. It is this, that although an agent is duly authorized, and although he might avoid personal liability by acting in the name and behalf of his principal, still, if by the terms of his contract he binds himself personally, and engages expressly in his own name to pay, or perform other obligations, he is responsible, though he describe himself as agent. * * * Where one, as president of an incorporated company, having authority to make notes, signed a promissory note by which he promised to pay, it was held that he was liable, upon the personal engagement and promise to pay, though he described himself as president of such company, and that it was not the note of the company. * * * A known agent of a country bank, drawing a bill and di-

recting the drawees to place the amount to the account of such bank, was held personally liable. * * * In a more recent case, where the solicitors to the assignees of a bankrupt, gave an agreement to this effect, "We, as solicitors, etc., do hereby undertake to pay," it was held, that they were personally bound. Burrell v. Jones, 3 Barn. & Ald. 47. In this case Mr. Justice Bayley says: "It is clear that an agent may so contract as to make himself personally liable, and I think the words here used, 'we undertake,' are sufficient to place the defendants in that situation." Norton v. Herron, 1 Carr. & Payne, 648; Eaton v. Bell, 5 Barn. & Ald. 34.

In examining this contract, the court are of opinion that it falls clearly within this rule. The introductory part is an agreement "between Horace Heard, Eli Sherman and Newell Heard, committee of the town of Wayland, on the one part, and William Simonds and John Chapin, on the other part"; and after a specific description of the work to be done, the contract on the part of the defendants is this: "Said committee are to pay said Simonds and Chapin the sum of three hundred and seventy-five dollars, when said work is completed," etc.

Two things are here observable. The first is, that they do not profess to act in the name or behalf of the town, otherwise than as such an intention may be implied from describing themselves as a committee. But such description, although it may have some weight, is far from being conclusive, and in many of the cases cited, a similar designation was used, which was held to be a mere descriptio personarum, and designed to show for whose account the contract was made, and to whose account the amount paid under such contract should be charged. The second and more decisive circumstance respecting this contract is, that here is an express undertaking on the part of the committee to pay. "Said committee are to pay said Simonds and Chapin," etc. Having described themselves as a committee, this undertaking is as strong and direct as if the names had been repeated, and Heard, Sherman, and Heard had promised to pay.

The court are therefore of opinion that, by the terms of this contract, the committee intended to bind themselves, and did become personally responsible, and that the action is well brought against them. * * *

Judgment on the verdict for the plaintiffs.

AVERY et al. v. DOUGHERTY.

(Supreme Court of Indiana, 1885. 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680.)

ELLIOTT, J. In the promissory notes upon which the complaint of the appellee is founded, the description of the payee is Oliver R. Dougherty. The answer to the complaint is in two paragraphs, but, as they are substantially the same, it is only necessary to give a synopsis of one of them. It is alleged that the sole consideration of the notes was the execution of a lease by the plaintiff to the defendants Monroe and Madison Avery. * * *

The introductory clause of the lease reads thus: "This agreement, made this 25th day of December, 1880, between Randolph Marshall, agent of Oliver Dougherty, guardian of his minor children, and Madison Avery and Monroe Avery," and the instrument is signed, "Randolph V. Marshall, Agent of O. R. Dougherty."

The appellee's counsel assert that the lease is executed by Marshall,

and not by Dougherty, and that the allegation that it was executed by the latter is overthrown by the exhibit. * * * It is also true that mere descriptive words are regarded as simply describing the person. * * * The rule is firmly ingrafted in our law, but it is not easy to find any real ground for it in this country, where there are no titles, designating rank or condition in life. In England there was reason for the rule; here there is none. The better doctrine would be that the words annexed to the name may be explained by extrinsic evidence; but the rule has been too long and too firmly settled to be shaken now. While accepting the general rule to be that stated, the American authorities agree that, if the contract itself shows that the words were not used as merely descriptive of the person, they will not be so regarded, but will be assigned their real meaning. In the instrument before us it clearly appears that Marshall was the agent of the lessor, and acted as such, for we find this recited: "That the said Marshall, agent as aforesaid, has rented to Madison and Monroe Avery." There are other provisions in the instrument clearly showing that Marshall executed the lease as the agent of Dougherty, and we have no doubt that it should be treated as having been executed by him, and that the improper description of the lessor in the introductory clause of the lease must be attributed to the unskillfulness of the draftsman of the instrument. * * *

Judgment affirmed.

WHITNEY v. WYMAN et al.

(Supreme Court of the United States, 1879. 101 U. S. 392, 25 L. Ed. 1050.)

SWAYNE, J. This action was brought to recover the value of certain machinery manufactured by the plaintiff in error, which he alleged he had sold and delivered to the defendants. The defendants insisted that they had contracted for and received the machinery in behalf of a corporation of which they were officers, and that hence they were not personally liable. The plaintiff lived in Massachusetts and the defendants in Michigan.

The latter addressed a letter to the former, which was as follows:

"Grand Haven, Feby. 1, 1869.

"Baxter Whitney, Esq., Winchenden, Mass.:

"Sir: Our company being so far organized, by direction of the officers, we now order from you, manufactured and shipped, at as early date as possible—for the manufacture of the Mellish fruit basket—1 large rounding lathe, 1 quart do. do., 2 lathes for peach basket bottoms, 3 do. do. quart do. do., pint do. do. Also the necessary small fixtures for clasping, etc. of which Mr. Whitney is advised, and will give you more definite order.

Charles Wyman,
"Edward P. Ferry,
"Carlton L. Storrs,
"Prudential Committee Grand Haven Fruit Basket Co."

To which the plaintiff replied:

"Winchenden, Mass., Feb. 10, 1869.

"Grand Haven Fruit Basket Company:

"Gentlemen: Yours of the 1st inst. is received, in which you order machinery for fruit baskets, etc. I had already anticipated your order by commencing on the machinery on Mr. Whitney's verbal order, and I am now driving it with all the force I can get on it.

"Yours respectfully, Baxter D. Whitney."

* * * The plaintiff charged the defendants individually on his books for the machinery. His draft [on the defendants] was protested. * * *

The machinery was delivered at Grand Haven, and the freight was paid by Edward P. Ferry as the treasurer of the corporation. The draft of Baxter was protested, because it was addressed to the drawees individually. They claimed that he had no right so to draw on them. * * *

The court instructed the jury, in substance, that the letter of the prudential committee of February 1, 1870, bound the corporation and not the defendants, if there was then a corporation and the defendants were authorized by it to give the order. * * * The plaintiff excepted to these instructions. * * * The jury found for the defendants.

Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. * * *

In the latter case the question is always one of intent; and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise.

The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so.

Looking at the letter of the defendants of the first of February, 1869, and the answer of the plaintiff of the 10th of that month, we cannot doubt as to the understanding and meaning of both parties with respect to the point in question.

The former advised the latter of the progress made in organizing the corporation; that the order was given by the direction of its officers, and the letter is signed by the writers as the "Prudential Committee of the Grand Haven Fruit Basket Co.," which was the name in full of the corporation. The plaintiff addressed his reply to the "Grand Haven Fruit Basket Co.," thus using the name of the corporation as the party with whom he knew he was dealing, and omitting the names of the defendants, and their designation as a committee, according to the style they gave themselves in their letter.

It seems to us entirely clear that both parties understood and meant that the contract was to be and, in fact, was with the corporation, and not with the defendants individually. * * * The record shows clearly that the plaintiff was not entitled to recover, and that the verdict and judgment are right. * * *

The judgment of the Circuit Court is affirmed.

SMITH et al. v. ALEXANDER.

(Supreme Court of Missouri, 1860. 31 Mo. 193.)

EWING, J. This was an action on the following instrument: "$500. St. Louis, Mo., July 22, 1855. Ninety days after date, I promise to pay to the order of Messrs. Smith & Co. five hundred dollars, for value received, negotiable and payable without defalcation or discount. [Signed] J. H. Alexander, Treas'r Ohio & Miss. R. R. Co."

On the trial, the plaintiff having read the note in evidence, the defendant introduced testimony showing that he was the treasurer of the Ohio & Mississippi Railroad, and tending to prove that the note sued on was given by him in liquidation of an indebtedness due to the plaintiffs from that company, and that defendant received no consideration for the giving of said note. The ruling of the court was excepted to by the plaintiff in admitting this evidence, as also in giving and refusing instructions.

The general rule usually laid down respecting sealed contract is not applicable in its full extent to written contracts not under seal. In reference to these, it is said to be clear from the authorities that it is not indispensable, in order to bind the principal, that such a contract should be executed in the name and as the act of the principal. It will be sufficient if upon the whole instrument it can be gathered, from the terms thereof, that the party describes himself and acts as agent and intends thereby to bind the principal and not to bind himself. Story, Ag. § 160.

And in reference to corporations (as to which the tendency of modern decisions, it would seem, is to relax somewhat the strict rules on this subject) it is said that if, from the contract itself, or from this coupled with the conduct of the parties thereto, it appears that credit was given, not to the agent, but to the corporation, and it appears to have been the intent of the parties that the corporation should be bound, the corporation is alone liable, irrespective of the particular form of the contract.

Owing to the great diversity in the form of the instruments involving questions of this character, the adjudged cases furnish no general rule more definite than that referred to; and many of them have little applicability to other cases except in their general principles. In some of the authorities cited, the execution of the instrument in the form of that before us has been held the individual obligation of the person signing it, and not that of the individual or company indicated by the addition to the signature, such addition being regarded merely as descriptio personarum, while in others it has been held sufficient on its face to avoid personal liability. Although it would appear to be by no means settled that such a mode of execution—the mere addition of the official character to the name—is tantamount to a disclaimer of personal responsibility, it is deemed such an indication of the representative character as to warrant a resort to parol evidence, not of course to contradict or vary the writing, but to explain it. The purpose of introducing parol evidence in such cases is to prove extrinsic circumstances, by which the respective liability of the principal and agent may be determined, such as to which the consideration passed and credit was given, the agent's authority, etc. When the names of both principal and agent appear on the instrument, and the contract,

though in the name of the agent, discloses a reference to the business of the principal, so that the instrument as it stands is consistent with either view of its being the engagement of the principal or of the agent, parol evidence is admissible in a suit against the agent to charge him by showing either that credit was given to him or that he had not authority to bind the principal, or to discharge him by proving that the consideration passed directly to his principal, etc. 1 Amer. Lead. Case, 453, and authorities there cited.

Justice Johnson, in Mechanics' Bank v. Bank of Columbia, 5 Wheat. 336, 5 L. Ed. 100, says it is enough for the purpose of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that the transaction was either an individual or a corporate one, in which case it becomes indispensable to resort to extrinsic evidence to remove the doubt. In that case parol evidence was admitted to prove that character or capacity in which the check was drawn; and the only evidence on its face of its being a corporate transaction was the corporate name in the caption. A mere addition to the name of the party signing a contract cannot be regarded as a certain indicium that it was made on behalf of another. Where, however, it is doubtful from the face of the contract whether it was intended to operate as a personal engagement of the party signing it, or to impose an obligation on some third person as his principal, parol evidence is admissible to show the true character of the transaction. * * *

In this view of the case, we see no error in giving the instruction asked by the defendant and refusing those asked by the plaintiff.

Judgment affirmed. * * *

HALL & BROWN WOODWORKING MACHINE CO. v. HALEY FURNITURE & MFG. CO. et al.

(Supreme Court of Alabama, 1911. 174 Ala. 190, 56 South. 726, L. R. A. 1918B, 924.)

SOMERVILLE, J. This is an action of detinue by the appellant against the Haley Furniture & Manufacturing Company, and W. T. Archer, assignee. The appellee duly intervened as claimant of the property sued for, filing his affidavit of claim, and the appropriate issue was made up, and the trial proceeded thereon. The affidavit did not state the nature of the right of the claimant as required by Code, § 6043. * * *

The subject-matter of the suit is a lot of machinery sold by the plaintiff to said Haley Company in February, 1906, and delivered in April following, except one item which reached the consignee as late as about June 12th. Only about one-third of the purchase money was to be paid on delivery, and to secure the payment of the balance the vendor retained the title and possessory right in itself until the price of the machinery was fully paid, as shown by the written contract and notes in evidence. This written contract was filed for record on August 3, 1906, and in the meantime, on June 18, 1906, the claimant Sheffield Company (now appellee) loaned to the defendant Haley Company $6,000, the latter executing to the former as security therefor a mortgage deed conveying certain property in the city of Sheffield described as "all of block numbered four hundred and forty-eight (448) together with all buildings and improvements thereon, and all

machinery and appliances thereat, together with the appurtenances." It does not appear that this mortgage has ever been foreclosed.

The tendency of the testimony of the two witnesses, C. L. Haley and J. J. Challen, introduced by the plaintiff, was to show that in the loan transaction of June 18th, in which the Haley Company secured the loan of $6,000 from the Sheffield Trust Company, the Trust Company was represented by one J. W. Worthington, who was a director and stockholder, but not an officer, in said Trust Company; that said Worthington was at the same time president of the Sheffield National Bank; that said witnesses, who were respectively president and secretary and treasurer of the Haley Company, negotiated with said Worthington in the months of January, February, March, and April, 1906, for the purpose of getting a loan for the Haley Company; that Worthington promised to get such a loan for them, and stated that he would secure it from a trust company about to be organized; that during these negotiations in January and February it was explained to Worthington that the loan was to be used in the purchase of the machinery in controversy; that the contract of sale between the plaintiff and said Haley Company, one of the terms of which provided for the reservation of the title and right of possession until the purchase money was paid, was exhibited to Worthington and its terms gone over with him, and then left with him for several days for his inspection; that the Sheffield Trust Company was not organized and had no existence until May 26, 1906; and that no conversations with Worthington, nor information to him as to the status of the title to the machinery occurred on or after May 26, nor any later than March, 1906. For the claimant, all of the testimony as to information given him concerning plaintiff's claim to the machinery is vigorously denied by Worthington, as well as any knowledge whatever on his part of such a claim, either before or during his agency. * * *

On motion of the claimant, the trial court excluded all the testimony of the two witnesses Haley and Challen as to conversations and transactions between them and J. W. Worthington relative to the property sued for, and relative to their negotiations with him for a loan from the claimant company; the ground of objection being, substantially, that any notice to Worthington of plaintiff's claim, before the organization of the claimant company, and hence before his agency for it began, was not notice to the claimant, nor binding on it. The question presented by this ruling is the vital question in the case.

By a long line of decisions, this court is thoroughly committed to the rule that knowledge acquired by an agent prior to his agency, or in regard to matters outside the line of his duty, or while pursuing his own or some other person's business, is not notice to his principal of such fact or facts, and is not binding upon him. * * *

The fundamental requirement is that such knowledge on the part of an agent to bind his principal "must be limited to such knowledge or information as comes to the agent in transacting the business of his principal." Central of Ga. Ry. Co. v. Joseph, 125 Ala. 319, 28 South. 37. This is a simple rule, easy of application, and just in its results.

Where the agent's knowledge is of this character, it is constructive notice to the principal entirely regardless of the principal's actual knowledge. * * * This is usually explained by saying that the law conclusively presumes that the agent has in fact communicated

his knowledge to his principal. We think, however, that the better and more logical explanation is that with respect to the given transaction; the agent is in law identified with his principal; that knowledge that comes to the agent, while acting in such matter for his principal, would have come to the principal had he been acting for himself; and that, as a rule of policy and justice, he must be equally charged therewith. * * *

But on either theory, the rule is not a rule of evidence merely, as is sometimes declared, but a rule of substantive law. The Alabama rule, as above defined, is not in accord with the weight of authority in other jurisdictions, as pointed out by Mr. Freeman in his valuable note to Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 228–233, where the cases on both sides are collected and discussed; and as shown by Mr. Pomeroy in his third edition of Equity Jurisprudence (volume 2, § 672, and notes). It appears from these authorities that the more generally accepted rule is that the agent's knowledge, though acquired previously to his agency, if retained by him and carried with him into the subsequent business which he transacts for his new principal, is notice to the latter whether communicated to him or not.

This rule we regard as both illogical and unjust—a criticism which is fully vindicated by a consideration of the numerous and unpractical qualifications and exceptions which courts expounding the rule have been compelled to adopt. In this connection we note Mr. Pomeroy's observation that "several of the ablest English judges have, in recent cases, expressed a decided opinion against the rule itself, and while considering themselves bound by it, as far as it is settled, have wished that it should be abrogated by the Legislature." 2 Pom. Eq. Jur. (3d Ed.) § 672, note 1. We adhere to the rule as settled by our own cases cited above. * * *

Constructive notice to the principal through the actual knowledge of the agent is not a rule of evidence, but one of substantive law. Given notice to or knowledge of the agent, received while so acting, and the principal is conclusively bound by it; not because he ever knows it in fact, because his actual knowledge is utterly immaterial, but because as to the thing the agent is doing the agent is in law the principal, and the principal is in law the agent. Their legal identity is complete. Nor can it matter, in this aspect of the rule, whether the agent has, or has not, private reasons or interests which make it likely or even certain that he will not inform his principal, as correctly ruled in First Nat. Bank v. Allen, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80.

On the other hand, the actual knowledge of the principal, when material, may be proved like any other fact. It is the duty of an agent to inform his principal of every material fact within his knowledge, no matter when acquired, bearing upon the subject-matter of his agency, which may affect the interests of his principal with respect thereto; and it will be presumed that he has discharged this duty. * * * Here we have a true rule of evidence—a presumption of law that a duty has been discharged, from which follows the further presumption that the principal has acquired the knowledge of his agent. But this presumption like others of a similar nature, is disputable, and not conclusive. Unless rebutted, it is sufficient to fasten upon the principal, not an unreal constructive notice which is incontestable, but

simply an implied actual notice which is contestable. A failure to distinguish between these entirely distinct principles has, in our judgment, produced most of the confusion and contrariety of judicial opinion which seems to have always attended the consideration of this subject by the courts. See the cases cited in 31 Cyc. 1594, note 50. * * *

The rule of implied notice, as above stated, unless there is direct evidence showing that the imputed knowledge was present in the agent's mind during his agency, must obviously depend upon the anterior presumption of fact that the knowledge in question has thus persisted in his memory, so as to be available for communication seasonably to his principal.

The law does not presume that a fact once known is never forgotten, for this is contrary to all human experience. Nor is the remoteness or lateness of its acquisition as knowledge by the agent in all cases the most important consideration, for all experience teaches that much that we learned in the remote past ineradicably persists in our memories, while unimportant events of yesterday have been already forgotten. This particular issue then rests in inference, and is for the jury to determine.

If the jury find that the knowledge was present in the agent's mind during the execution of the agency, then they must find as matter of law that the principal was duly informed, unless they are reasonably satisfied to the contrary from other evidence before them. We do not mean to say that the agent's prior knowledge may not be so remote in point of time, or so lacking in clearness or apparent importance, as to justify the trial court in presuming, prima facie, that it has been forgotten. * * *

The information acquired by Worthington from the witnesses Haley and Challen, being acquired prior to the period of his agency for claimant, did not operate as constructive notice of it. But their testimony in this regard was admissible in evidence for the purpose of showing actual knowledge of plaintiff's claim on the part of the claimant corporation, under the principles above declared; and its exclusion was error prejudicial to appellant.

Other assignments of error need not be noticed, as the questions presented will hardly recur upon another trial.

Reversed and remanded. * * *

SECTION 2.—RIGHTS AND LIABILITIES OF THE UNDISCLOSED PRINCIPAL

LINDQUIST v. DICKSON.

(Supreme Court of Minnesota, 1906. 98 Minn. 369, 107 N. W. 958, 6 L. R. A. [N. S.] 729, 8 Ann. Cas. 1024.)

Action by August Lindquist against Ella M. Dickson. There was a verdict for plaintiff, and from an order denying motion for a new trial, defendant appeals.

START, C. J. Action to recover from the defendant, as an undisclosed principal, for labor and material performed and furnished by

the plaintiff in decorating and repairing her house, pursuant to an alleged contract made for her by her husband, Joseph M. Dickson. The complaint alleged, in effect, that at the time the contract was entered into with the husband he was in fact acting as agent for his wife, the defendant, but he failed to disclose to the plaintiff the fact of such agency, or the fact that she was the real party in interest and owned the house, the decorating and improvement of which was the subject-matter of the contract; that the plaintiff performed the contract on his part; that he was not paid therefor; and that he commenced an action against the husband to recover the balance due him on the contract, and on August 29, 1904, he recovered judgment against him for the sum of $273.68, no part of which has been paid; and further that thereafter (in the month of October, 1904) the plaintiff learned for the first time that the defendant was the real party in interest, and that the contract was made for her by her husband as her agent. This action was commenced in the month of June, 1905. * * * The trial resulted in a verdict in favor of the plaintiff for the amount stated, and the defendant appealed from an order denying her motion for a new trial. * * *

It is not controverted that the plaintiff, at the time the contract was made, understood that the house he was to decorate and improve belonged to the husband, and that he was dealing with him as principal, and further that he recovered judgment against the alleged agent upon the same claim which is the basis of this action, in ignorance of such alleged agency. It is the contention of the defendant that such judgment is a bar to this action. The general rule is that, where a simple contract, by parol or writing, is made by an authorized agent without disclosing his principal, and the other contracting party subsequently discovers the real party, he may abandon his right to look to the agent personally and resort to the principal. * * * But whether the creditor can proceed against the undiscovered principal, after he has obtained a judgment on his claim against the agent, is a question as to which the adjudged cases are conflicting. In the case of Kingsley v. Davis, 104 Mass. 178, the creditor, after being fully informed that the party with whom he made the contract was acting for an undiscovered principal, brought an action against the agent and recovered judgment for his claim. Afterwards he brought an action against the principal to recover for the same claim, and the court held that the action against the principal could not be maintained for the reason that: "The general principle is undisputed that, when a person contracts with another who is in fact an agent of an undiscovered principal, he may upon the discovery of the principal resort to him or to the agent with whom he dealt at his election. But if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot resort to the principal." In Beymer v. Bonsall, 79 Pa. 298, it was held that nothing short of satisfaction of the judgment against the agent would discharge the principal.

The case of Kingsley v. Davis suggests the true basis for solving the question. It is a question of election. Election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice. * * * We therefore hold upon principle, and what seems to be the weight of judicial opinion, that: If a person contracts with another, who is in fact an agent of an undisclosed principal, and, after learning all the facts, brings an action on the contract

and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undiscovered principal when discovered, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent. * * *

Order affirmed.

VAN DYKE v. VAN DYKE.

(Supreme Court of Georgia, 1905. 123 Ga. 686, 51 S. E. 582, 3 Ann. Cas. 978.)

Mary J. Van Dyke brought suit against Alice M. Van Dyke, alleging in brief as follows: The defendant is indebted to the plaintiff in the sum of $1,440, besides interest, which indebtedness was created as follows: On April 25, 1899, E. A. Van Dyke, the husband of the defendant, who the plaintiff knew had been the owner of 32 shares of the capital stock of the Merchants' National Bank, of St. Paul, Minn., came to the plaintiff, and informed her that the stock had been assessed 45 per cent. of its face value, and that it was necessary, in order to prevent it from being sold, to pay the assessment, and that he should send to the bank at once the amount of the assessment, and requested plaintiff to lend him the sum for that purpose. Plaintiff loaned him the amount, and the money was used in paying off and discharging the assessment of the stock. The stock was in fact then standing on the books of the bank in the name of the defendant. It was afterwards sold, and the proceeds were sent by a check payable to the order of defendant, and were used, as defendant claims, by her, to the extent of $1,440, in paying for certain improvements on land which she claims to own. At the time the loan was made the plaintiff did not know that the stock stood in the name of the defendant, but believed that it belonged to her husband. Believing him to be the true owner, she took from him a note for the amount of the loan. A copy of the note is attached to the declaration. She has since learned that at the time she made the loan Van Dyke was acting as agent for his wife in borrowing the sum to pay off the assessment on the stock. Plaintiff elects to proceed against the defendant as the undisclosed principal for whom the money was borrowed. By reason of the facts aforesaid "defendant became liable to plaintiff in the sum of $1,440 besides interest." * * *

On motion the court dismissed the action on two grounds: First, that the declaration set out no cause of action, for the reason that the allegations disclosed that it was based on a contract under seal, and in such a case the law would not permit the plaintiff to proceed against the undisclosed principal when discovered; and, second, that the allegations of the petition disclosed that the plaintiff parted with her money on an express contract under seal, and no action can be maintained against the defendant for money had and received. The plaintiff excepted.

LUMPKIN, J. * * * The general rule with reference to holding an undisclosed principal liable upon the contract of his agent is thus stated in Civ. Code 1895, § 3024: "If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may go directly upon the principal, under the contract, unless the principal shall have previously accounted and settled with the agent." This

is a codification of the law as it stood prior to the original Code of 1863, and is not an innovation resulting from legislative enactment. In Lenney v. Finley, 118 Ga. 718, 45 S. E. 593, it was held that: "The rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal. Accordingly, a lease under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although it appears from extrinsic evidence that the lessee was the general agent to conduct a business for his principal, and that the premises were leased to be used in such business." We are asked to review and reverse this decision, but the court declines to change the ruling then made. An examination of the authorities cited in the opinion will show that it was not without foundation. * * * In 1 Am. & Eng. Enc. L. (2d Ed.) 1141, it is said: "It has been laid down as a common-law doctrine that, when a contract is made by an instrument under seal, no one but a party to the instrument is liable to be sued upon it, and therefore, if made by an agent or attorney, it must be in the name of the principal, in order that he may be a party, because otherwise he is not bound by it. * * * Some of the later decisions, however, qualify this doctrine by holding that when a sealed contract has been executed in such form that it is in law the contract of the agent, and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of the performance by the other party, and has ratified and confirmed it by acts in pais, and the contract is one which would have been valid without a seal, the instrument will be binding on the principal." * * * Some courts hold that negotiable instruments do not fall within the general rule, and that an unnamed principal cannot be sued on them. See Clark on Contracts, § 275, p. 519 and notes.

It is contended that the rule applies only to instruments which were specialties at common law, as to which a seal was necessary; and that in cases where the instrument would be valid without a seal the addition of a seal would not bring it within the rule. There are some authorities holding or tending to hold this to be the rule. See Stowell v. Eldred, 39 Wis. 614; Wagoner v. Watts, 44 N. J. Law, 126; Shuetze v. Bailey, 40 Mo. 69, 75. The distinction drawn in this line of authorities, however, has not been followed in Georgia. * * * From what has been said it follows the plaintiff could not have recovered against the defendant on the note given by the husband of the latter.

It is contended, however, that, whether the plaintiff can recover on the note or not, she has a cause of action against the defendant aside from the note, under the facts alleged. The case of Farrar v. Lee, 10 App. Div. 130, 41 N. Y. Supp. 672, was very similar to that now under consideration. It is there said: "That the liability rested entirely upon the bond, in which any preliminary contract was merged; that, as the bond was signed by Tanner [the agent] in his own name, and not as agent for Lee [the principal], it was not competent to transfer by parol evidence, or in any other way, from Tanner to Lee, the obligation which Tanner had assumed personally." In the case of Lenney v. Finley, supra, it was contended that, if the concealed principal was not liable on the contract of lease by reason of its being under seal, nevertheless, having occupied the premises and used them

for the purpose of conducting business, she was liable to the plaintiff. This contention was denied by the court. * * *

Under the allegations of the petition the trial court committed no error in sustaining the demurrer.

Judgment affirmed.

FRADLEY v. HYLAND.

(United States Circuit Court, Southern District of New York, 1888. 37 Fed. 49, 2 L. R. A. 749.)

Libel by one Fradley against Hyland for supplies furnished one Gibson, respondent's agent in charge of a canal boat. Decree for libelant as to the first cause of action, and respondent appeals.

WALLACE, J. The libel sets forth two causes of action for supplies purchased by one Gibson. * * * The facts which appear in evidence are these: During the period in which the supplies were purchased, one Gibson, who was the owner, and was managing certain canal boats of his own, was employed by the appellant, to manage certain canal boats for the latter. Gibson was to obtain employment for the boats, and return the net earnings monthly to appellant, after paying for all repairs and supplies, and deducting his own commissions. His instructions were not to obtain supplies upon credit, but, if not in funds from the earnings, to call upon the appellant. Monthly settlements of account took place between Gibson and the appellant, in which Gibson was allowed all items for supplies paid or contracted for by him against the earnings of the boats, and a considerable fund was always left in his hands by the appellant. Gibson ceased to act as appellant's agent September 1, 1886. The supplies were sold to him prior to that time. The libelant supposed that Gibson was the owner of all the boats he was managing, and dealt with him as such, selling him supplies for all indiscriminately, charging the price to him, and taking his notes from time to time, or those of one Isham, his clerk. The claim to recover the part of these supplies used on appellant's boats is the first cause of action set forth in the libel. * * *

As to the first cause of action no question is made by the appellant that it is not of admiralty cognizance, but he insists that he is not liable as a principal for the supplies sold to his agent by the libelant, under the circumstances of the case. The general rule is familiar that, when goods are bought by an agent, who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to the latter for payment. But the rule which allows the seller to have recourse against an undisclosed principal is subject to the qualification stated by Lord Mansfield in Railton v. Hodgson, 4 Taunt. 576, and by Tenterden, C. J., and Bayley, J., in Thomson v. Davenport, 9 Barn. & C. 78. As stated by Mr. Justice Bayley, it is "that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller, where he has looked to the responsibility of the agent." The principal must respond to and may avail himself of a contract made with

another by an undisclosed agent. When he seeks to enforce a bargain or purchase made by his agent the rule of law is that, if the agent contracted as for himself, the principal can only claim subject to all equities of the seller against the agent. In the language of Parke, B.: "He must take the contract subject to all equities, in the same way as if the agent were the sole principal" (Beckham v. Drake, 9 Mees. & W. 98), and accordingly subject to any right of set-off on the part of the seller (Borries v. Bank, 29 L. T. N. S. 689).

Thus the rights of the principal to enforce and his liability upon, a contract of sale or purchase made by his agent, without disclosing the fact of the agency, are precisely co-extensive, as regards the other contracting party, if the limitation of his liability is accurately stated in the earlier cases. The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities mentioned, was narrowed by the interpretation adopted in Heald v. Kenworthy, 10 Exch. 739, to the effect that the principal is not discharged from full responsibility unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine of this case has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself, but as a broker, or otherwise as representing an undisclosed principal. One of the more recent English cases of this class is Davison v. Donaldson, 9 Q. B. Div. 623. But, as is shown in Armstrong v. Stokes, L. R. 7 Q. B. 599, the version of Heald v. Kenworthy, while a correct interpretation of the rule of the principal's liability, when applied to cases in which the seller deals with the agent relying upon the existence of an undisclosed principal, is not to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal. This case decides that the principal is not liable if he has in good faith paid the agent at a time when the seller still gave credit to the agent, and knew of no one else. See, also, Irvine v. Watson, 5 Q. B. Div. 102.

Under such circumstances it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent. In that case the court was dealing with a contract made by an agent which was within the scope of the authority conferred on him, but which was nevertheless made by the agent as though he were acting for himself as principal. In the present case Gibson had no authority at all to make a purchase upon the credit of the appellant. But as it appears that appellant, in the monthly settlements of account with Gibson, allowed him out of the earnings charges for supplies for which the latter had not actually paid, he must be deemed to have authorized Gibson to purchase supplies for him upon Gibson's own credit. Under the circumstances, if Gibson had purchased supplies, purporting to act as an agent of appellant in doing so, appellant, by consenting to their being used for his benefit, and by allowing the price in his settlements with Gibson, would have been liable to those who sold to him upon the theory of ratification. But, as Gibson did not assume to act as agent in making the purchases, there is no basis for applying the doctrine of ratification.

Very different considerations govern the case in which an agent who assumes to represent an undisclosed principal buys of a seller

upon credit, and one in which the agent assumes to be acting for himself, and the seller deals with him, and gives him exclusive credit, supposing him to be the only principal. In the first, if the agent has authority, express or implied, to buy upon credit for the principal, or ostensible authority to do so, upon which the seller relies, then, by the familiar rules of law, the contract is the contract of the principal, and is none the less so because the name of the principal does not happen to have been disclosed. The principal is bound by the acts of his agent within the scope of his real or apparent authority; and the seller understands that, even though he may hold the agent personally responsible, he may also resort to the undisclosed principal. But in the other, as the seller does not rely upon any ostensible authority of the one with whom he contracts to represent a third person, he can only resort to the third person as principal, and charge him as such, when the purchase is made by one having lawful authority to bind the third person. It is immaterial, in such a case, whether the contract is made by an agent who is employed, in a continuous employment or in a single transaction, by a principal, or whether he is one who may be deemed a general, instead of a special agent. "When the agency is not held out by the principal by any acts or declarations or implications to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent beyond what he has apparently authorized, because he has not misled the confidence of the other party who has dealt with the agent." Story, Ag. § 133.

It is therefore difficult to understand how, as an original proposition, it could be reasonably maintained that there is any liability on the part of one who has employed another to manage his interests in a business, or series of transactions, in which, as an incident, purchases of goods are to be made, has given him instructions not to purchase on credit, and has supplied him with funds to purchase for cash, to a seller who has sold to the person employed upon credit, and dealt with him as the only principal. * * * Of course he would be liable, and the instructions not to buy on credit would go for nothing, if he did not supply the agent with funds to pay for the necessary goods, because in that case the agent would have implied authority to buy them on credit. So, also, in a case which may be supposed, where a principal knows, or ought to know, that the agent is buying on credit in his own name, yet the principal takes all the income of the business without making any provision for payment to those who have trusted the agent, the principal would be liable, because in such a case his conduct would be inconsistent with good faith, and he ought not to be permitted to avail himself of the benefits without incurring full responsibility for the agent's acts. But it is probably too late to consider the questions thus suggested upon principle; and it may be accepted as law that the seller, under the circumstances of a case like the present, upon discovery of the principal, can resort to and recover of him, if he has not bona fide paid the agent in the meantime, or has not made such a change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller. Story, Ag. § 291; * * * Laing v. Butler, 37

Hun, 144. In the case last cited the court used this language: "Where the purchase has been made by the agent upon credit authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable."

According to these authorities, if it should be conceded that the facts in the present case warrant the inference that the appellant gave Gibson authority to buy either upon his own credit or upon the credit of the appellant, the libelant cannot recover. It certainly is not material that the appellant did not pay Gibson, or make any settlement with him, on account of the libelant's demands specifically. It is enough that he did settle with Gibson for, and allowed him to retain in his hands sufficient moneys to pay, all outstanding liabilities contracted by him for the appellant's benefit, including the demands of the libelant. At the time of the last settlement the appellant had paid the libelant's demands and all outstanding liabilities contracted by Gibson as between Gibson and himself, and this was before the libelant knew any principal in the purchases other than Gibson himself. * * *

The libel is dismissed, with the costs of this court and of the District Court.

HUBBARD v. TEN BROOK.

(Supreme Court of Pennsylvania, 1889. 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585.)

MITCHELL, J. * * * The agency, though stated in the objectionable form of an inference from the previously recited evidence is clearly intended to be averred, and may fairly be so treated. Taking the statement, therefore, in its plain intent, it sets out that plaintiff sold and delivered a quantity of hams to one Sides, who was conducting a grocery business in his own name, but with the property and as the agent of defendants. The defendants filed an affidavit of defense, and a supplementary one, the substance of which is that "Sides was not the agent of defendants to purchase from plaintiffs, or any one else," and that he "was employed as salesman only by said defendants, without any authority whatever to act for or bind defendants for the purchase of any goods or merchandise upon credit of the said defendants." We have thus the question presented whether an agent may be put forward to conduct a separate business in his own name, and the principal escape liability by a secret limitation on the agent's authority to purchase. The answer is not at all doubtful. A man conducting an apparently prosperous and profitable business obtains credit thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavorable turn in the business. To allow an undisclosed principal to absorb the profits, and then, when the pinch comes, to escape responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public. No exact precedent has been cited. None is needed.

The rule so vigorously contended for by the plaintiff in error, that those dealing with an agent are bound to look to his authority, is freely conceded; but this case falls within the equally established rule that those clothing an agent with apparent authority are, as to parties deal-

ing on the faith of such authority, conclusively estopped from denying it. The affidavits set up no available defense, and the judgment is affirmed.

SECTION 3.—RATIFICATION

DEMPSEY v. CHAMBERS.

(Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249.)

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of the opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "feigned to be all one person" by a fiction which is an echo of the patria potestas and of the English frankpledge. * * * Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. * * *

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. * * * But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify it. * * *

If we assume that an alleged principal, by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a

man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. * * *

Doubts have been expressed, which we need not consider, whether this doctrine applied to a case of a bare personal tort. * * * If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. * * * Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit. * * *

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present, when the ratification is established. * * *

The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant's coal for his benefit, and as his servant, and the defendant afterwards assented to McCullock's assumption. The ratification was not directed specifically to McCullock's trespass, and that act was not for the defendant's benefit, if taken by itself, but it was so connected with McCullock's employment that the defendant would have been liable as master if McCullock really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. * * * The ratification goes to the relation, and establishes it ab initio. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. * * *

For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

ROSEBERRY et al. v. HART-PARR CO.

(Supreme Court of Minnesota, 1920. 176 N. W. 175, 145 Minn. 142.)

Action by W. A. Roseberry and E. A. Bjork, copartners doing business under the name and style of Roseberry & Bjork, against the Hart-Parr Company. Verdict for plaintiffs, motion for new trial denied, and defendant appeals. Order affirmed.

LEES, C. In September, 1917, plaintiffs signed an order for the purchase from defendant of an oil tractor. They claim that it was represented to them that the factory or wholesale price of the tractor was $2,915. This was the price specified in the order, and it was to be paid by the execution of three notes of $800 each and by the delivery of a Universal tractor, valued at $515, which plaintiffs owned. In obtaining the order, defendant was represented by its agents, Mjoen and Schweich. The order was accepted, the notes executed, and the Universal tractor delivered and the tractor ordered was shipped to

plaintiffs who paid the freight charges, amounting to $124. In April, 1918, one of the notes being overdue and unpaid, it was agreed that plaintiffs should return the tractor and that defendant should sell it and credit them on their notes with the amount received. This agreement was carried out; the tractor being resold for $1,750. In January, 1919, plaintiffs learned of facts which led them to believe that the factory price of the tractor when they ordered it was $1,750 instead of $2,915, and in February they brought this action, demanding judgment for the unpaid balance of their notes together with $515 for their old tractor and $124 freight paid on the new one, or, in lieu thereof, judgment for the return and cancellation of the notes and for $639 and interest.

The complaint alleged that to induce plaintiffs to sign the order, defendant's agents falsely represented that the factory price of the tractor was $2,915; that the representation was made with intent to deceive plaintiffs; that they believed it to be true and were thereby induced to make the purchase; and that in fact such price was only $1,750. There was a trial by jury, and plaintiffs had a verdict for the full amount of their claim. A motion for a new trial was denied, and defendant appeals. * * *

Plaintiffs were allowed, over defendant's objection, to testify that they were induced to sign the order because Mjoen told them he would sell them the tractor at the wholesale or factory price and save them the dealer's commission, and that such price was $2,915. The second contention is that the court erred in receiving this testimony in view of the following provisions contained in the order: "* * * No employé of Hart-Parr Company unless authorized in writing from party duly empowered to delegate such authority, has any authority to bind the company by any statement, act, or agreement." * * *

It is claimed that it precludes plaintiffs from asserting that defendant was bound by the alleged misrepresentation because they had notice that defendant would not recognize or be bound by any statements made by its agents unless they were printed in the order blank it supplied or were authorized in writing by the company. This contention runs counter to a settled principle of the law of agency. It is this: When a principal retains the benefits of a contract obtained for him by his agent, he cannot repudiate the acts of the agent which induced the other party to the contract to enter into it on the ground that such acts were unauthorized. Defendant is here insisting that it has the right to retain plaintiffs' notes and the Universal tractor. It may be granted that in the first instance it neither authorized nor knew of the representations made by its agents, but when this action was brought and it asserted a right to the fruits of their acts, even though they were done without authority, it assumed the same responsibility for them as though they had been authorized and were within its knowledge originally. This court has stated the rule substantially as follows: One who adopts the unauthorized act of another done in his behalf and receives the benefits thereof is held to adopt and ratify the instrumentalities by which such benefits were obtained. By accepting a contract procured by the fraud of his agent, even though the agent acted contrary to his authority, he takes the contract with whatever taint attached to its origin. * * *

The claim that, if the alleged misrepresentation may be shown, a new term is added to the order in violation of the parol evidence rule,

cannot be sustained. Parol evidence is always admissible to show that a party to a contract was induced to enter into it through fraudulent representations. The purpose of such evidence is to show that the contract was procured by fraud and impeach its validity as a whole, and not to change or modify its terms. * * * We hold that the testimony under consideration was properly received and that defendant was not entitled to a dismissal at the close of plaintiff's case. * * *

Finding no error in the record the order denying a new trial is affirmed.

BAILEY et al. v. PARDRIDGE et al.

(Supreme Court of Illinois, 1890. 134 Ill. 188, 27 N. E. 89.)

Assumpsit by Joel J. Bailey & Co. against C. W. & E. Pardridge, for goods sold to defendants for plaintiffs by one Holmes, a salesman for plaintiffs. Defendants obtained judgment, which was affirmed by the appellate court. Plaintiffs bring error.

CRAIG, J. The question presented by this record is one not entirely free from difficulty. As to the main features of the case there is no substantial controversy in regard to the facts. Holmes had possession of the samples, and claimed authority to sell and receive the pay therefor. The defendants purchased the samples, paid Holmes for them by check, payable to Joel J. Bailey & Co. or bearer, and he delivered the goods. So far as appears, defendants acted in perfect good faith, relying upon the representations of Holmes. * * * But it may be said that Holmes was not empowered by plaintiffs to sell the goods; that he merely held the samples as a means to solicit orders. A sufficient answer to this position is that the acts of plaintiffs since the sale may be regarded as a ratification. Where the owner, where goods have been sold without authority, sues the purchaser for the amount of the contract price for which the goods were sold, the sale, although unauthorized, will be regarded as ratified. * * *

In the case under consideration, as soon as plaintiffs learned of the sale they made out a bill according to the contract price, presented it to the defendants, and demanded payment for the goods. This was followed by the present action of assumpsit to collect the amount for which the goods were sold. If, therefore, Holmes made the sale without direct authority, these acts of the plaintiffs, after full knowledge of the sale, may be treated as a ratification of the sale made by Holmes. The case then stands in this position: Holmes had possession of the goods, claiming the right to sell. He called on the defendants, and they bought the goods. He delivered the goods, collected the pay, and gave defendants a receipt acknowledging full payment. Plaintiffs first deny authority to sell, but by their acts concede the power of sale, but they deny authority to collect the pay for the goods. This they cannot do. The power of sale, or the sale without authority, subsequently ratified, carried with it the implied power to receive payment. Had the sale been repudiated by the plaintiffs, and an action brought to recover the goods, a different question would arise; but that course was not pursued. * * *

The judgment of appellate court will be affirmed.

HENRY et al. v. HEEB.

(Supreme Court of Indiana, 1888. 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613.)

MITCHELL, C. J. This was a suit by Nicholas Heeb against Henry Heeb, John F. Schonert, and James D. Henry, to recover the amount of two promissory notes signed by Heeb and Schonert, who were partners, as principals, and by James D. Henry, as surety. The controversy is between the plaintiff and the appellant, Henry, and relates exclusively to the note described in the second paragraph of the complaint, the execution of which Henry denied under oath. To the denial of the latter the plaintiff replied, in substance, that the defendant, after having obtained full knowledge that the plaintiff held the note in controversy ratified and confirmed the same, and promised to pay it, and accepted a chattel mortgage covering the partnership property of Heeb & Schonert, the principal debtors, as indemnity against any liability which might exist on account of his having become surety on the note. This was held to be a sufficient reply. * * * Relevant to the issue made by the plea of non est factum, and the reply thereto, and to the evidence pertaining to that feature of the case, the court instructed the jury, in substance, that if the appellant, after having obtained full knowledge upon the subject of whether or not he executed the note, ratified and confirmed the same, and promised to pay it, he would be liable for the amount thereof. The judgment was favorable to the plaintiff below. * * *

It does not appear that the promise of the appellant induced the plaintiff to change his position in any manner, or that, in reliance thereon, he surrendered any right or benefit whatever. There is, therefore, no element of estoppel in the case as presented in the pleading or instruction of the court. The appellant contends that a person whose name has been forged to a note cannot ratify or adopt the criminal act so as to become bound, unless facts have intervened which create an estoppel, and preclude him from setting up as a defense that his signature is not genuine. There appears to be an irreconcilable conflict in the decisions of the courts of last resort on this question. Thus, in Wellington v. Jackson, 121 Mass. 157, the supreme judicial court of Massachusetts, following its earlier decisions, held that one whose signature had been forged to a promissory note, who, yet with knowledge of all the circumstances, and intending to be bound by it, acknowledged the signature, and thus assumed the note as his own, was bound to the same extent as if the note had been signed by him originally, without regard to the question whether or not the acknowledgment amounted to an estoppel in pais. * * * There are other cases which, while seeming to lend support to the doctrine that a forged signature may be ratified, nevertheless turn upon the proposition that the holder of the note had in some way acted in reliance upon the promise or admission of the person whose name appeared on the note, or that the latter had received or participated in the consideration for which the note had been given, and was therefore estopped to deny the genuineness of his signature. Still other decisions depend upon principles which distinguish them from cases involving the doctrine of ratification or adoption of forged instruments purely. Bank v. Keene, 53 Me. 103; * * * Livings v. Wiler, 32 Ill. 387; Bank v. Warren, 15 N. Y. 577. * * *

It is a well-established rule of law that if one not assuming to act for himself does an act for or in the name of another, upon an assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies original authority to do the act. In such a case the principal is bound to the same extent as if the act had been done in the first instance by his previous authority; and this is so whether the act be detrimental to the principal or to his advantage, or whether it be founded in tort or contract. The reason is that there was an open assumption to act as the agent of the party who subsequently adopted the act. The agency having been knowingly ratified, the ratification becomes equivalent to original authority. * * * So, if a contract be voidable on account of fraud practiced on one party, or if, for any reason, it might be avoided, yet if the party having the right to avoid the contract, being fully informed, deliberately confirms or ratifies it, even though this be done without a new consideration, and after acts have been done which would have released the person affected, the party thus ratifying is thereby precluded from obtaining the relief he otherwise might have had. * * *

The ratification or adoption of a forged instrument, or of a contract which is prohibited by law, or made in violation of a criminal statute, involves altogether different principles. One who commits the crime of forgery by signing the name of another to a promissory note does not assume to act as the agent of the person whose name is forged. Upon principle, there would seem to be no room to apply the doctrine of ratification or adoption of the act in such a case. Where the act done constitutes a crime, and is committed without any pretense of authority, it is difficult to understand how one who is in a sense the victim of the criminal act may adopt or ratify it, so as to become bound by a contract to which he is to all intents and purposes a stranger, and which, as to him, was conceived in a crime, and is totally without consideration. As has been well said, it is impossible, in such a case, to attribute any motive to the ratifying party but that of concealing the crime, and suppressing the prosecution; "for why should a man pay money without consideration when he himself had been wronged, unless constrained by desire to shield the guilty party?" The distinction made in many well-considered cases seems to be this: Where the act of signing constitutes the crime of forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter, to their detriment, the act from which the crime springs cannot, upon consideration of public policy, be ratified without a new consideration to support it. * * * In case of a known or conceded forgery, we are unable to discover any principle upon which a subsequent promise by the person whose name was forged can be held binding, in the absence of an estoppel in pais, or without a new consideration for the promise. * * *

The ratification which the law interdicts, relates only to such acts as clearly appear to have been done in violation of a criminal statute; the motive of the ratifying party being, presumably, the concealment of the crime, or the suppression of its prosecution. Where, however, as in the present case, the act ratified is of an ambiguous character, and may as well be attributed to a mistaken assumption

of authority, as to a purpose to commit a crime, public policy does not prohibit the adoption or ratification of the act. Nor can it be said to be without consideration, especially where, as in the present case, indemnity has been accepted. These conclusions lead to an affirmance of the judgment. * * *

KEIGHLEY, MAXSTED & CO. v. DURANT.

(House of Lords, 1901. [1901] App. Cas. 240, 70 L. J. K. B. [N. S.] 662, 84 L. T. [N. S.] 777, 17 Times L. R. 527, 1 B. R. C. 351.)

LORD DAVEY. My Lords, the facts necessary to raise the question of law on which the learned judges have differed may be thus stated: Roberts made a contract in his own name to purchase a large quantity of wheat from Durant & Company, the present respondents. Roberts bought on his own account, and without any authority from the appellants to buy the wheat on joint account with them, but (it may be assumed for the purpose of the present judgment) intending that the appellants should have the benefit of the contract on joint account with himself, if they chose to accept it, and hoping and expecting that they would do so. The appellants did afterwards agree with Roberts to take to the purchase on joint account with him. Roberts was unable to fulfill his contract, and thereupon the respondent sued the appellants, as undisclosed principals. At the close of the plaintiffs' case the learned counsel for the appellants submitted that there was no case, and, after some argument, Day, J., gave judgment for the appellants, holding that there had been a failure to prove any ratification by them —meaning, as appears from what he had previously said, that no ratification was legally possible in the circumstances.

The question of law, therefore, is whether a contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, can be ratified by that third party, so as to render him able to sue or liable to be sued on the contract. In the course of his judgment Collins, L. J., says that the point has never been actually decided, though he admits there are numerous dicta upon it which have become the foundation of statements in text-books more or less adverse to the present respondent's contention, and he says that the question must now be determined on principle. * * *

LORD MACNAGHTEN. * * * As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorized agent, can sue or be sued on the contract. A stranger cannot enforce the contract, nor can it be enforced against a stranger. That is the rule; but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law. That doctrine is thus stated by Tindal, C. J., in Wilson v. Tumman (1843) 6 Mann. & G. at p. 242, 6 Scott, N. R. 894, 1 Dowl. & L. 513, 12 L. J. C. P. N. S. 306: "That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and

whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his previous authority." And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and no one else? If Tindal, C. J.'s statement of the law is accurate, it would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intention locked up in his own breast; for it cannot be said that a person who so conducts himself does assume to act for anybody but himself. But ought the doctrine of ratification to be extended to such a case? On principle I should say certainly not. It is, I think, a well established principle in English law that civil obligations are not to be created by, or founded upon undisclosed intentions. That is a very old principle. * * *

LORD ROBERTSON. * * * With the Master of the Rolls, and in his words, I hold that, "unless the contract made by the unauthorized agent purports or professes * * * to have been entered into on behalf of another * * * then that contract made by the unauthorized agent was not capable of being ratified by a stranger to it." To speak of the "purporting or professing" as if this were one condition, more or less, or ratification, seems to me to be rather an understatement. All are agreed that there must be some special relation between the ratifier and the contract other than and antecedent to his claiming the contract. To hold otherwise would be to admit extravagant results. It seems to me that the whole hypothesis of ratification is, that the ultimate ratifier is already in appearance the contractor, and that by ratifying he holds as done for him what already bore, purported or professed to be done for him. * * * Whether the unauthorized agent be marked out as an agent by what he says, or by what he wears, is, of course, a mere matter of circumstance and of evidence; but an agent he must be known to be, and as agent he must act. * * *

LORD LINDLEY. * * * The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is, that the contract is in truth, although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made; and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although that truth may not have been known to the other contracting party. * * *

The reasons upon which a real principal not disclosed can sue or be sued on a contract made on his behalf by an agent acting with his authority have no application to contracts made by one person for another, but without any authority from him. Some other reason must be found to permit a person to sue or be sued upon a contract not entered into by him through an agent or otherwise.

The principle relied on, and the only principle which by our law can be invoked with any chance of success, is that known as ratification, by which an approval of what has been done is sometimes treated

as equivalent to a previous authority to do it. The mere statement of the general nature of what is meant by ratification shows that it rests on a fiction. Where a man acts with an authority conferred upon him, no fiction is introduced; but where a man acts without authority and an authority is imputed to him a fiction is introduced, and care must be taken not to treat this fiction as fact. * * *

The doctrine of ratification as hitherto applied in this country to contracts has always, I believe, in fact given effect in substance to the real intentions of both contracting parties at the time of the contract, as shown by their language or conduct. It has never yet been extended to other cases. The decision appealed from extends it very materially, and I can find no warrant or necessity for the extension. * * *

Order appealed from reversed, and judgment of Day, J., restored, with costs here and below. * * *

KLINE BROS. & CO. v. ROYAL INS. CO., Limited.

(United States Circuit Court, Southern District of New York, 1911. 192 Fed. 378.)

HAND, District Judge. These are four actions upon fire insurance policies issued by four different companies. * * * There seems to be no escape from the conclusion that by his contract with the defendants McIntosh did not bind the corporation to pay the premium. Furthermore, the board of directors never learned of the policies until after the fire, and did not therefore ratify them up to that time. At least, there is no evidence upon that question, and the burden rests with the plaintiff. As I view it, no subsequent ratification was possible. After the fire McIntosh tendered the premium, and after that the defendants repudiated any liability.

The facts, therefore, raise two questions: First, whether a third party who has made a contract with an unauthorized agent on behalf of his principal is bound before the principal has ratified; and second, if not, whether the occurrence of a fire before the unauthorized application for the policy has been ratified prevents its future ratification so as to bind the company. Upon the first question, there is no doubt some division of authority. In England the law now is that the third party may not withdraw, provided the principal ratifies the contract in season. Bolton Partners v. Lambert, 41 Ch. D. 295; In re Tiedemann (1899) 2 Q. B. D. 66. * * * On the other hand, in Wisconsin (Dodge v. Hopkins, 14 Wis. 630; Atlee v. Bartholomew et al., 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103), and apparently in Illinois (Cowan v. Curran, 216 Ill. 598, 75 N. E. 322), the whole unauthorized contract seems to amount only to an offer by the third person, which must be accepted de novo by the principal, a rule certainly at variance with the well-established law that an uncommunicated ratification by the principal will bind him. The English case proceeds on the civil-law maxim, "Omnis ratihabitio retrotrahitur," though it by no means follows, because a ratification relates back when once a valid contract is made, that the third party is bound meanwhile, and may not withdraw while the principal remains unbound.

Now, relation back is in the sense here used a fiction, and certainly

should not be extended to cover unjust cases, of which this is one, as I shall show. In so far as by the maxim it is only meant to say that a ratification carries with it by implication the intention of the principal that the contract shall in fact date from the time when it was made between the agent and the third party, it is unobjectionable in principle, and accords with the facts; but, if taken in the sense that the law will regard both parties as bound from the date of the contract, it merely misstates the facts, because, by hypothesis, the principal is not bound before ratification. All that the law can do is to hold the third party bound from the outset, and that by the mere force of authority. It certainly serves no useful purpose to cloak that authority in a phrase which misstates the truth in Latin, unless it accords with the principles of the law of contracts, or at least produces just results at the expense of those principles.

Upon principle the doctrine does not appear to be correct, and it has been criticised by text-writers. Wambaugh, 9 Harv. L. R. 60; 31 Cyc. 1291. The contract of insurance is bilateral, and, until the principal ratifies, he is by hypothesis under no obligation to pay the premium. If so, there is until then no consideration to support the counter promise of the third person, for a consideration implies a legal obligation, and his promise ought not in principle to bind him, being indeed nudum pactum. Second. The result is unfair to the third party, since it permits the principal to speculate on the value of the contract, while he himself remains unbound. If it proves advantageous, he may ratify. If not, he may repudiate. There is no just ground for giving him such an advantage over the third party merely because of an unknown defect in the agent's powers. In view of the dearth of authority in this country and especially of any decisions binding upon me, I do not think that I should follow the rule in Bolton v. Lambert, supra, but rather what I cannot but believe to be the result necessary under the principles of the laws of contract. * * *

The next question is whether, if the contract was not binding upon either party until McIntosh tendered the premium, the occurrence of the fire terminated that possibility. * * * There is no difference of judicial opinion so far as I can find upon the proposition that the insurer is not bound, where the insured at the time of the binding of the bargain had learned that the loss has happened or the risk has changed since the original application. The only difference between those cases and the case at bar is this: That here the insurer likewise knew that the loss had occurred, and nevertheless did not withdraw from the contract. This fact would perhaps be irrelevant in any case, even if the insurer did not formally withdraw his offer upon learning of the loss, for it might be held that to withdraw it after a loss has occurred would be an idle ceremony; but that question is not up at present, because the defendants had no knowledge that McIntosh had not bound the plaintiff to pay the premium, and that their own undertaking had therefore been without consideration from the outset. They certainly dealt with him in good faith, and were not called upon to disaffirm a contract which, so far as they knew, was binding upon them. If, however, it be once admitted that it was not binding upon them until ratified, it could not be ratified or accepted by paying a premium after the risk had ceased and the fundamental condition of the promise no longer existed. This would be quite obvious had the offer never been accepted at all, before the loss, but, if the policy

was not binding while unratified, the situation was the same as though the offer had never been accepted. * * *

[Verdict directed for defendants.]

SECTION 4.—MASTER'S LIABILITY FOR TORTS OF THE SERVANT

KINGAN & CO. v. SILVERS et al.

(Appellate Court of Indiana, 1894. 13 Ind. App. 80, 37 N. E. 413.)

Appeal from a judgment for defendant in an action on a promissory note bearing interest at 8 per cent., "after maturity." The note was procured by plaintiff's traveling salesman, one Nichols, who, without the consent or knowledge of defendants, altered it by striking out the words "after maturity" and inserting words so as to make it bear 8 per cent. interest "from date." Plaintiffs never approved the alteration, and now sue upon the note as originally made. It was no part of the duty of Nichols to make settlements, nor to take notes, but in this instance he had been instructed by plaintiffs to procure from defendants a note to cover their indebtedness to plaintiffs, and to transmit the same to his principals.

LOTZ, J. [after stating the facts, and pointing out the general principle that public policy demands that a material alteration of a written instrument shall destroy it so as to prevent a recovery upon it]. The change in the note was not made by the plaintiff's order or direction, but it intrusted certain business to another as its agent, and such person made the alteration. If the alteration was made by the agent while in the transaction of the principal's business, and in the scope of his authority, then the act of the agent is the act of the principal; "Qui facit per alium facit per se." The solution of this case depends upon the relation existing between Nichols and the plaintiff at the time the alteration was made. If he was the plaintiff's agent, and the act was within the scope of his authority, then his act must be deemed the act of the plaintiff, and the law is with the defendants. If his position was that of a mere stranger to the note, then the law is with the plaintiff. * * *

The appellees further insist that Nichols was the agent of the payee in making the alteration; that he was acting in the line of his agency, and under color of his employment; that his wrongful act is imputable to his principal. In support of this position appellees' learned counsel say this upon the legal maxim, " 'Whatever a man sui juris may do of himself, he may do by another,' and, as a correlative, whatever is done by such other in the course of his employment is deemed to be done by the party himself. On this principle, the liability of one person for the acts of another who is employed in the capacity of an agent is extended to the wrongful and tortious acts of the latter committed in the line and under color of the agency, although such unlawful acts were not contemplated by the employment, and were done by the agent in good faith, and by mistake. In other words, where a principal directs an act to be done by an agent in a lawful manner, but the agent errs in the mode of executing his authority to the prejudice

of another person, the principal will be held responsible." This is a correct statement of the law. * * *

At the time Nichols made the alteration of the note, was he the agent or servant of the plaintiff in respect to his duties pertaining to said note? It is averred that he was the traveling salesman, but that he was not a general agent, and had no authority to make settlements or take notes on plaintiff's account, nor was that any part of his duties; that, being about to go to Lebanon in the course of his duties as such traveling salesman, the plaintiff instructed him to procure for plaintiff from the defendants a note on account of an indebtedness due from them to the plaintiff. But the averments of the complaint negativing the fact of agency will not control if it appear from all the averments that the legal relation of agency exists. The same person may be a special agent for the same principal in several different matters. Nichols was the agent of the plaintiff to sell goods. He was also its agent to procure the note. We are here concerned with the latter agency only. Did his relation as agent cease when he obtained the note, or did it continue until the note was delivered to the plaintiff? If the agency ceased when the note was obtained by him, what relation did he sustain to the plaintiff in the interval of time between the delivery to him and the delivery to the plaintiff? * * * When Nichols was engaged in treating with the defendants concerning the note, he was an agent. When the note was delivered to him, it was in law delivered to the plaintiff, and he ceased to treat or deal with the defendants. All his duties concerning the note then related to the plaintiff. It was his duty to carry and deliver it to the plaintiff. In doing this he owed no duty to the defendants. He ceased to be an agent, because he was not required to deal further with third parties. He was then a mere servant of the plaintiff, charged with the duty of faithfully carrying and delivering the note to his master. When Nichols made the alteration in the note he was the servant, and not the agent, of the plaintiff. * * *

Upon what principle is the master liable for the wrongful acts of his servant? This inquiry carries us back to the very dawn of jurisprudence. The modern idea of law is that it consists of those rules of conduct prescribed and enforced by the sovereign power of the state. But, as Mr. Justice Stephen truly remarks: "It is not till a very late stage of its history that law is regarded as a series of commands issued by the sovereign power of the state." As a matter of historical fact, ancient laws were not commands. They were not issued by political superiors, nor were they enforced by punishment or otherwise. "They were merely customs sanctioned by usage, voluntarily observed with that strong devotion to usage which always characterizes uncivilized nations." Vengeance on the part of the person injured is the foundation of all legal redress. The early history of all political societies shows the same system of private revenge and personal redress for injuries. Each person avenged, in whatever manner he deemed right, the injuries done him. The tribal customs not only sanctioned his doing so, but perhaps required him to do so. If he failed to avenge an injury or wrong, he was brought under the ban of public contumely. The spirit of retaliation is deeply rooted in human nature. Retribution in kind is the first impulse of the savage mind on sustaining an injury. An eye for an eye, a tooth for a tooth; whoso sheddeth man's blood, by man shall his blood be shed—was the

rule of all early and savage communities. If one man killed another, custom permitted, and perhaps required, that the blood relatives of the deceased should avenge his death by killing the slayer.

The Romans were the most civilized of all the ancient peoples. Their laws form the basis of all modern jurisprudence. Moyle, in speaking of the Roman law, well says: "Before the establishment of a regular judicature, the injured person, with his kinsmen or dependents, made a foray against the wrongdoer, and swept away his cattle, and with them perhaps his wife and children; or he threatened him with supernatural penalties by 'fasting' upon him, as in the east, even at the present day; or, finally, he reduced his adversary to servitude, or took his life." 1 Moyle, Just. Inst. p. 614. The family or tribe of the person who had committed an offense might escape the vengeance of their adversaries by delivering up or surrendering the offending member. As society slowly and gradually emerged from this depth of barbarism, a custom arose by which the person who inflicted the injury might buy off the vengeance of the injured. If the parties could not agree on the amount to be paid, the tribal assembly fixed it. These tribal assemblies, met for the purpose of fixing the price of vengeance, are the prototypes of modern courts. The idea that a society or the state was injured by a wrong inflicted upon one of its members or upon his property was of much later growth. If a man's slave inflicted an injury upon another, the injured party was entitled to wreak his vengeance upon the immediate cause of the injury. This same principle extended to animals and inanimate objects. But the master or owner might buy off the vengeance of the injured person by a money consideration, and thereby save the life of his slave or injury to his property.

This digression into the history of law may seem inappropriate to the decision of this case, but a knowledge of the history of that branch of law with which any principle is connected is often necessary before the true bearings and the limits of its application can be fully determined. Principles which have originated from certain causes are sometimes misapplied simply because there is a similarity in the facts of two different cases, and sometimes the true principle is overlooked or forgotten, and a new one invented, to explain rules which from a historical standpoint are well established. The law is sometimes said to be the perfection of human reason, and it is further said that when the reason fails the law fails. But these expressions, when applied to certain conditions, are often mere platitudes. The law does not always proceed logically, for "the life of the law has not been logic; it has been experience. * * * Many things which we take for granted have had to be laboriously brought out or thought out in times past." Holmes, Com. Law, p. 1.

The principle involved in this case is that of the master's liability for the tort of his servant. Let us take a common illustration: The driver of a grocer's cart negligently runs over another in the street, the person injured being without fault. The grocer is liable for the negligence of his servant, the driver. But why, or upon what principle? It is sometimes said that the reason for the master's liability in such cases is his negligence in employing an unskillful servant. If this were really the true reason, the logical result would be that, if the master was guilty of no negligence in employing the servant, he would not be liable. This, however, we know does not follow. It is no de-

fense that the master used the greatest care in employing his servant. Again, suppose an engineer or servant of a railroad company willfully run a train of cars over another person, we know the company is liable for the wrongful act of its servant, and that it is no excuse for the company to say it did not authorize the act, and that it was done without the knowledge or consent of the company, or against its express will or order. It is difficult to understand this principle of liability unless we approach it from the side of history. It is, in reality, a survival of the ancient doctrine that the master or owner was liable for the act of his slave, and for injuries committed by animals in his possession. The ancient idea was that the family of the master, including his slaves, his animals, and all other property, was a unity; and that the personality of the master affected all of his property; that, as he was entitled to all the benefits of ownership, he must accept the consequences flowing from injuries caused by his property. He might buy off the vengeance of the injured person, or he might appease it by surrendering the offending property to the person aggrieved. In Roman law there was a class of actions known as "noxal actions," which provided for this vicarious liability. The defendant had the option of surrendering the delinquent, instead of paying damages.

In ancient times the masses were slaves; in modern times the masses are freemen. When slaves became freemen, the master was shorn of his power to surrender the delinquent servant; but he still continues to be liable for the acts of this servant done in the line of the employment. This principle of liability originates in slavery, and in the power and domain that the master exercised over the members of his family. But it may be said that, as the master has ceased to have any property in his servants, and as he is shorn of his power to surrender a delinquent, the reason for the rule fails, and that the law must fall within the reason, and that this would result in exonerating the master from all liability in all such cases. It is true that the power of surrendering the delinquent has ceased, but it is not true that the personality of the master has ceased to affect his servants. The will of the master dominates any given enterprise. He calls to his aid servants and appliances. The servant surrenders his time, and in a measure permits the will of the master to dominate and control his actions. He is the instrument of his master in accomplishing certain ends. The servant is placed in the position and given the opportunity to commit the wrong by the will of the master. In a qualified sense, the servant is the representative of the master. Without the controlling, dominating influence of the master's will, there is but the remotest probability that the servant would have been placed in the position or given the opportunity to commit the particular wrong. Anciently, the liability of the master was not limited by the duties imposed upon his slave. When a servant became a freeman he was no longer a member of the master's family, and he could not properly be said to be the representative of his master, except in the line of the employment. Modern jurisprudence properly and justly limits the liability of the master to the acts of his servant done within the scope of his employment. There is still substantial and just grounds for the principle that the master is liable for the wrongful acts of his servant. No liability arises against the master for the wrongful acts of his servant unless the

servant has perpetrated an injury either upon the person or property of another. * * *

[Judgment for defendants reversed.]

JENSEN v. BARBOUR.

(Supreme Court of Montana, 1895. 15 Mont. 582, 39 Pac. 906.)

DE WITT, J. Plaintiff's complaint is for damages for personal injuries sustained while riding on defendant's horse street car. The district court upon the trial directed the jury to find for the defendant. Plaintiff appeals from the judgment, assigning error in that order. * * * There was evidence that the plaintiff, a boy five years of age, was riding on the front platform of the horse car, with the knowledge of the driver, and that the car struck a stone, and jolted the plaintiff off, and ran over him, inflicting the injuries complained of. * * *

The question presented is whether the person immediately causing the injury to plaintiff stood in the relation of a servant of defendant, or whether he was the servant of an independent contractor, for whose acts of negligence the defendant was not liable. The defendant was the owner of a street-car franchise in the city of Great Falls. He had built a car track extending over six or seven blocks, and had one or two cars on the track. Defendant lived in Helena. J. O. Gregg, of Great Falls, was his agent, acting for him in relation to this street-car franchise, track, and cars. Gregg was also one of the owners of the railway. Defendant, Barbour, was trustee of the railway. He was sued apparently as trustee, and also personally. It seems that the railway people were not operating their line very extensively, for Mr. Gregg testified that he, as agent for the trustee, hired one Vaughn to run the car one trip a day. Gregg says that the contract with Vaughn was that he was to be paid so much money per month to haul the car over the line once a day each way, and to furnish a driver. In pursuance to this arrangement Vaughn furnished the driver, and was moving the car along the track at the time the plaintiff was injured.

Defendant contended that by virtue of this employment Vaughn wan as independent contractor, and that defendant was not liable for the negligence of Vaughn's driver. Mr. Gregg, however, testified that there was nothing as to collecting fares in this contract with Vaughn. In fact fares were not collected. * * * The track and rolling stock were not delivered into the possession of Vaughn at all. He did nothing more than to haul the car the one trip a day. Mr. Gregg further testified: * * * "I had no direct control over the drivers, but I ordered Mr. Vaughn to see that the drivers kept the boys away. I was trying to protect the property. I had driven the plaintiff off the cars several times. The contract with Vaughn was that I was to pay him so much money a month to haul the car over the line each way once a day, and furnish a driver. I had nothing to do with the drawing of the car backward and forward, or directing the manner in which it should be done. I sometimes spoke to Vaughn about matters concerning the protecting of the property and driving the boys off. * * *" Under these facts the district court held that Vaughn was an independent contractor, and that the defendant was not liable for his negligence.

To draw the distinction between independent contractors and servants is often difficult, and the rules which courts have undertaken to

lay down on this subject are not always simple of application. A rule as often quoted as any is stated in the syllabus of the case of Bibb's Adm'r v. Railroad Co., 87 Va. 711, 14 S. E. 163, after an able review of the authorities, as follows: "Independent contractor is one who renders service in the course of an occupation, and represents the will of his employer only as to the result of his work, and not as to the means whereby it is accomplished, and is usually paid by the job." Brackett v. Lubke, 4 Allen (Mass.) 138, 81 Am. Dec. 694, is also a leading case. The opinion states as follows: "The distinction on which all the cases turn is this: If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner, and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But, on the other hand, if the work is done under a general employment, and is to be performed for a reasonable compensation, or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient. This distinction is recognized in the cases adjudged by this court. * * *"

The respondent argues that Vaughn represented the will of his employer only as to the result of his work, and not as to the manner of its performance; that is to say, that Vaughn contracted to deliver to his employer the result of putting the car over the track once a day by his own methods. But so it might be argued that one's coachman contracts to produce the result of conveying his master from his house to his office, or wherever he may wish to go; or one's cook contracts to produce the result of placing before his master his daily food. But such is not the sense in which the word "result" is used in the rule. We think the word "result," as so used, means a production or product of some sort, and not a service. One may contract to produce a house, a ship or a locomotive and such house, or ship or locomotive produced is the "result." Such "results" produced are often, and probably generally, by independent contractors. But we do not think that plowing a field, mowing a lawn, driving a carriage or a horse car for one trip or for many trips a day is a "result" in the sense that the word is used in the rule. Such acts do not result in a product. They are simply a service. * * * It would perhaps be difficult to draw a clear, distinction between the relations which Mr. Gregg held to the railway property and the drivers, and that of any person admittedly having supervision over them. No superintendent assumes control over every minute detail of an employé's work. In all work which demands sufficient intelligence to require a man instead of a machine, the man must be left to direct his own movements to some extent. But it is clear, from our review of Mr. Gregg's testimony, that he did not consider the driver of the car as the servant of a contractor independent of the railway people. * * * Mr. Gregg qualified his statement somewhat by an attempt to disclaim any supervision of the actual moving of the car, but we think that his testimony as a whole did not place Vaughn in the position of an independent contractor.

After stating any rule which is to determine whether one is an independent contractor or a servant, it is very easy, by a little casuistry, to construe any person who performs a service to be an independent contractor. We have endeavored to point out such dangers. We think that the district court fell into just such a mistake. If Vaughn, in this case, is an independent contractor, a very few steps further in the same direction of construction would make all servants independent contractors. We are wholly satisfied that Vaughn was not an independent contractor, but, on the contrary, stood in the relation of an employé for wages of defendant in this case. The judgment is therefore reversed, and the case is remanded for a new trial.

STONE v. HILLS.

(Supreme Court of Errors of Connecticut, 1877. 45 Conn. 44, 29 Am. Rep. 635.)

Trespass on the case, for an injury by reason of the negligence of the defendants' servant. The defendants were operating a paper-mill in the town of Glastonbury and had in their employment one Smith, as a driver of their team. On that day they directed him to carry a load of paper from the mill and deliver it to one Taylor at a point in the same town four and a half miles distant, and to return from thence by way of Nipsic with a load of wood. On reaching Taylor's, the latter requested Smith to deliver the paper at the warehouse of Tracy & Co. in Hartford, four and one-half miles distant from Taylor's, and to go from thence to a railway freight station in the city and get some freight belonging to Taylor and transport the same to his place. Smith acceded to Taylor's request, and while he was in the station, paying Taylor's freight bill, the horses, which he had negligently left unhitched and unattended, being frightened by a passing train, ran up the street and against the plaintiff's wagon, and injured it to the extent of $18.42, besides making it necessary for him to spend $6 in addition for the use of another wagon.

PARDEE, J. The rule is that for all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible. We cite a few from the many cases in which the rule has been judicially illustrated and applied.

In Mitchell v. Crassweller, 13 C. B. 237, the defendant's carman having finished the business of the day returned to their shop in Welbeck street with their horse and cart, and obtained the key of the stable, which was close at hand; but instead of going there at once and putting up the horse, as was his duty, he drove to Euston square, and on his way back negligently drove over the plaintiff; and it was held that the carman was not at the time engaged in his master's business so as to make him liable. Maule, J., said: "At the time of the accident the servant was not going a roundabout way to the stable, and as one of the cases expresses it, making a detour. He was not engaged in the business of his employer. But in violation of his duty, so far from doing what he was employed to do, he did something to-

tally inconsistent with his duty, a thing having no connection whatever with his employer's service. The servant only is liable and not the employer. All the cases are reconcilable with that. The master is liable even though the servant in the performance of his duty is guilty of a deviation or failure to perform it in the strictest and most convenient manner. But when the servant, instead of doing that which he is employed to do, does some thing which he is not employed to do at all, the master cannot be said to do it by his servant; and therefore is not responsible for the negligence of the servant in doing it." In Storey v. Ashton, L. R., 4 Q. B. 476, the defendant intrusted his servant with his horse and cart for the day, and when his work was ended and it was his duty to drive home, he, for a purpose of his own and without authority express or implied from his master, drove in an entirely different direction and by his carelessness injured the plaintiff. The court held that the master was not liable.

In Sleath v. Wilson, 9 C. & P. 607, Erskine, J., said in his charge to the jury: "But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. * * * The master, in such a case, will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage by intrusting him with it." In Storey v. Ashton, Cockburn, C. J., said: "I think the judgment of Maule and Cresswell, JJ., in Mitchell v. Crassweller, expresses the true view of the law, and the view which we ought to abide by; and that we cannot adopt the view of Erskine, J., in Sleath v. Wilson, that it is because the master has intrusted the servant with the control of the horses and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey, which had nothing at all to do with his employment. It is true that in Mitchell v. Crassweller the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going too far to say that under such circumstances the master was liable." In the same case, Mellor, J., said: "But here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles, when he had got within a quarter of a mile from the defendant's office he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary, every step he drove was away from his duty." In Cormack v. Digby, Ir. Rep. (9 Com. Law Series) 557, a servant had leave from his master to go for the day to a neighboring town to transact business of his own, and borrowed his master's horse and cart for the purpose; he afterward proposed, and the master assented, that he should bring home some meat from

the town for the master; by negligent driving he injured the plaintiff. Held, in an action against the master for the negligence of the servant, that the court could not hold as matter of law, upon the evidence, that the master was responsible for the negligence of the servant.

In Lamb v. Palk, 9 C. & P. 629, where a servant driving his master's horse got off the carriage and took hold of a horse standing before a van and caused the van to move so as to make room for the carriage to pass, whereby a packing case fell from the van and broke the thills of the plaintiff's gig, it was held that the master was not liable for the injury. In Woodman v. Joiner, 10 Jur. (N. S.) 852, the plaintiff permitted the defendant to use his shed temporarily as a carpenter's shop, and the defendant's workman in lighting his pipe set the shed on fire; the court held that the defendant was not liable in an action for negligence, saying, "We have had much doubt upon this question, but have all arrived at the conclusion that there is no liability. If the servant had been guilty of any negligence relating to his employment, it may be that the defendant would have been liable." In Campbell v. City of Providence, 9 R. I. 262, the defendant, a hack owner, employed a person as a day driver. He used the hack at night without the master's consent or knowledge. Held, that the master could not be held responsible for an omission on the part of the driver to comply with the terms of a city ordinance during the time of such unauthorized use of the hack. * * *

In the case before us the servant left the employers' premises under precise instructions as to the place to which their team was to be driven and as to the merchandise to be transported; and under instructions equally precise as to the route to be taken in returning, and as to what he should bring home. These, therefore, covered the entire period of his contemplated absence; nothing was left to his option or discretion; nothing to chance; and in fact the deviation was not occasioned or even suggested by any unforeseen event in connection with the employers' business; the record shows no obligation, express or implied, upon them to deliver the paper elsewhere than in North Glastonbury, nor that the journey thence to Hartford, even if successfully accomplished, would have been for their advantage or profit; it was not connected with, did not grow out of, did not contribute to, the successful completion of their business. When, therefore, the servant accepted instructions from Taylor and became a carrier of merchandise for him to and from a railroad station in an adjoining town, he temporarily threw off his employers' authority, abandoned their business and left their service. They are not responsible for his negligence on this occasion. There is error in the judgment complained of.

STAPLETON v. INDEPENDENT BREWING CO.

(Supreme Court of Michigan, 1917. 198 Mich. 170, 164 N. W. 520, L. R. A. 1918A, 916.)

MOORE, J. This suit arises as a result of an automobile accident. The suit was commenced in the justice court to recover the sum of $375 for damages done, as a result of the accident to a wagon and team of horses belonging to plaintiff. The automobile which caused the accident was owned by the defendant, but at the time of the accident above referred to it had loaned it to the Detroit Axle Company to be used in the Detroit Axle Company's business, and at this par-

ticular time the automobile was being driven by an employé of the Detroit Axle Company. * * *

Counsel for appellant say there is but one question presented for determination—i. e.: "If an employé of the Detroit Axle Company engaged in that company's business, negligently operates an automobile owned by another party, is the owner of that automobile liable where there is no relation of master and servant," but where the automobile is so used with the consent of the owner?

The question involves a construction of section 29 of Act No. 302 of the Public Acts of 1915. The portion of that section necessary to an understanding of this case reads as follows:

"Sec. 29. Civil Actions. Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligence of the owner or operator or his agent, employé or servant, of any such motor vehicle, or resulting from the negligent use of the highway by them or any of them. The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle, whether such negligence consists in violation of the provisions of the statutes of this state or in the failure to observe such ordinary care in such operation as the rules of the common law require: Provided, that the owner shall not be liable unless said motor vehicle is being driven by the express or implied consent or knowledge of such owner." * * *

It is true that the automobile has become so perfected that it may not be classed as a "dangerous instrumentality" when intelligently managed. It will not shy, balk, back up, or run away when properly directed, but may do all of these when managed by an inexperienced, incompetent, or reckless driver. When in the control of such a one it becomes an exceedingly destructive agency as the daily toll of lives and the many injuries to persons chronicled by the newspapers attests. If the owner of such agency consents to turn it over to the control of an incompetent or reckless chauffeur he is not deprived of any legal right by holding him liable for its negligent operation when in such control and a greater degree of safety to the general public is likely to follow.

The present statute, while safeguarding the rights of persons having occasion to use the streets, does not unreasonably infringe upon the rights of those able to own automobiles. The owner of an automobile is supposed to know, and should know, about the qualifications of the persons he allows to use his car, to drive his automobile, and if he has doubts of the competency or carefulness of the driver he should refuse to give his consent to the use by him of the machine. The statute is within the police power of the state.

Judgment is affirmed, with costs to the plaintiff.

GERSTEIN v. C. F. ADAMS CO.

(Supreme Court of Wisconsin, 1919. 169 Wis. 504, 173 N. W. 209.)

Action by Gertrude Gerstein against the C. F. Adams Company. Judgment for plaintiff, and defendant appeals.

This action was commenced in the civil court for Milwaukee county to recover damages for assault and battery. A general verdict was

rendered in favor of the plaintiff assessing damages at $685. An appeal was taken to the circuit court, where the judgment of the civil court was affirmed. Defendant appealed to this court.

KERWIN, J. The evidence in this case tends to show the employés of the defendant, at the time of the alleged injury, were attempting to collect the balance due on a clock sold and delivered by defendant to plaintiff; that said employés forcibly took the clock from the home of plaintiff, and in so doing committed an assault and battery upon her, kicking and severely injuring her; that they forcibly took possession of the clock after plaintiff had failed to pay the balance due. Said employés denied that they assaulted or beat plaintiff or used any force in taking the clock. Plaintiff testified that at the time in question she was alone, and that the employés of the defendant came to her home and demanded all the money due on the clock. She said she owed $3 and would pay 50 cents and the balance later, but one of the employés said, "No; I have to have all the money." Then they entered the room where the clock was and immediately took it, and she tried to stop them, and they struck her, and she fell. They ran away, taking the clock with them, and she lay on the floor half an hour and could not get up. She bought the clock on the installment plan.

The evidence is practically undisputed that the clock was taken by the employés of the defendant while engaged in the course of their employment; hence their employer, the defendant here, was liable for the negligent or wrongful act of his servants committed while endeavoring to perform a duty delegated to them by the master notwithstanding the method adopted by the servants may not have been authorized, and even may have been prohibited, by the master. * * *

Judgment affirmed.

FIELD et al. v. KANE.

(Appellate Court of Illinois, First District, 1901. 99 Ill. App. 1.)

This suit was brought in trespass by appellee to recover damages for a false arrest of the appellee by appellants. The evidence discloses that appellee had been for a long time a customer of the appellants, and that she had a credit or "charge" account with appellants; that at the time in question she visited the store of appellants and after examining certain wares upon the third floor, started away from the store, having made no purchase. She took the elevator, and upon reaching the main floor left the building. After she was upon the street Mr. Claribut, an employé of appellants, whose duties were those of usher on the third floor of the store, followed her, placed his hand upon her arm, and caused her to return to the store with him, where she was taken into a room and interviewed by others of appellants' employés. Appellee testified that Claribut opened her cloak and put his hand into her pocket, and that he stated to Mr. Weber, another of appellants' employés, "This lady has stolen a candlestick." Claribut testified to actions of appellee while in the store, which evidently aroused his suspicion, and that he followed her out of the building and asked her "if she hadn't got something there that didn't belong to her," to which appellee replied that he had made a mistake, and that he thereupon requested her to step into the store with him. He testified that in conducting appellee back into the store he had put his hand under her arm, "just as I would escort any lady." He denied that he or any

other person had searched appellee. Appellee testified that Claribut "grabbed her by the shoulder" when taking her back to the store.

No article belonging to appellants was discovered in the possession of appellee, and it was not contended upon the trial that she had in fact taken anything. The appellants pleaded the general issue. The issues were submitted to a jury, and they found appellants guilty and assessed appellee's damages at $475. From judgment upon that verdict this appeal is prosecuted.

SEARS, J. [after finding that there were present the essential elements of a wrongful arrest and detention]. Greater difficulty is to be found in the second question presented, viz., as to whether appellants are liable for this conduct of their employé. The learned counsel for the appellants cites and relies upon the decision of the New York court in Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448. The opinion in that case proceeds upon the theory that a principal can not impliedly and without express direction authorize another to do that as agent which the principal could not himself lawfully do. The decision supports the contention of counsel. For here the appellants did not, in express terms, authorize Claribut to detain appellee nor could it be said that appellants themselves might, under the facts of this case, lawfully detain her. The same reasoning would exonerate the principal from liability in every case where an agent made a wrongful arrest without express direction from the principal. We are of opinion that the basis of the decision is not sound, and that it lacks the support of the weight of authority in this country. * * *

In the case under consideration Claribut was employed in a manner which made it his duty to protect his employer's wares against thieves. That he might lawfully stop a thief who was carrying off any of those wares, can scarcely be questioned. This authority is to be implied from the nature of his employment. If the authority to detain one who actually was carrying away the goods of the master is implied, and the act of the agent is in that respect the act of the master, then when the agent wrongfully exercises this implied authority by detaining one under suspicion of guilt who is in fact innocent, it would seem as clearly to be the act of the master done by the servant, wrongfully, to be sure, yet in the exercise of the implied authority.

The fact that the exercise of the implied authority was wrongful, does not of itself exclude a liability of the master. The criterion is, was the act within the general scope of the implied authority conferred on the agent. If so, the wrongful exercise of it, although not expressly directed by or contemplated by the master, will yet render the master liable. In Arasmith v. Temple, 11 Ill. App. 39, this court said: "That a master is liable for a trespass committed by his servant bona fide as such and in the line of his employment, although willful on the part of the servant, has been often declared by the Supreme Court of this state. * * * The act of the servant within the scope of his authority, with all its characteristics, whether of willfulness, negligence or unskillfulness, is deemed to be the act of the master. And everything done by the servant bona fide as such and in the line of his employment, is within the scope of his authority. The master's direction to do it is impliedly or conclusively presumed from the relation existing between them. * * * Having set the servant to work about his own business with the right to direct and control him as to

the manner of doing it, he ought to answer to others for whatever injury they suffer by reason of what he so does or of the manner in which he does it; and equally so whether it be willful or only careless or unskillful." * * *

Authorities which do not follow the reasoning of the Mali Case, but proceed upon a different and opposite interpretation of the law, are found in Staples v. Schmid, 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824; Mallach v. Ridley, 47 Hun, 638, 9 N. Y. Supp. 922; Rounds v. D. & L. W. R. Co., 64 N. Y. 129, 21 Am. Rep. 597. In Staples v. Schmid, supra, the Rhode Island court held a shopkeeper liable for a wrongful arrest of a customer by an employé of the shopkeeper, although there was no express direction by the principal, and the only authority of the agent to act in the matter for the principal was the implied authority arising from his duty to protect his employer's property. The court said:

"It is quite true that the master would have no right to arrest and search an innocent person; but it is equally true that he would have the right to detain a thief and to recapture his property from him. The case therefore was one where the act, aside from any excessive force, might be lawful or unlawful, according to whether the supposed circumstances were real or unreal. The servant was left in a situation where he was obliged to determine the fact and where his duty to his master depended upon his decision. The decision was his, as the substitute of the master, and the act was one intended by him to be for his master's benefit and which his duty required if the facts were as supposed. Hence, as to third persons, it was the master's act. The criterion of the master's liability can never be whether the act would have been lawful for the master to have done in the circumstances as they actually existed. It remains to apply these principles to the case at bar. The servant in this case was left with an assistant in charge of his master's store. His ordinary duties undoubtedly were to show goods and to sell them to customers. It was, however, equally his duty to protect his master's property from pilfering. The acts complained of were evidently done with that intention. The arrest was for the purpose of searching for and recovering the master's property, not with the object of punishing crime against the public. The establishment was not a railroad station where the multiplicity of employés confines each one to a narrow round of duties, where special officers are stationed to preserve order and detain criminals, nor a large dry goods emporium where detectives and watchmen are employed to guard against thieves. The servant here was salesman and custodian in one. Whatever the master might do in the protection of his property, he expected his servant to do in his absence. If the servant had seen the plaintiff take up and secrete the package of spoons in question and had allowed her to walk away with them unmolested, could any one say that he had not been derelict in his duty to his master? If in the performance of this duty he mistook the occasion for it, or exceeded his powers or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master."

We are of opinion that if it was properly determined that the implied authority of Claribut included the protecting of the wares of appellants against thieves, then the wrongful act of Claribut in detaining appellee upon an unfounded suspicion that she had committed a

theft, was the act of appellants. Whether the implied authority of the usher included such protection of the appellants' property, was, upon the facts here, a question for the jury, and we are not prepared to hold that the conclusion expressed in the general verdict is against the weight of the evidence. * * *

Claribut was usher upon the floor where the appellee was suspected of having committed a theft. As such, his plain duty was to protect his employer's wares there. It does not appear that there was any other employé of appellants upon that floor whose specific duty it was to act in the matter, and to whom Claribut should have reported the circumstances before acting. If the suspicions of Claribut had been well founded, it would have been a useless thing to have gone in search of a detective while a theft was being committed in his presence, and if the culprit in such case had escaped through his inattention he would have been derelict in his duty. In the Rhode Island case the court held the shopkeeper to respond for actual damages only. No question arises in the case under consideration as to any such limitation of the recovery, as no complaint is made that the damages awarded are excessive. * * *

The judgment is affirmed.

MERCHANTS' NAT. BANK OF SAVANNAH v. GUILMARTIN.

(Supreme Court of Georgia, 1892. 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322.)

Action by L. J. Guilmartin against the Merchants' National Bank of Savannah to recover for the loss of a special deposit of valuables feloniously appropriated by defendant's cashier. Judgment for plaintiff. Defendant brings error.

LUMPKIN, J. The main question raised in the record is whether a bank, which, through the cashier, received from one of its customers a special deposit of valuable securities, to be kept simply for the depositor's accommodation, and returned to him on demand, shall be held liable for the felonious appropriation of the securities by the cashier to his own use, he taking them while they were in the bank. The answer to this question depends on the nature of the duty assumed by the bank with respect to the deposit. Such a deposit belongs to the class of bailments termed "gratuitous," and the test of the bailee's liability on a loss of the property is to inquire whether he exercised the full amount of diligence which the law exacts as the measure of his duty in keeping the property. Each kind of bailment imposes on the bailee the obligation to use a degree of care commensurate to some extent with his interest in the transaction. If the bailment is for the benefit exclusively of the bailee, he must use extraordinary care; if for the mutual benefit of the parties, ordinary care; and if for the exclusive benefit of the bailor, slight care will suffice. Thus the essence of a contract of bailment on the part of the bailee is for diligence of the required degree, and when he has used such diligence his contract is performed, and he discharged, although the property may be lost during his custody of it. Accordingly we find the authorities holding that the bank is not liable for the loss of a special deposit, to keep which it receives no compensation, by the theft of its cashier or other servant, provided it has not been guilty of gross negligence in any respect. * * * The bank may be guilty of neg-

ligence, and liable accordingly, in employing or retaining an unfit person in the position of cashier. But when it does its full duty in selecting a proper person, and in not disregarding indications of dishonesty which ought to arouse suspicion and investigation, then it is not responsible to one who has obtained from it the favor of barely keeping specific property without recompense, though the cashier steal the property so put in his charge. The law, as disclosed by the authorities, seems to consider that, in the case of a gratuitous special deposit, there is consideration enough in the bare custody of the property to insure its being kept without gross negligence, but not enough to bind the bank as an absolute insurer of its servant's honesty.

But it has been strongly urged that the bank, as master, is liable for the fraud of the cashier, its servant, in the course of its business. This is the point of most difficulty. Every bailee is bound to exercise good faith, and abstain from fraud, in keeping the property. Bad faith is at least as bad as gross negligence, and entails as much liability. The application of this is easy where the very person to whom the property was intrusted is guilty of the fraud. But suppose the master, being the bailee, is personally blameless, and his servant is the guilty one, shall the master be held liable? At common law there was once some authority that the master was not liable for the unauthorized willful tort, which of course included fraud, of his servant.

But the better view is that the master is liable for every tort by the servant which is within his authority, or is committed in the prosecution and within the scope of the business. It is often hard to draw the line between torts within and torts without the master's business. On the question now to be decided the cases hold that the act of the cashier, by which he appropriates exclusively to himself a gratuitous special deposit in the bank, is not an act done in the bank's business, and within the scope of his employment. The custody of the deposit implies no act to be done, but only a mere continuance of possession until a return of the property is demanded. The cashier had nothing to do about it except suffer it to remain in a safe place of deposit. Consequently, in taking it to himself, he is said to "step aside" from his employment to do an act for his personal gain, regardless of the business for which he was engaged. Such an act is lacking both in the rendition of, and in the intent to render, any service to the employer. The cashier does not, as a matter of fact, act with the bank's authority, and, furthermore, does not essay, or even profess, to act in its behalf. He represents nobody but himself. He throws off all allegiance to his master and takes the part of a common enemy to all concerned. He becomes the same as a stranger from without, who by robbery, burglary, or stealth deprives the bank of a special deposit; and the authorities hold that the bank is not chargeable with such a loss, in the absence of gross negligence, but is liable if grossly negligent. Such a fraud, by a well-selected servant, duly supervised, is not to be imputed to the bank as its own fraud. The bank cannot be said to have stolen when there is on its own part no participation in the theft, no appropriation, and no intent to appropriate the property. Of course, if the bank derive profit or benefit from its servant's speculation, it is liable. * * * The common law appears to be that a master generally is not liable for the servant's fraud or willful tort unless he is acting at the time by the master's express authority or in the conduct

of his business; that is to say, at his actual or implied instance. The servant must, in the wrongful act, be acting or intending to act in behalf of the master, and in the course of his employment.

Judgment reversed.

MICK v. ROYAL EXCHANGE ASSURANCE.

(Court of Errors and Appeals of New Jersey, 1914. 87 N. J. Law, 607, 91 Atl. 102, 52 L. R. A. [N. S.] 1074.)

PARKER, J. The question to be determined is whether the forfeiture clause in a standardized fire insurance policy, making it void "in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss," is under any circumstances available to the company after a loss, when there is fraud in the claim committed by an agent of the insured without specific knowledge thereof or assent thereto by the insured himself, and, if so, whether the circumstances of this case are such as to make the forfeiture applicable. * * *

The responsibility of an innocent principal for the fraud of an agent has been one of the vexed questions of the law. That an innocent principal cannot, as a general proposition, be permitted to benefit by the fraud of his agent, has been settled in this court. It seems to be settled that a principal is not liable in tort for deceit, upon fraudulent representations made by his agent without his knowledge or consent; * * * the remedy in such case resting on a rescission of the contract. But this seems to relate mainly to the form of the remedy. In many cases the controlling factor was the extent of the agent's authority; and such authority was held to have been exceeded in such cases as National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Kennedy v. Parke, 17 N. J. Eq. 415. While in others, the scope of the authority was held to cover the fraudulent acts and the principal had to suffer. * * * Naturally, when an agent intrusted with powers to deal with a particular subject matter misuses those powers so as to deal unlawfully, and the principal is sought to be held responsible, the plea is that the powers are exceeded, and the unlawful acts are not within the scope of the agency. But, as was said by Mr. Justice Willes in the leading case of Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147, 12 E. R. C. 298: "In all these cases it may be said, as it was said here, that the master had not authorized the particular act, but he has placed the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

That case was quite generally considered to limit the responsibility of the principal for fraudulent acts of the agent to those committed for the benefit of the principal; but this misapprehension is set right by the House of Lords in the recent case of Lloyd v. Grace, Smith & Co., 1912 A. C. 176, where a solicitor was held accountable for the fraudulent procurement of a transfer of property from a client by the solicitor's managing clerk, though the solicitor in no way benefited or could benefit thereby, knowing nothing of the transaction. The rule is laid down that, irrespective of the question of benefit, the principal is liable for the fraud of the agent acting within the scope of his authority. These, and other English cases, are cited with approval, and

the general question discussed by Mr. Justice Kalisch, speaking for this court in Corona Kid Co. v. Lichtman, 84 N. J. Law, 363, 86 Atl. 371. In this state we have decided, it is true, that in such case an action of deceit will not lie against the innocent principal; but those decisons go to the form of the remedy and not to the denial of relief. That fraud of an agent within the scope of his employment will invalidate a contract so procured by him for his principal, may be considered settled and is not disputed here. * * *

RHODA v. ANNIS.

(Supreme Judicial Court of Maine, 1883. 75 Me. 17, 46 Am. Rep. 354.)

DANFORTH, J. This is an action to recover damages for deceit in the sale of a farm. The representations complained of were made by the defendant's son acting in her behalf. The jury were instructed that the "defendant was responsible for all the acts and representations of her agent in making the sale." This instruction does not make her responsible for the acts or representations of any person who was not her agent, or for such as were not made in furtherance of the sale, or to accomplish that end. These things were first to be found by the jury under proper instructions as to the law. We must then assume that the son had authority as agent for his mother to make a sale of the farm, that the representations, so far as they were submitted to the jury, were made by him as a part of the negotiation for the purpose of bringing about the sale, that by means of them it was brought about, the conveyance was made, and that the defendant received the proceeds of the sale. In fact, all these things are conceded. The verdict affirms the fraudulent character of the representations, and that in making them the agent acted within the scope of his authority. This would seem to bring the case within the well established law, that the principal is responsible for such acts of his agent as are done within the scope of his authority, to do the principal act.

In fact, this principle of law is conceded in this case, but it is denied that the defendant is liable in this form of action. It is said that being personally innocent of the fraud, she cannot be convicted of that which has been committed by another with no authority from her, except that which results from his agency. This may be true in a criminal prosecution, but not in a civil action. If she is liable that liability must be ascertained in the proper form of action. Here is no contract of any kind, express or implied, between the parties which can afford any remedy for the injury of which the plaintiff complains. He claims that a wrong, for which the defendant is responsible, has been done him. For that wrong he seeks a remedy. What remedy can he have except an action of tort? The counsel says two. He may rescind the contract, and recover back the consideration paid, or in an action for money had and received, recover the profits accruing from the fraud. But neither of these may be adequate to his injury. If he rescinds the contracts he may perhaps lose all the consideration paid, and it would be difficult, if not impossible, to ascertain the amount received on account of the fraud, if that should be held to differ from the amount of damages recoverable in this form of action. But how does this change of form relieve the defendant's feelings or reputation? In either case the action is founded upon a fraud, and

one which must be proved. In either case it is not her own fraud but that of another for whose doings she is legally, though perhaps not morally, responsible.

The counsel relies largely, if not entirely, upon the English cases to support his views and some of them do so. But an examination of them will show that they are conflicting, many of them decidedly sustaining the instruction given to the jury in this case. It will however be noticed that in the most, if not all of them, the form of the action is not considered material. The object is to limit the extent of the liability to the advantages received from the fraud, applying a somewhat different test to the amount of damages to be recovered.

The American cases are more uniform, and sustain the instruction complained of, both as to the form of action and extent of liability. Bigelow on page 23, says: "In America it has generally been held that an action of deceit may be maintained against the principal; but the cases are at variance as to the ground of liability." As are the cases, so we find the text-books uniform in sustaining the liability of the principal in actions of tort for the wrongful acts of the agent done within the scope of his authority, even though the principal himself is innocent. * * *

As already seen all the cases, both here and in England, hold the principal liable for the fraud of the agent to some extent when he has adopted the contract into which that fraud has entered, and if liable, we see no good reason why that liability should not be co-extensive with the injury in accordance with the great weight of authority. If he would avoid this he may, as undoubtedly the law would authorize him to do, repudiate the contract, and restore to the injured party what has been taken from him. But in this case no such offer has been made, but defendant still holding the fruits of what the jury have pronounced a fraud, denies any liability on her part. * * *

Exceptions overruled.

CHAPTER III

TERMINATION OF THE RELATION

Section
1. What Constitutes a Termination of the Relation?
2. Irrevocable Powers.
3. Effect of Terminating the Relation.

SECTION 1.—WHAT CONSTITUTES A TERMINATION OF THE RELATION?

AHERN v. BAKER.

(Supreme Court of Minnesota. 1885. 34 Minn. 98, 24 N. W. 341.)

VANDERBURGH, J. The defendant, on the ninth day of September, 1884, specially authorized one Wheeler, as his agent, to sell the real property in controversy, and to execute a contract for the sale of the same. He in like manner on the same day empowered one Fairchild to sell the same land; the authority of the agent in each instance being limited to the particular transaction named. On the same day, Wheeler effected a sale of the land, which was consummated by a conveyance. Subsequently, on the tenth day of September, Fairchild, as agent for defendant, and having no notice of the previous sale made by Wheeler, also contracted to sell the same land to this plaintiff, who, upon defendant's refusal to perform on his part, brings this action for damages for breach of the contract.

This is a case of special agency, and there is nothing in the case going to show that the plaintiff would be estopped from setting up a revocation of the agency prior to the sale by Fairchild. A revocation may be shown by the death of the principal, the destruction of the subject-matter, or the determination of his estate by a sale, as well as by express notice. The plaintiff [defendant?] had a right to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it. In dealing with the agent the plaintiff took the risk of the revocation of his agency. * * *

Order affirmed, and case remanded.

CLAFLIN et al. v. LENHEIM.

(Court of Appeals of New York, 1876. 66 N. Y. 301.)

RAPALLO, J. The plaintiffs seek to recover in this action the price of certain merchandise which they allege that they sold and delivered to the defendant, through his brother H. S. Lenheim, as his agent.

To establish the agency, they proved that this brother of the defendant had, for several years prior to July, 1867, conducted the business of a store at Meadville, Pennsylvania, in the name of the defendant, and had been in the habit of purchasing goods for that store from

the plaintiffs. These purchases were all made in the name and on the credit of the defendant, and the bills thereof were rendered to and paid by him.

The defendant concedes, in his testimony, that previous to a fire which took place in July, 1867, in the store at Meadville, his brother was authorized by him to make purchases and carry on that store in his (the defendant's) name, but contends that after the fire he terminated such authority. The purchases for which this action was brought were made by the brother, for the Meadville store, in November and December, 1869, in the name of the defendant. The plaintiffs claim that they had no notice of the revocation of the agency, and sold on the credit of the defendant.

The last bill paid by the defendant for goods sold for the Meadville store, was for upwards of $8,000, and was paid in August, 1867. It was for goods sold before the fire. There was a difficulty between the plaintiffs and the defendant about this bill. An action was brought upon it and an attachment issued against the property of the defendant, and he was required to pay the costs of these proceedings, which he did in August, 1867. The defendant had for several years previously carried on another store at Great Bend, Pennsylvania, and had been in the habit of purchasing goods from the plaintiffs for that store; but after this difficulty he suspended all his dealings with the plaintiffs until the month of October, 1869, when he resumed his business relations with them by the purchase of goods, personally, for the store at Great Bend. In the following months of November and December, 1869, the brother made the purchases now in controversy, in the name of the defendant, for the Meadville store.

The defendant gave evidence on the trial tending to show actual notice to the plaintiffs of the revocation of the agency, after the fire of July, 1867. It was conceded that the plaintiffs had notice of the burning of the store at Meadville, but the evidence of notice of the revocation of the agency was controverted.

The court submitted to the jury the question whether the plaintiffs had notice of the revocation, but charged that if the jury came to the conclusion "that the circumstances of the case were such, independently of the question of notice, that in fair dealing between man and man plaintiffs should have inquired by telegraph or by letter of the defendant at Great Bend whether he continued the Meadville store, and whether the brother continued to have authority to buy goods in his name, that will end the recovery in this case," and, further, that if the jury came to the conclusion "that no notice in fact was given and that the circumstances were such as to put the plaintiffs fairly upon inquiry as to whether that business was continued by the defendant and the brother had authority to continue it by making these purchases, that ends the responsibility on the part of the defendant." Exceptions were duly taken to the portions of the charge above quoted.

It is a familiar principle of law that when one has constituted and accredited another his agent to carry on a business, the authority of the agent to bind his principal continues, even after an actual revocation, until notice of the revocation is given, and, as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. The case of such an agency is analogous to that of a partnership, and the notice of revocation of the agency

is governed by the same rules as notice of the dissolution of a partnership. As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor, or at least, that the credit should have been given under circumstances from which notice can be inferred. Where the circumstances are controverted, or where notice is sought to be inferred, as a fact, from circumstances, the question is for the jury; they must determine, as a question of fact, whether the party claiming against the partnership or the principal, did have notice of the dissolution or revocation; and there being some evidence of the fact of notice, the court, in the present case, properly submitted to the jury this question of fact.

But the court submitted to the jury the further question whether, independently of the question of notice in fact, the circumstances were such as to put the plaintiffs on inquiry as to whether the authority of the agent continued, and charged them that if they were, the plaintiffs were charged with notice of the facts which the inquiry would have disclosed. In other words, the question was submitted to the jury whether, although the plaintiffs had no notice in fact, they had constructive notice of the revocation of the agency.

Assuming that the doctrine of constructive notice is applicable to cases of this description, what circumstances amount to constructive notice is a question of law. Where the facts are in dispute, a mixed question of law and fact is presented, and then of course the question is to be determined by the jury, under instructions by the court, as to the effect of the circumstances which they may find to have existed. But the question whether circumstances which are undisputed, or are found by the jury, are sufficient to put a party on inquiry and thus charge him with constructive notice, is not for the jury but for the court.

In this case, throwing out of view the evidence bearing upon the question of actual notice, there was no controversy about the facts. These were, that the store at Meadville was burnt in July, 1867, and the plaintiffs knew of the fire; that the plaintiffs brought an action and issued an attachment against the defendant for the bill then due for goods furnished to the store at Meadville; that this claim and the costs of the proceedings were paid by the defendant in August, 1867, and the defendant thereafter suspended all dealings with the plaintiffs until October, 1869, when he resumed them, and that in November, 1869, the brother resumed his purchases for the Meadville store, from the plaintiffs on credit, in the name of the defendant. Whether these circumstances were sufficient to put the plaintiffs on inquiry, or in other words, whether they amounted to constructive notice of the fact which an inquiry would have disclosed, viz. the revocation of the agency, was a question of the law, to be determined by the court, and it was error to submit it to the jury. * * *

This error, however, would not be ground for reversing the judgment if it appeared that the court would have been justified in holding, as a matter of law, that the circumstances were sufficient to put the plaintiffs on inquiry, and we must, therefore, examine that question.

The mere fact that the store at Meadville was burnt did not indicate that the defendant intended to discontinue business there; and if business had been promptly resumed and purchases for that store renewed

by the defendant's brother, there could have been no reason, in the absence of any notice from the defendant, to suppose that the agency had been discontinued. The principal feature in the case is the delay of two years and upwards between the fire and the resumption of purchases, by the defendant's brother, for the Meadville store. But, under the circumstances, this delay might well have been attributed by the plaintiffs to the difficulty between them and the defendant, in July and August, 1867, which resulted in the defendant suspending all dealings with the plaintiffs, notwithstanding that he continued his business at Great Bend. And when the defendant, in 1869, resumed his dealings with the plaintiffs, without giving them notice of any change in his business arrangements with his brother, at Meadville, the plaintiffs were warranted in believing that the suspension of the dealings of the brother was attributable to the same cause which had deterred the defendant himself from making purchases; and when, immediately after the defendant himself resumed dealings, the brother applied to make purchases as before, for the Meadville store, the plaintiffs would not, naturally, attribute the suspension of dealings for that store, in the meantime, to a revocation of the agency, nor suspect that the brother was committing a fraud. We must, in considering the portion of the charge excepted to, assume, as we have assumed, that no notice was given by the defendant to the plaintiffs that he had discontinued his business at Meadville or revoked the authority of his brother, and that the plaintiffs knew nothing of it, for the charge expressly submits the question of constructive notice, independently of the question of notice in fact, and expressly states that the jury are to pass upon it in case they find that there was no notice in fact.

We think that the circumstances existing at the time of the sale of the goods in question were not sufficient to constitute constructive notice of the revocation of the agency, and that the case should have been submitted to the jury only upon the question of notice in fact. In this there is no hardship upon the defendant; it was his duty, after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiffs had been to his knowledge. This was an act easily performed and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or dubious or equivocal circumstances substituted in place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most usual and necessary precaution.

The jury may have been satisfied that notice was given, but under the charge they may have rendered their verdict solely on the ground of constructive notice; the judgment must, therefore, be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed.

BURCH v. AMERICUS GROCERY CO.

(Supreme Court of Georgia, 1906. 125 Ga. 153, 53 S. E. 1008.)

Action by the Americus Grocery Company against J. B. Burch. Judgment for plaintiff. Defendant brings error.

EVANS, J. The Americus Grocery Company sued J. B. Burch for a balance alleged to be due on open account. The only item in dispute was one of May 8, 1903, for a certain quantity of tobacco. The defendant contended that this item was purchased by his clerk, Mike Burch, after he had left his employment, and that he neither authorized, nor ratified the purchase nor received the tobacco. On the other hand, the plaintiff insisted that Mike Burch was the general agent of the defendant in the management of his store, and as such, on previous occasions, had ordered goods of plaintiff on defendant's account, and that the plaintiff, without notice that Mike Burch was no longer employed by the defendant, took the order in the defendant's name and shipped the goods to the defendant, as was usual in the past transactions. * * * When the merchandise, to recover the price of which the present action was brought, was ordered of the plaintiff by Mike Burch, he was not in the employment of the defendant, and had not been for two months past. Neither the plaintiff company nor its "drummer" was aware at the time of receiving the order that Mike Burch was no longer in the service of the defendant. * * * Upon these facts the jury returned a verdict in favor of the plaintiff for the value of the goods, which verdict the trial judge refused to set aside on motion for a new trial. * * *

It is a general rule of law, therefore, upon which there seems to be no conflict of authorities, that all acts of a general agent within the scope of his authority, as respects third persons, will be binding on the principal, even though done after revocation, unless notice of such revocation has been given to those persons who have had dealings with and who are apt to have other dealings with the agent upon the strength of his former authority." 1 Clark & Skyles on Agency, § 173 (b). * * * The term "actual notice" is intended to be understood in its strictly legal, technical sense, and is not to be confounded with actual knowledge, which, as was pointed out in Clarke v. Ingram, 107 Ga. 570, 33 S. E. 802, is by no means a synonymous or interchangeable term. "Notice is actual when one either has knowledge of a fact or is conscious of having the means of knowledge, although he may not use them." It may be either "express notice," or simply "implied notice" ; notice communicated by direct and positive information from persons cognizant of the fact, or notice such as "arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact." 1 Parsons on Contracts (9th Ed.) 71.

In the present case no express notice was shown, and the controlling issue was whether or not the plaintiff had "implied notice" that there had been a revocation of the agency, within the meaning of Civ. Code 1895, § 3933, which declares that: "Notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, is equivalent to knowledge in fixing the rights of parties." The only circumstance upon which the defendant could

rely as suggesting the necessity of making inquiry whether the agency had been terminated was that the order for the goods was given to the plaintiff's salesman three miles from the defendant's store, where the agent had been employed. The defendant was engaged in the sawmill business, and his "commissary" was run in connection with that business, as an adjunct to it, and not as a wholly independent enterprise. When the order for the goods was taken, Mike Burch, who still assumed to act as the defendant's agent, was superintending the erection of a sawmill. That it did not belong to the defendant or was not to be used in connection with his business was not self-apparent, nor was the fact that Mike Burch was not at the time engaged in his customary duties at the commissary calculated to put the plaintiff's salesman on notice that he had left the service of the defendant. Moreover, the salesman had first driven by the store of the defendant and inquired for Mike Burch, who had theretofore been in charge of it. Instead of being notified that Mike Burch was no longer in the defendant's employ, the salesman was told where Mike Burch could be found. Under these circumstances it is not strange that the salesman should assume that the employés at the store of the defendant understood that he had called on business, as theretofore, and wished to see the defendant's representative, nor is it remarkable that, after being informed as to his whereabouts but given no intimation that he was no longer the defendant's agent, the drummer should entertain no doubt as to the continuance of the general agency.

The jury, after considering all the facts and circumstances brought to light at the trial, found against the contention of the defendant that due caution and prudence on the part of the plaintiff's drummer ought to have suggested to him the propriety of making inquiry, if he did not divine the truth. The burden of proof was upon the defendant to establish his defense that the plaintiff was affected with implied notice. * * * The plaintiff being a creditor of the defendant and having had numerous business transactions with his accredited agent was entitled to receive a formal notification from him of the termination of the agency, or the legal equivalent of such a notification. The plaintiff could not in good faith remain passive, so long as the defendant failed in his legal duty to take active measures to impart notice. * * * The defendant was admittedly at fault, having failed to take any steps to give notice to the plaintiff, whereas the plaintiff had not omitted to perform any legal duty owing to the defendant, and the plaintiff's drummer admittedly acted in entire good faith. The jury took the view that the plaintiff should not be called on to suffer the loss. "In this there is no hardship upon the defendant," as was pointed out by Rapallo, J., in Claflin v. Lenheim, 66 N. Y. 301, who added that it was the defendant's duty, "after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiffs had been to his knowledge. This was an act easily performed, and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or dubious or equivocal circumstances substituted in place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most

usual and necessary precaution." The verdict of the jury appears to be in accord both with the strict law and the common justice of the case, and it should not be set aside unless the court below committed some error which was obviously calculated to bring about a result which would not otherwise have been probable. * * *

Judgment affirmed.

CLAYTON v. MERRETT et al.

(Supreme Court of Mississippi, 1876. 52 Miss. 353.)

CHALMERS, J. Leroy M. Wiley, a resident of Georgia, intrusted to his agent, James Drane, of Choctaw county, Miss., a note against G. B. & T. D. Merrett, and with it a deed to be delivered to them on payment of the note. Drane placed the note in the hands of Tucker & Green, attorneys, for collection. The attorneys filed a bill and obtained decree for sale of the land, and the same was sold by the commissioner appointed for that purpose by the chancery court. The Merretts bought at the sale, paid the purchase money directly to the attorneys, Tucker & Green, and withdrew the deed, which had been previously tendered and filed with the bill, and the same recorded. James Drane having died during the pendency of the suit, Tucker & Green paid over the money which they received to his executrix.

After all these transactions had occurred, it was discovered for the first time that Leroy M. Wiley had died before the institution of the suit in his name, and nearly two years before the payment of the money. Some time thereafter appellant, Clayton, administered upon his estate in this state (where the deceased owned other claims and owed some debts), and filed his bill against the Merretts to compel them to pay again the amount due on the land. The bill sets forth the above facts, and is aided by an agreement of counsel, in which it is admitted that neither Drane nor Tucker & Green nor the Merretts knew of Wiley's death at the time of payment by the latter.

Two principal points are raised by the demurrer: 1st. The six years statute of limitations. 2d. That the payment being made in ignorance by all parties of the death of Wiley, is good. * * *

Upon the second point it is admitted that the former legal proceedings, having been commenced and prosecuted in Wiley's name after his death, are void, and that the deed abstracted from the papers, and recorded, conveyed no title; but it is contended that the payment of the money was good, because made in ignorance that the death of the principal had revoked the agency.

There are several cases which seem to hold that although, as a general principle, death revokes an agency and renders null every act of the agent thereafter performed, yet that where a payment has been made in ignorance of the death, such payment will be good. The leading case so holding is that of Cassiday v. McKenzie, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76, where, in an elaborate opinion, this view is broadly announced. It is referred to, and seems to have been followed, in the case of Dick, Ex'r, v. Page et al., 17 Mo. 234, 57 Am. Dec. 267; but in this latter case it appeared that the estate of the deceased principal had received the benefit of the money paid, and therefore the representative of the estate might well have been held to be estopped from suing for it again. * * * In Stout v. Iberry, 10 M. & W. 1, a wife purchased provisions on the husband's credit,

during his absence, and, as was afterwards developed, after his death. In an action to hold her personally liable for the goods it was held that she originally had full authority to contract the debt in her husband's name; that she was guilty of no wrong and suppressed no information in doing so; that the person supplying her took equally with herself the chance of the continued life of the absent husband; that his death, being the act of God, should work her no harm, and she was therefore acquitted of the debt. It seems to have been conceded that the estate of the husband was not bound, and the result would appear to be that the unfortunate tradesman lost his debt altogether.

These cases, in so far, at least, as they announce the doctrine under discussion, are exceptional. The Pennsylvania case, supra, is believed to stand almost, if not quite, alone in announcing the principle in its broadest scope. The overwhelming weight of authority is to the effect that the death of the principal operates as an instantaneous revocation of the agency where it is a naked power, unaccompanied with an interest, and that every act of the agent thereafter performed is null so far as the estate of the principal is concerned. This rule frequently operates very unjustly and produces very great hardship. A party dealing with an insolvent agent, upon the faith of his well-known authority from a wealthy and distant principal, is suddenly confronted with the fact that the authority had ceased, by the death of the principal, one day or perhaps one hour before his transaction occurred. Impressed with the hardship of such a case, the civil law adopts the rule contended for in the case at bar, and renders valid a contract executed or payment made under such circumstances.

The Scotch law is said to be similar. Judge Story regrets that this beneficent rule does not prevail under the common law, and insinuates a doubt as to whether that system is altogether liable to the reproach which he seems to think that the opposite doctrine casts upon it. Story on Agency, § 495, and notes. It will be observed, however, that the distinction which he undertakes to draw, in his desire to rid the common law of what he regards as a defect, is only the case of an agency coupled with an interest, as to which it is well settled that the act of the agent, performed in ignorance, and sometimes even with full knowledge, of the death of the principal, is binding.

Several states of the Union, among which are said to be Maryland and Georgia, have by statute adopted the rule of the civil law on this subject. 2 Kent's Com. 646, note.

However wise such legislation may seem to be, and however great the injustice produced in particular cases by the contrary doctrine, undoubtedly the common law rule is that death revokes the agency and nullifies all acts thereafter performed. This doctrine rests upon the obvious principle that as a dead man can do no act for himself, so no man can do an act for him. When, therefore, the agent undertakes to act in his name, he is acting for a being not in existence. To hold his act valid is not to bind the dead man, but to bind his heirs and representatives, who are thus held liable for the acts of one whom they never appointed, and whom perhaps they would be unwilling to trust. Whether a system of jurisprudence which would accomplish this result would be found in the long run less productive of injustice than our present rule may well be doubted. At all events we are satisfied that such is not now the law. * * *

We would remark that the case at bar is not one where the death of the principal occurred within a few hours or days before the payment, but that nearly two years intervened between the two events. If the principle is the same, it does not, at least, present a case where it was physically impossible for the debtor to know that the power of the agent had been terminated by the death of the principal.

The views of the court below seem not to have been in accordance with the views here announced, and were therefore erroneous. We observe, however, that complainant, Clayton, who is the administrator of Wiley, fails to make the heirs of his intestate defendants to the bill. This should have been done, inasmuch as the legal title to the land was in them. No objection to this was urged either in the court below or in this court, but the absence of a necessary party renders it impossible to proceed with the bill in its present aspect.

So much of the decree of the court below as sustains the demurrer is, therefore, affirmed; so much of it as dismisses the bill is reversed, and the cause is retained, and remanded with leave to complainant to amend his bill within ninety days, or such further time as to the chancellor may seem proper, * * * at which the bill, if not amended, shall stand dismissed.

SECTION 2.—IRREVOCABLE POWERS

TERWILLIGER v. ONTARIO, C. & S. R. CO.

(Court of Appeals of New York, 1896. 149 N. Y. 86, 43 N. E. 432.)

The action was brought to recover the purchase price of 1,224 railroad ties, alleged in the complaint to have been sold and delivered by the defendant in the months of February and March, 1890, for the price of $602.55. The answer, among other things, alleges that the plaintiff, for a good and valuable consideration, authorized one Wheeler to sell the ties to the defendant, and to receive the pay therefor for his own use, and that thereafter Wheeler sold the ties to the defendant, and that the defendant paid him therefor in full. The issues were referred to a referee for trial.

ANDREWS, C. J. The principal question on this appeal arises on the exception by the defendant to the refusal of the referee to make any finding upon the question whether the plaintiff, in the summer of 1889, authorized Wheeler to sell the ties to the defendant, and apply the proceeds of the sale in payment for the timber which had been cut by the plaintiff, without authority, from Wheeler's lands. The evidence upon this question was conflicting. The defense rested substantially upon the assertion that such authority was given; that it was executed by a sale and delivery of the ties thereunder by Wheeler to the defendant; and that, the defendant having subsequently paid Wheeler therefor, the debt was discharged. The refusal of the referee to pass upon the question of Wheeler's original authority was put upon the ground that, assuming it to have been given, it was subsequently revoked by the act of the plaintiff in himself selling and delivering the ties to the defendant. It became, therefore, as the referee held, an immaterial issue, which, if found in favor of the defendant, would not affect the result, since, by the general rule, an authority once given, if

revoked before execution, except where an element of estoppel intervenes, is the same as to third persons as though it had never existed. The primary question presented by this ruling of the referee involves an inquiry into the nature of the authority given by the plaintiff to Wheeler. It is to be conceded, for the purpose of this appeal, that Wheeler possessed the authority which the evidence on the part of the defendant tended to establish, and that it was conferred for the purposes which, by direct evidence or by fair inference, can be collected from the evidence most favorable to the defendant. If the authority conferred on Wheeler was a mere naked authority, by which we understand an authority in the execution of which the agent has no other interest than that which springs from his employment as agent and his right to earn his compensation, then, according to the general rule, it was, while executory, revocable at any time, at the pleasure of the plaintiff. In case of a naked power, the authority of the agent, derivative, and not original, ceases when the principal, for whatever reason, withdraws the delegation and terminates the agency. There is a qualification of the rule where the agent has entered upon the execution of the authority before revocation, and has so bound himself that a retraction of the authority would subject him to liability. In such cases the principal cannot revoke the authority as to the part of the transaction remaining unexecuted, at least not without indemnifying the agent. * * *

But an authority may be irrevocable by reason of its purpose and the circumstances attending its creation. The cases of an authority coupled with an interest are of this character. What constitutes an authority coupled with an interest was considered in one of the masterly judgments of Chief Justice Marshall, in Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. In that case the owner of an interest in a certain vessel, then at sea, to secure a loan of money, executed to the lender contemporaneously with the loan a power of attorney authorizing him to sell the borrower's interest in the vessel, which power, by its terms, was to become void on payment of the loan. The borrower died before payment, and the question was presented whether his death operated to revoke the power. It was decided that the power was revoked by the death of the grantor. The general doctrine that a power must be exercised in the name of the principal, and does not survive his death, was held to be applicable. But the court, in the decision of the question, proceeded to consider the exception to the rule in cases where the power was coupled with an interest, and to define the meaning of that phrase. In a luminous statement the Chief Justice confined the scope of the exception to cases where, together with the power, there was vested in the donee an estate, right, or interest in the subject of the power, as distinguished from an interest in the proceeds of the power when exercised. In the former case he declared that the power would not be extinguished by the death of the creator of the power, because it attached to the estate of the donee in the subject of the power, and was capable of execution in his own name after the death of the principal, unlike cases where the power was unconnected with any interest in the thing itself, and the only interest was in the execution of the power. The distinction between the cases of a power given for the purpose of a power given for the same purpose, but supplemented by a transfer of an interest, seems technical; but in the latter case it at least pre-

serves the substance and effectuates the intent, while it obviates in the particular case the general doctrine that a power is determined by the death of the creator of the power. In Watson v. King, 4 Camp. 272, Lord Ellenborough, in a case very similar to that of Hunt v. Rousmanier, also held that a power of attorney to a creditor to sell a vessel was revoked by the death of the principal, and upon the same ground, namely, that it could not thereafter be executed in his name. The same point was ruled in equity in Lepard v. Vernon, 2 Ves. & B. 51, where it was held that a power given to a creditor to receive a debt, expressly for the purpose of liquidating the claim, unaccompanied, however, by any assignment of the debt, was revoked by the death of the principal. Knapp v. Alvord, 10 Paige, 205, 40 Am. Dec. 241, is an illustration of a power coupled with an interest. There a power of attorney to sell a stock of goods and apply the proceeds upon liabilities incurred and to be incurred by the donee of the power was given, accompanied by the possession of the goods, and it was held that it was not revoked by the death of the principal, because it was a power coupled with an interest. The fact that the possession of the goods accompanied the power was the controlling point in the decision.

Testamentary powers, from their nature, necessarily survive the death of the testator. They usually accompany some estate given by the will to the donee of the power, or are regarded as trusts, which, if accepted, the donee is in conscience bound to execute. * * * There are other familiar cases of irrevocable powers, because coupled with an interest, such as powers of sale accompanying mortgages, or powers to do other acts affecting real or personal property, to make effectual an interest or right in the subject of the power vested in the donee, and to which the power is auxiliary. Powers of this character are neither revocable by the grantor of the power, nor are they revoked by his death. * * * Chief Justice Marshall's definition of a power coupled with an interest has been generally accepted in this country, but in some cases his classification has not been accurately observed. See Hutchins v. Hebbard, 34 N. Y. 24. Indeed, the English courts give a wider meaning to the phrase than in the close definition of Chief Justice Marshall. In Watson v. King, supra, Lord Ellenborough speaks of the power in that case as a power coupled with an interest, and in Smart v. Sandars, 5 C. B. 895, Wilde, C. J., referring to the authorities, said: "The result seems to be that, where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest." The distinction between the English and American cases is rather in words than substance. Upon the same facts the decisions in both judicatures are the same. Both in Hunt v. Rousmanier and Watson v. King the death of the principal was held to revoke the power, although in one case it was regarded as a power coupled with an interest, and in the other that it was not.

But there are classes of powers which are irrevocable by the act of the principal, although they do not come within Chief Justice Marshall's definition of powers coupled with an interest. This is clearly recognized by that eminent judge in the case to which reference has

been made. After stating the general rule that a power may at any time be revoked by the party conferring it, he says: "But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms part of a contract, and is security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law;" and he proceeds to state that the power to sell the vessel by Rousmanier in that case could not have been revoked by him during his life, but, not being a power coupled with an interest, it was revoked by his death. Kent uses similar language. He says (2 Kent, Comm. 644): "But where it [power of attorney] constitutes part of a security for money, or is necessary to give effect to such security, or where it is given for a valuable consideration, it is not revocable by the party himself, though it is necessarily revoked by his death." And Story, in his work on Bailments, § 209, says: "But if it is given as part of a security, as if a letter of attorney is given to collect a debt as a security for money advanced, it is irrevocable by the party." This doctrine has support in adjudged cases. * * *

In the cases referred to, the authority was conferred by formal written powers of attorney. But unless an authority given is for the performance of some act which by statute or by the common law the agent cannot perform in the name of his principal unless thereunto authorized in writing, we can perceive no legal distinction in the application of the doctrine between formal written power and an informal oral authority. * * * Unless there was a consideration for the authority conferred on Wheeler to sell the ties and apply the proceeds on his claim, it is plain that it was not irrevocable. * * * Without going into particulars, it is sufficient to say that the evidence given on the part of the defendant would, in our opinion, justify an inference that Wheeler accepted the arrangement proposed by the plaintiff, and forbore the pursuit of his lumber or its proceeds, in reliance upon the authority given him by the plaintiff to sell the ties, and apply the proceeds on his claim.

The position of an agent holding an irrevocable power for the sale of chattels, not connected with possession of the property or any interest in the nature of a title, general or special, in the subject of the power, is peculiar. * * * The fact that possession does not go with the power subjects the holder of the power to the risk that the purpose of the power may be frustrated by a transfer by the owner of the chattels to a purchaser in good faith for value without notice. It will be for the court or jury on a new trial to determine, upon the facts found, whether there was any valid consideration within the law applicable to executory contracts to uphold the authority. If such consideration existed, then we are of the opinion that the authority was irrevocable, and that the payment by the defendant to Wheeler, under the contract made with him, was binding upon the plaintiff. In our opinion, the referee erred in refusing to find upon the question of authority in Wheeler to sell the ties and apply the proceeds on his claim. If no such authority existed, there is no defense to the action. If it was given, but was not based upon any consideration which the law deems sufficient to uphold an executory contract, then we are of opinion that it was revocable, and that it was a question of fact upon

the evidence whether there was an actual revocation before the defendant paid Wheeler. The judgment should be reversed, and a new trial ordered. * * *

SECTION 3.—EFFECT OF TERMINATING THE RELATION

ATLANTIC COAST REALTY CO. v. TOWNSEND.

(Supreme Court of Appeals of Virginia, 1919. 124 Va. 490, 98 S. E. 684.)

Plaintiff, a land brokerage concern, secured of defendant's testator the exclusive right, for a year, to sell certain lands of testator, under an agreement whereby the lands were to be divided into small lots and the company to receive $40,000 out of the proceeds of sale. Testator made a sale of the land himself before the end of the year, and claimed that this worked a revocation of plaintiff's agency. The company brings action for damages for breach of the contract. Judgment sustaining demurrer to declaration. Plaintiff brings a writ of error.

KELLY, J. * * * No question as to rights of third persons is here involved, and there is no claim that the agency was, in a technical sense, coupled with an interest. Under the facts as alleged in the declaration, it is not denied, and it is clear, that the defendant not only had the power to revoke, but did in fact effectually revoke, the agent's authority, by making, on his own behalf and independent of the agency, a sale of the subject-matter of the contract. * * * It by no means follows that such a revocation can be made by the principal as a matter of right and without liability to his agent. The latter question depends upon the character and terms of the agent's contract. Quoting again from 2 C. J. at page 533, the following general and comprehensive statement is peculiarly germane in this connection: "As between principal and agent, the right to terminate the agency depends upon the ordinary principles of contract, and is governed by the same rules as apply to any other contract of employment. Although, as has been stated, a principal has the undoubted power, so far as the agency is executory, to revoke the agent's authority, it by no means follows that he has always a right to do so, since the contract of agency may provide otherwise. Accordingly, if he revokes the agency in violation of the contract, he becomes liable to the agent for the damages caused thereby, although it should be observed in this connection that the agent is limited to his action for damages; the courts will not specifically enforce the contract against the principal. But if the contract of agency contains no terms indicating the creation of an agency for a definite period, or if the contract is not supported by a sufficient consideration, it is terminable at will, and the principal by revoking the authority incurs no liability to the agent, unless the agent has entered upon performance of the contract so that a revocation of his authority will work him legal injury." * * *

It follows from these authorities, to which many more might be added, that, when an agency is not such as to constitute what in legal

parlance is called a power coupled with an interest, and no third party's rights are involved, the agency, so long as it remains unexecuted, may be effectually revoked at the will of the principal, but that a wrongful revocation will nevertheless render him liable in damages to his agent. In other words, the agency may always be revoked, but the contract of employment will not necessarily be thereby rescinded. * * *

In the instant case we are of opinion that a valuable consideration for the agreement itself, as distinguished from the mere chance of the agent to earn a commission or compensation, was sufficiently alleged in the declarations; and, while the agency was not coupled with such an interest as to make it irrevocable, the contract which created it was a mutual agreement between competent parties for a lawful purpose and upon a valuable consideration, with the result that neither party could violate it without becoming responsible to the other for the breach. * * *

Reversed.

SHEAHAN v. NATIONAL S. S. CO.

(United States Circuit Court of Appeals, Second Circuit, 1898. 87 Fed. 167, 30 C. C. A. 593.)

Judgment for defendant, and plaintiff sued out this writ of error.

PER CURIAM. This is an action to recover damages for breach of contract. The plaintiff was the sole witness, and the only contract with defendant which his testimony tended to establish was one made in 1867, whereby defendant employed him as its agent to sell tickets on commission, with no limitation as to time or provision requiring notice of termination. After he had continued in such employment about nine years, defendant abruptly terminated the contract. In the absence of any provision requiring notice as a condition precedent to termination, or of any clause fixing a term of employment, defendant was entitled to dismiss its agent at pleasure, without thereby giving plaintiff a cause of action for damages sustained by reason of such discharge. The judgment of the circuit court is affirmed.

CHAPTER IV

RELATIONS OF THE PRINCIPAL AND AGENT

Section
1. Rights of the Principal Against the Agent.
2. Rights of the Agent Against the Principal.

SECTION 1.—RIGHTS OF THE PRINCIPAL AGAINST THE AGENT

THOMAS v. BEAVER DAM MFG. CO.

(Supreme Court of Wisconsin, 1914. 157 Wis. 427, 147 N. W. 364, Ann. Cas. 1916A, 1020.)

Action to recover on a contract of employment. Plaintiff claimed he was employed by defendant for one year at a salary of twelve hundred dollars, payable in monthly installments of one hundred dollars, and that before expiration of such period he was discharged without cause and sues for damages to the extent of the wages he might otherwise have earned.

There was evidence tending to prove that plaintiff did not devote all his time to the performance of his duties; that he was unnecessarily absent therefrom one or two days a week on several occasions, and that once he was absent for some three weeks and made no account thereof to defendant. There was also evidence tending to prove that plaintiff charged as expenses $2 per day, regularly, when away from home, whether he spent this amount or not and sometimes when he did not spend anything. There was also evidence tending to prove that he disobeyed instructions on several occasions.

There was further evidence that defendant notified plaintiff by letter that his contract would expire by a particular date mentioned, because the corporation had concluded to change its mode of selling, to which plaintiff replied that he should decline to accept a discharge except upon the conditions mentioned in the contract, to which defendant replied that, for plaintiff's benefit, he would be retained thirty days longer, if he so desired, but that at the end of that time his services would be dispensed with, adding: "If it will be any relief to you we will notify you to the effect that you have proved incompetent to handle our line, and furthermore that you have had certain instructions that you have not followed out as per our instructions. We hope this will be sufficient notice." At the close of the evidence the court directed a verdict for plaintiff because of there not being any satisfactory evidence of conduct on plaintiff's part warranting his discharge, and because he was not in fact discharged for bad conduct.

MARSHALL, J. If when respondent was discharged there existed an uncondoned justification therefor, regardless of whether it was then known to appellant, or whether the reason assigned for such discharge was sufficient, the trial court erred in holding that appellant

was precluded by the first or any notice of discharge from providing an existing ground not therein referred to. * * *

Under the terms of the contract appellant, acting in good faith and within the terms of its contract, had a right to determine for itself whether any of the stipulated grounds for discharging respondent existed. There being at the best for respondent, evidence tending to prove incompetency and several substantial violations of contract duty, the trial court erred in directing a verdict in respondent's favor.

Any inexcusable substantial violation by an employee of instructions, or neglect of duty of a substantial character, or any misconduct inconsistent with the relations of master and servant and which might injuriously affect the former's business, regardless of any express agreement on the subject, constitutes good ground for discharging the employee.

What constitutes sufficient ground for discharging an employee is matter of law unless provided for in the contract of employment; but, where the facts are in dispute, the case, under proper instructions, should be submitted to the jury.

It is considered here that the case was not so clearly in favor of appellant as to require condemnation of the refusal to direct a verdict in its favor, since before the commencement of the action, it duly tendered respondent the amount due him for the time he served and kept the tender good; but that appellant's rights were entirely misconceived in directing the verdict for respondent.

The judgment is reversed, and cause remanded for a new trial.

SMITH v. HERRING-HALL-MARVIN SAFE CO.

(Supreme Court of New York, Appellate Term, 1909. 115 N. Y. Supp. 204.)

Action by Abram V. Smith against the Herring-Hall-Marvin Safe Company. From a judgment for plaintiff, defendant appeals.

GILDERSLEEVE, P. J. * * * Plaintiff swears that he was hired to act as sales manager at defendant's office, No. 400 Broadway, New York City; that he sometimes went on a trip previous to November 12, 1907, and always had his traveling expenses paid; that, when ordered to Philadelphia, he called at defendant's office and expressed his willingness to go if the defendant would pay his expenses, which defendant's officers declined to do; that defendant's officer finally gave him a ticket one way, and he went to Philadelphia; that "they (defendant's officers) would not tell me what they wanted of me in Philadelphia, and not finding what was required, and as they would not pay my expenses over there, I came back to New York."

On November 18, 1907, upon his return from Philadelphia, plaintiff wrote to defendant's president as follows: "Your letter of November 12th, ordering me to report to Mr. Green, 627 Chestnut St., Philadelphia, on the 14th, received. On the statement by Mr. W. H. Smith, executive secretary, that no hotel expenses would be allowed me, but that I must pay same, I desire to say that my contract with the company was for specific duties in New York, which I am now and have been willing to perform to the end of my contract, January 1, 1908, and that I respectfully decline to comply with the order."

Upon receipt of this letter the defendant's executive secretary wrote to plaintiff as follows: "We are in receipt of your letter of the 18th inst., and note that you decline to comply with our order to report at

our Philadelphia office for services at that point. Inasmuch as you refuse to obey our instructions, we consider ourselves released, effective this date, from further payment on your contract." * * *

If the orders of defendant were unreasonable, the plaintiff could refuse to obey them, without subjecting himself to dismissal upon legal grounds, and the question of unreasonableness depended upon the circumstances of the case. Wood's Master & Servant (2d Ed.) p. 227. The general rule is that a master has the right to give reasonable orders to a servant, even though the master knows that the work required is distasteful to the servant, and even though the master gives the order with the expectation that the servant will leave the employment rather than obey, as the motive of the master is unimportant, and the servant is bound to obey all reasonable orders, even if given in bad faith, while he is not bound to obey unreasonable orders, even when given in good faith. * * *

Plaintiff began his employment, as we have seen, as manager of the New York office, and, although he made trips for defendant to other cities from time to time, it was on the understanding that his expenses should be paid, which was done, notwithstanding the silence of the contract in this respect. Defendant refused to pay plaintiff's expenses in Philadelphia. Plaintiff also swears that he is married and has a family, with whom he resides at his "beautiful home" at Ridgefield Park, N. J., near New York, and that he never would have agreed to any proposition to go away for any length of time from his home; but there is nothing to show notice of this situation to defendant. Under these circumstances, can it be said that it was unreasonable for defendant to order plaintiff to report to the Philadelphia office? How long he was to remain in that city, under the said order, does not appear. Although plaintiff claims himself that he was hired as manager of defendant's New York office, when defendant offered evidence to show a general or frequent custom in the trade to transfer such agents from one city to another, the court ruled out such testimony. Evidence of such a custom would seem to have a direct bearing upon the question of the reasonableness of the order in question. It seems to us that the judgment should be reversed.

Judgment reversed, and new trial ordered.

DAYTON, J. (dissenting). It cannot be said that the contract was definite as to place of employment or duties to be performed. The evidence is that plaintiff resided with his family near New York City. It is not, therefore, probable that he accepted an employment which required a change of residence.

I vote for an affirmance, with costs.

CITY OF EAST GRAND FORKS v. STEELE et al.

(Supreme Court of Minnesota, 1913. 121 Minn. 296, 141 N. W. 181, 45 L. R. A. [N. S.] 205, Ann. Cas. 1914C, 720.)

TAYLOR, C. The complaint, in form, sets forth four causes of action. The trial court sustained a demurrer to the first cause of action, and overruled demurrers to each of the other three. Both parties appeal.

The following brief outline of the facts alleged in the complaint will serve to indicate the questions presented:

The defendants, representing themselves to be expert accountants, and able to detect any irregularities in the transactions of the city officers, contracted with the city to investigate and audit the books, accounts, and financial transactions of the city and of its officers for the year 1908, and especially the books, accounts, and financial transactions of the city clerk, for the sum of $150. The city clerk, in addition to his ordinary duties as clerk, was also employed to collect money due the city for electric lights, water and sewer assessments, and license fees, and had given a surety bond to secure the faithful performance of these additional duties. The investigation of these collections, and of whether they had been properly accounted for, was included in the duties of the defendants. They made the investigation and audit, and in February, 1909, reported to the city that all books and accounts had been correctly kept and all funds properly accounted for. Plaintiff, believing they had made a correct report and had properly performed their work, paid them the full contract price therefor.

In December, 1909, defendants again contracted with the city to make a similar investigation and audit, concerning both the years 1908 and 1909, for the sum of $500. They made such investigation and audit, and reported the result thereof. Plaintiff, still believing that they had made a correct report and had properly performed their work, paid them the full contract price for this second audit. In fact, the clerk had embezzled the sum of $1,984.26 during the year 1908, and the further sum of $5,339 during the year 1909, and prior to the investigation made by the defendants. The defendants failed to discover and disclose these defalcations, by reason of incompetence and negligence. They were discovered and disclosed by an investigation made by the state examiner immediately after defendants had completed their second audit. If in making their first audit defendants had discovered and reported the defalcation then existing, it could have been recovered from the surety company, and the clerk would have been removed from office, and his subsequent embezzlement could not have occurred. The surety company became insolvent before the investigation made by the state examiner, and the amount of the defalcations of the clerk has been wholly lost to the city.

The plaintiff seeks to recover the following items, and states each as a separate cause of action: (1) The sum of $5,339, embezzled by the clerk after the first audit and before the second audit. (2) The sum of $1,984.26, embezzled by the clerk prior to the first audit. (3) The compensation paid the defendants for making the first audit. (4) The compensation paid the defendants for making the second audit. * * *

The damages claimed on account of the losses resulting from the defalcations of the clerk and the insolvency of his surety are too remote to be recovered, without showing the existence of special circumstances, known to defendants, from which they ought to have known that such losses were likely to result from a failure to disclose the true condition of affairs. Such losses are neither the natural nor the proximate consequences of the failure of defendants to make a proper audit. Neither are any facts shown from which it may be inferred that a loss from either of these causes was or ought to have been contemplated, when the contract was made, as likely to result from a breach of duty on the part of defendants. * * *

There may be circumstances under which the negligence of an expert

accountant may make him liable for losses, as where he is employed to determine the amount that should be exacted from a surety for the default of his principal; but the facts alleged in the complaint do not bring this case within any such rule.

Defendants represented themselves as expert accountants, which implied that they were skilled in that class of work. In accepting employment as expert accountants, they undertook, and the plaintiff had the right to expect, that in the performance of their duties they would exercise the average ability and skill of those engaged in that branch of skilled labor. They were employed to ascertain, among other things, whether any irregularities had occurred in the financial transactions of the city clerk, and, if so, the nature and extent of such irregularities. If, from want of proper skill, or from negligence, they did not disclose the true situation, they failed to perform the duty which they had assumed, and failed to earn the compensation which plaintiff had agreed to pay them for the proper performance of such duty.

The work of an expert accountant is of such technical character and requires such peculiar skill that the ordinary person cannot be expected to know whether he performs his duties properly or otherwise, but must rely upon his report as to the thoroughness and accuracy of his work. The full contract price having been paid in the belief, induced by defendants' report, that such report disclosed fully and accurately the condition of the city's accounts, the city is entitled to recover back the amounts so paid, upon proving that, through the incompetence or the negligence of defendants, the report was in substance misleading and false.

The order sustaining the demurrer to the first cause of action is affirmed. The order overruling the demurrer to the second cause of action is reversed. The orders overruling the demurrers to the third and fourth causes of action are affirmed.

G. A. KELLY PLOW CO. v. LONDON.

(Court of Civil Appeals of Texas, 1910. 59 Tex. Civ. App. 208, 125 S. W. 974.)

Action by R. W. London against the G. A. Kelly Plow Company. From a judgment for plaintiff, defendant appeals.

HODGES, J. This suit was instituted in the court below by the appellee against the appellant to recover damages for the breach of a contract. * * * The material facts * * * show that the appellant is a private corporation engaged in the business of manufacturing and selling plows and other farming implements, with its place of business and principal office at Longview, Tex. Some time prior to February, 1907, G. A. Kelly, the president of the company, who had been actively engaged in the management of its affairs, desired to retire, and turned over the business almost entirely to R. M. Kelly, his son, who was at the time secretary and treasurer. * * * R. M. Kelly had known the appellee for about 10 years prior to the time when they began their negotiations which resulted in the contract referred to in the pleadings. * * * After several meetings, in a conversation concerning the details of which there is some conflict in the testimony, a written contract was entered into, by which London was employed by the appellant as sales manager for five years at a salary of $333.33 per month, payable monthly. * * * After the

execution of this contract, London entered upon the duties of his position and continued therein till August 6, 1907, at which time he claimed that he was injured in a wreck on a Texas & Pacific Railway train while going from Dallas to Longview. From that time until October 4th he did not perform any services for the appellant. On the latter date he made a settlement with the railway company in which he was paid $4,100 compensation for injuries which he claimed had been received in the wreck referred to. He then returned to work for the appellant, and continued in its service till he was discharged April 4, 1908.

The two principal witnesses concerning the making of the contract were R. M. Kelly and the appellee. There is much conflict between them as to the details of the conversations which they had at different times before the making of the contract. The effect of the testimony of Kelly was that at the first meeting between him and London before making the contract the latter represented to him that he was then getting $250 per month from the Parlin & Orendorff Implement Company, but would accept the position offered for $300 per month. Witness further stated that he afterwards met London in Dallas, and was there told by him that Mr. Robinson, the local manager for the Parlin & Orendorff Implement Company "was all broken up and torn to pieces" about his (London's) leaving; and that London told him that Robinson had told him (London) that he would meet any price that the Kelly Plow Company could afford to pay him; that, if it offered him $3,600, he would meet that; if it offered him $4,000 he would meet that, and, if that was not satisfactory he (London) could go to the bookkeeper and tell him what would be satisfactory, and that it would be all right with him (Robinson). Kelly says this led him to believe that London was an exceedingly valuable man in that line of business, and that Robinson had implicit confidence in him, that he had formed a very high opinion of London and believed everything the latter told him. He further testified that London * * * stated to him (Kelly) that, when he went back to the Parlin & Orendorff Implement service from the Studebaker Company he received a telegram from W. H. Parlin, of Canton, Ohio, the president of the implement company, congratulating him on returning to the service of the company, and that the telegram closed as follows: "I hope nothing will allow you to leave our service again." * * *

Kelly further testified that on August 6, 1907, London claimed that he received injuries in a wreck on the Texas & Pacific Railway; that he saw him examined, but could not see anything wrong. He then began to make an investigation about the matter and also about the salary. * * * He went to Dallas in October, some time during the Fair, and called to see Mr. Robinson of the Parlin & Orendorff Implement Company, asked Robinson what salary London was getting at the time he employed him prior to that time, and was told that it was $200 a month. * * * He says that, when London returned to work, he never told him he had settled his claim with the railway, or intimated that he had any claim against the railway company; that, when he reported for work, he looked as well as ever. * * *

W. M. Robinson, the manager of the Parlin & Orendorff Implement Company, testified that London was in the employ of the Parlin & Orendorff Implement Company at a salary of $200 per month; that his contract was to work by the year at a salary of $2,400 per

year to be paid monthly at $200 per month, and that he was not to receive any additional compensation; that some time about March or April, 1907, London told him that the Kelly Plow Company had offered him a salary of $3,600 per annum, and he told the appellee that it was a larger amount than he could afford to pay, and that, if he could make the arrangement he (Robinson) was not disposed to stand in his way, and advised him to accept the position.

As to the fraud which it is alleged the appellee perpetrated upon the railway company in procuring a settlement by which he was paid $4,100 as compensation for injuries claimed, appellant offered testimony tending to show that the shock to the coach in which the appellee was at the time riding was so slight that no injury could have resulted; that an observation of the physical condition of the appellee after the wreck failed to disclose any evidences of the injuries he claimed. There was also testimony of doctors who had made an examination of London to the effect that, if he was injured at all, it was only in a slight degree. Considered in its entirety, the evidence offered by appellant upon this phase of the defense tended to show that London's injuries were simulated, and that he had by dishonorable means, false statements and misrepresentations perpetrated a fraud upon the railway company for the purpose of obtaining money. As opposed to this, there was testimony on the part of the appellee tending to show that his injuries were real, and that he had made no false representations to the company and had not been guilty of any of the misconduct charged.

Upon a trial before a jury a verdict was rendered in favor of the appellee for the sum of $3,000. * * *

The uncontroverted evidence shows that by the terms of his contract with the appellant London was to take charge of the sales department of the business of the G. A. Kelly Plow Company; that he assumed supervision of all the traveling salesmen employed, had the right to fix prices of the product placed upon the market, and to make special prices in competitive territory, passed upon the contracts of sale when made, and was vested with such full authority and discretion as might make him the representative of his employer in that department of the service. This necessarily placed him in a position of trust and confidence, and one of much importance to the appellant. The jury might very properly have inferred that such employment would carry with it implicit reliance by the principal, not only upon the competency of the agent, but upon his honesty and integrity as well. They might have concluded that this reliance was one of the essentials without which the functions assumed by the agent could not be adequately and satisfactorily performed. * * *

The argument of the appellee proceeds upon the theory that the materiality of the misrepresentations and fraud charged must be tested by their immediate effect upon, and relation to, the subject-matter of the contract, the business of the appellant. We are unable to appreciate the force of that argument as applied to the facts of this case. Here the question is, Has the agent shown himself unworthy of the confidence and trust which his position implies should be reposed in him? and not as to whether he has been guilty of any breach of his contract, or has adopted a course of conduct that will injuriously affect the business of his principal in the future. If the different acts of deception, misrepresentation, and fraud charged in the

answer of the appellant be true, then we cannot say that a jury would not be justified in concluding that they were inconsistent with the relations London sustained by his contract. Every one who seeks and obtains employment in positions of trust and confidence impliedly warrants that he is an honest man, and the employer has the right to expect the possession of that personal integrity that will not lead to disappointment if he relies implicitly upon the honor and fidelity of his employee.

When the principal discovers that his agent or the master his servant is lacking in those moral qualities that he had a right to expect and rely upon in making the particular contract, in other words, ascertains that his employee is not an honest man and cannot be trusted—why should he not have the right to discharge? If he may discharge for incompetency, either physical or mental, why should he not have the same right when moral unfitness is shown, where moral qualifications form an important consideration in making the contract? We see no good reason why an employer should not be permitted to rid himself of a dishonest and corrupt employee upon a discovery of that fact, without waiting till he has himself been victimized by such corruption and dishonesty. He would have the right to assume that a man who would deliberately make a false statement about one matter would be equally perfidious about another; that a man who would willfully and knowingly perpetrate a fraud upon one party for the sole purpose of obtaining money would, when to his interest to do so, defraud his employer also. Hence, the materiality of the facts pleaded in this case must be tested by their effect upon the appellee as tending to show a degree of moral depravity inconsistent with the position he held in the service of the appellant. It was for that reason unimportant that the false statements and misconduct alleged related to matters in no way connected with the subject-matter of the contract, or did not amount to a breach of duty toward the employer. No agent occupying a position of trust and confidence can say that his principal had no right to assume that he was honest and truthful, or that his lack of personal integrity furnished no just grounds for a discharge. * * *

No man is compelled to be dishonest or to be guilty of fraudulent conduct. Neither should any other be compelled to continue such a person in a position of trust simply because he took him for a man of integrity and gave him employment. It is no answer to say that an employer should first acquaint himself with the character of his agent. It would ill become any man to say that another should not have trusted him. * * *

The judgment of the district court is reversed, and the cause remanded.

ESSEX TRUST CO. v. ENWRIGHT et al.

(Supreme Judicial Court of Massachusetts, 1913. 214 Mass. 507, 102 N. E. 441, 47 L. R. A. [N. S.] 567.)

This is a bill in which the plaintiff seeks to have the defendant enjoined from interfering with the possession held by it and by the Lynn Publishing Company of the premises occupied by the Essex Trust Company or the Publishing Company in Lynn, and from instituting any proceedings for their eviction; and it further seeks to have the

defendant enjoined from transferring a lease of said premises given to him by the International Trust Company, and prays that defendant may be decreed to hold said lease as "constructive trustee" for the benefit of the Essex Trust Company or the Lynn Publishing Company, and that he be ordered to assign said lease to the plaintiff to hold as trustee.

LORING, J. The question on which the decision in this case depends is this: In case a reporter on a newspaper in the course or by reason of his employment learns that the premises on which the business of publishing the paper is conducted are of peculiar value to his employer or one carrying on his business, has he the right without his employer's knowledge to take a lease of the premises and hold them as his own to the injury of his employer's property? * * *

The doctrine invoked by the plaintiff in this suit had its origin in two decisions by Lord Eldon. In Yovatt v. Winward, 1 Jac. & W. 394, the defendant (formerly employed as a clerk by the plaintiff, who was a veterinary surgeon) was enjoined from using medicines compounded from the plaintiff's recipes which he (the defendant) had surreptitiously copied while in the plaintiff's employ. In Abernethy v. Hutchinson, 3 L. J. (O. S.) Ch. 209, the publication in the Lancet of lectures on surgery delivered by the plaintiff at St. Bartholomew's Hospital, which the defendants had obtained from the students attending the lectures, was enjoined. * * *

Since then the doctrine has been applied in England in a number of cases. In Helmore v. Smith, 30 Ch. D. 449, a clerk was committed for contempt on its being shown that he had taken a copy of the customers of a business conducted by a receiver appointed by the court and that he had solicited their custom for a competing business which he had set up for himself. A similar decision as to the use of a list of the plaintiff's customers surreptitiously copied by a clerk was made in Robb v. Green, [1895] 2 Q. B. 1. In Merryweather v. Moore, [1892] 2 Ch. 518, a clerk was enjoined from communicating to a subsequent employer the details of machinery manufactured by his former employer, the plaintiff; and in Lamb v. Evans, [1893] 1 Ch. 218, the defendants who were employed to secure advertisements for the plaintiff's Trades Directory, and who by the terms of their employment furnished at their own expense the blocks and materials necessary for producing the advertisements, were enjoined from using the blocks and materials so obtained in aid of a competing directory. In the latest of these cases, Kirchner v. Gruban, [1909] 1 Ch. 413, 422, Eve, J., states the doctrine of these cases in these words: "I think it is abundantly clear upon the authority of Robb v. Green, [1895] 2 Q. B. 1, that the real principle upon which the employee is restrained from making use of confidential information which he has gained in the employment of some other person is that there is in the contract of service subsisting between the employer and employee an implied contract on the part of the employee that he will not, after the service is determined, use information which he has gained while the service has been subsisting, to the detriment of his former employer."

This doctrine was applied by this court in Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664. In that case the plaintiff having invented a process of manufacturing gunny cloth from jute butts had built a factory where gunny cloth had been so manufactured. The defendant Norfolk had been employed by him as an engineer in his factory,

and had agreed not to disclose to others the construction of the machinery. On leaving the plaintiff's employ Norfolk imparted the nature of the machinery to one Cook, who knew of Norfolk's agreement. Both were enjoined. * * *

The plaintiff is entitled to a decree directing the defendant to assign to the plaintiff the lease obtained by him on being paid the rent, if any, paid by him under it and to its costs.

NALTNER et al. v. DOLAN.

(Supreme Court of Indiana, 1886. 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61.)

MITCHELL, J. * * * Dolan, who at the time the suit was commenced lived in Illinois, owed Naltner $600 then due. The appellants, as attorneys, had in their hands for collection a claim in favor of Dolan against the Indiana, Bloomington & Western Railway Company, which Dolan, on the thirteenth day of September, 1882, transferred, for value, to Montague. On February 24, 1883, the day on which the attachment suit was commenced, appellants received from the clerk of the United States district court for the district of Indiana checks for something over $80,000, which was in payment of claims against the Indiana, Bloomington & Western Railway Company; which payment was made to them in behalf of Dolan and many other of their clients. Dolan's claim against the company was $600. Upon receiving the check they deposited it with the Indiana Banking Company, which was then in good standing, the deposit being to the credit of themselves, in their firm name. The money thus received belonged to some hundreds of their clients, and the computation of interest, and the dividend to each of his share, required several days of continuous work before distribution could be made. The appellants were lawyers, partners, actively engaged in practice. They had an account at the bank in question, in which all money collected for and belonging to their various clients were deposited and checked out in the firm name, but such moneys were not mingled with their own.

Before they had time or opportunity to pay out the money in controversy, the appellants were garnished at the suit of Naltner. They received notice of the assignment to Montague, February 28, 1883, four days after the suit was commenced. Montague, within a few months after giving notice of his claim, and while the proceedings in garnishment were pending, made demand on the garnishee defendant for the money remaining in their hands which were derived from the Dolan claim. On the ninth day of August, 1883, the Indiana Banking Company, having until that time continued in good standing and credit, failed. A receiver was appointed for the bank, August 13, 1883. The appellants brought the certificate of the receiver of the bank for the money in dispute into court, and offered to surrender it to the person entitled, as the court should direct. The amount remaining in their hands, in the manner above stated, was $445.69. Conclusions of law were stated favorable to a recovery by Montague against the appellants of the amount thus remaining in their hands.

Do the facts found warrant the conclusion of law stated? Money belonging to a client, having been received by the attorneys in payment of a claim left with them for collection, the transmission of such money having been arrested by garnishee process before an opportunity for transmitting it occurred, the question is, having acted in the utmost

good faith, and without any suggestion of fault or neglect, are the attorneys responsible for the continued solvency of the bank in which such funds were deposited in their own name, but not mingled with their own funds, notwithstanding the bank was in good credit when the deposit was made?

The receipt of money by an attorney, under the circumstances disclosed in this case, does not pro facto create the technical relation of debtor and creditor between the attorney and client. It is because it does not that a suit cannot be maintained by the latter against the former without first making a demand. Money so collected belongs to the client. The attorney occupies towards it the relation of a trustee, so long as he chooses to treat and preserve the fund as a trust fund. The circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee. While it is preserved in its trust character, if he exercises the same caution in respect to depositing it, if a deposit becomes necessary or proper, as a prudent man would in regard to his own money, and a loss happens, he will be excused. * * *

The authorities, however, distinguish between cases in which the deposit was made in such a manner as to preserve its trust character on the books of the bank in which the fund was deposited, and those in which the owner of the fund might be put to the trouble of proving, by extraneous evidence, that the fund was not the individual money of his trustee. Whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the cestui que trust has his election either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such manner as, on the face of the books of the bank in which the deposit is made, to authorize the trustee, his assignee or legal representative, to claim it as the fund of the depositor, the cestui que trust has the option to do likewise. * * *

In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank as to indicate, in some way, that it is the principal's money. If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal. In such a case the good faith or intention of the trustee is in no way involved. Having, for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows, as a necessary consequence, when loss occurs, he will not be permitted to say, as against his cestui que trust, that the fact is not as he voluntarily made it appear.

What the legal or equitable rights of the real owner of the fund would be in such a case, as against the bank, or as against attaching creditors of the depositor, has been the subject of much discussion and of some diversity of opinion. * * *

Whatever diversity of opinion may be found in respect to the rights of the bank, or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested

or deposited. Having put the owner of the fund to the hazard of losing it, or of maintaining its trust character by such proof aliunde as may be available to him, the trustee thereby gives the former the privilege of treating the latter as his debtor, or of supplying the proof, or accepting his admission of the facts, at his option.

Applying the principles stated to the facts found, the conclusion follows that the appellants assumed the risk that the bank in which the fund was deposited in their name, and from which it could only have been drawn by their check, would be able to respond with the money when their check for it should be presented. The fact that none but money belonging to clients was deposited in the account in which the fund in question was placed does not alter the case. The controlling consideration is that it was deposited to the credit of the firm, without anything to designate or preserve its trust character. They took and retained the legal title to the deposit in themselves. In the event of a controversy, the character of the fund would have depended wholly on extraneous proof. This being so, the owner had the right to elect to stand upon the title to the deposit as he found it. Having so elected, there is no rule of law which authorizes any inquiry into the motives for so taking the title, short of an express or implied direction from the owner of the fund.

The judgment [for plaintiff] is affirmed, with costs.

HOLMES v. GILMAN et al.

(Court of Appeals of New York, 1893. 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463.)

This is an appeal by the plaintiff from an order of the general term of the supreme court of the first department, which reversed upon the facts as well as the law so much of a judgment entered upon the report of a referee as was in favor of the plaintiff, and granted a new trial of the issues involved before another referee. The action was brought for the purpose of having an account taken of all of certain moneys alleged to have been wrongfully abstracted from a partnership by one Arthur C. Gilman, who was one of the partners, and invested by him in certain policies of insurance in favor of his wife and children. The complaint asked also that the amount of the insurance money collected on such policies might be impressed with a trust in favor of the plaintiff, who was one of the partners in such firm, and the assignee of the other members excepting Gilman, and that the defendant the Union Trust Company (with which the moneys collected on the insurance policies had been deposited) might be directed to pay such moneys over to the plaintiff. Other relief was asked which was appropriate to the case stated in the complaint. The answer denied the chief allegations contained in such complaint, and upon the issues thus raised the parties proceeded to trial before a referee. The following are the material facts:

In December, 1880, Arthur C. Gilman became a member of the firm of J. H. Labaree & Co., dealers in teas and coffees in New York City, and continued such member until his death, which occurred suddenly on the 15th of December, 1890. During all this time he was a trusted member of the firm, and practically had exclusive charge of its office affairs, which included the management of the firm bank account and the making of all notes and other paper issued in the business of

the firm. For several years prior to his death he had prepared semi-annual statements purporting to show the financial condition of the firm, and these statements he had rendered to its different members. The last one had been rendered as of the date December 1, 1890, and showed the firm with assets exceeding liability by nearly the amount of $200,000. This statement was received by the plaintiff (who resided in Cincinnati) about December 11, 1890. For some reason, which is not made plain by the proof, and soon after the above date, the members of the firm commenced an examination as to its condition, and the examination was not concluded until after Gilman's death, when it was discovered that the firm was insolvent by more than $36,000. Further investigation brought to light the fact that Gilman, commencing in the year 1882, and continuing down to his death, had wrongfully and fraudulently taken from the assets of the firm large sums of money, which he had wrongfully appropriated to his own use. By reason of this dishonest conduct on the part of Gilman the firm was, in December, 1890, insolvent, instead of having a surplus of nearly $200,000, and it was done by means of false entries in the books of the firm, spread over the period of about eight years. There were found among his papers in the safe at the office of the firm four policies of insurance upon his life; one for $5,000 issued and dated March 9, 1880, and three other policies, aggregating $45,000, and issued between the dates April, 1884, and January, 1888; also two certificates of his membership in a benefit association, one dated in August, 1881, and the other in January, 1885. Each of the four policies was issued on Gilman's application, made in the name of his wife, and each was in terms payable to her. The certificates were also issued on his application, signed by him, in which he stated he desired his death loss to be paid to his wife. It does not appear that any of the premiums upon any of the policies were paid by Mrs. Gilman, or with funds provided by her, or that she had any knowledge of the existence of the policies prior to her husband's death. All of the premiums on the above mentioned policies, aggregating about $4,000 were paid by Gilman out of the firm funds, and the premiums which fell due after the year 1882 on the above mentioned $5,000 policy were also paid from such funds. * * *

The policies of insurance having been collected and paid into the trust company, the plaintiff and the defendant Mrs. Gilman each claimed the right to recover the whole sum, amounting to over $56,000. The referee awarded the above mentioned $5,000 policy which was dated and issued in March, 1880, to the defendant, subject to the lien of about $1,000 of premiums becoming due subsequent to 1882, and paid by Gilman out of the funds of the firm. The policy itself was taken out prior to any conversion of firm funds, and the premiums thereon prior to 1882 were paid by Gilman out of his own funds. The policies aggregating $45,000 were obtained and maintained as the referee finds, from the funds of the firm, which the evidence traces and identifies as thus invested. The referee, therefore, awarded all the moneys collected on those three policies to the plaintiff. He awarded to the defendant, Mrs. Gilman, the amounts of the two certificates of insurance in the benefit associations, on the ground that the plaintiff had failed to show that they had been either procured or maintained from the funds of the firm. The defendant Mrs. Gilman appealed from this judgment entered upon the report of the referee to the gen-

eral term where the judgment was reversed, and a new trial granted as to the amount awarded to the plaintiff. * * *

PECKHAM, J. * * * The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a cestui que trust to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property provided the trust fund can be clearly ascertained, traced and identified, and provided the rights of bona fide purchasers for value without notice do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the cestui que trust has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title. * * * It is somewhat akin to the principle decided in Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, where corn was wrongfully taken from its owner, and converted into whisky. The court held the property was not changed in the hands of the wrongdoer, and the whisky belonged to the owner of the original material, no matter how much it had been increased in value. The case of Pennell v. Deffell, 53 Eng. Ch. 372, 388, 389, discusses the principle as thus stated, and agrees to it. That a partner occupies a fiduciary position with regard to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds, is, I think, clearly established. Although partners do not in the strict sense of the term, occupy the position of trustees towards each other and towards the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called on behalf of a cestui que trust. * * * The right to follow the funds springs from the fiduciary nature of Gilman's position with regard to them.

These general positions are not really denied by the defendant. It is claimed, however, that the tracing and identification of the funds have not been sufficiently proved in fact, and it is also urged that there has been an actual mingling of firm funds with the private funds of Gilman in the purchase and maintenance of the policies. I have looked carefully through the evidence upon these questions of fact, and I think the findings of the referee are fully sustained and that no exception can prevail on such grounds. If these preliminary questions be decided against him the counsel for defendant then urges that the rule clearly is if the trust fund has become mingled with money or property of the trustees or others, equity impresses the proceeds with a trust to an amount equal to the original trust fund and interest, and will go no further. He then claims that the firm funds which went to the purchase of the policies and the payment of the annual premiums were mingled with the property right of the wife, called her "insurable interest" in her husband's life, and so the policies were not wholly the result of the use of those firm funds and therefore the plaintiff can have only a lien on the policies or the moneys arising from their payment, to the amount of the premiums paid with the firm funds, and the interest thereon. This is really the chief question in the case.

Where moneys have been misapplied, and have been used as a portion of a larger amount, which has been invested in other property, the property thus acquired does not, as a whole, belong to the owner of the moneys misapplied. It does not belong to him because it has not been purchased or acquired wholly with his money or funds, and hence it is that such property is held charged with a lien at least, to the amount of the trust funds invested in it. It is not necessary to here decide it, because we take another view of the facts, but I am not all prepared to admit that under no circumstances is the cestui que trust entitled to recover back anything more than the amount of his property and interest, where there has been a mingling of funds. In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property, which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee and that only the original sum wrongfully taken and interest, can be given to the cestui que trust, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value. If, in such case, the cestui que trust were not allowed to at least participate proportionately in this increased value, it would appear to be a violation of the principle that the trustees cannot ever be permitted to make a profit out of the use of the trust funds. It seems to me to be a case for the application of the doctrine that the parties became co-owners of the property at the option of the cestui qui trust, in the proportion which their various contributions bore to the sum total invested. In this case, however, the defendant is enabled to claim a mingling of funds and property only by treating the right of a wife to insure the life of her husband for her benefit as a species of property which has been mingled with the funds of the firm, the result of the combination being the procurement of the policies.

We do not regard this right as property in any such light as to bring the case within the principle of the authorities upon the subject of a mingling of funds in the purchase or acquisition of other property. The right of a wife to insure the life of her husband for her own benefit is not property. It is more in the nature of a power or a privilege to make a valid contract. It is a status and not a property right. The common law upon motives of public policy held that there must be what was termed an "insurable interest" in the life which was insured, or else the policy was a dangerous kind of a wager, and therefore void. To take a policy out of such a class it was necessary to show that the insured had some interest in the continuance of the life of the cestui que vie. Who had such an interest as to give a right of insurance was frequently a matter of some discussion and of possible doubt. It may not even now perhaps be said that the precise nature, character, and extent of the interest in another's life, which shall render that life insurable, have been formally and plainly laid down. It is said by the federal supreme court that one essential is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. Connecticut Mutual Life Insurance Co. v. Schaefer, 94 U. S. 457, 460, 24 L. Ed. 251, 253. An interest which is insurable must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction. * * *

Whether at common law or under the provisions of our statute the procurement of policies of insurance in the wife's name, under the facts developed in this case, does not prevent the cestui que trust from following and claiming the trust funds or their proceeds, if the proceeds of these policies had been greater than the whole amount of the indebtedness of the husband to the cestui que trust, arising out of the husband's breach of trust, we do not decide what might in equity be the different rights of the wife and such cestui que trust in the balance, or whether any different rule could be logically applied. The husband in this case converted over $200,000 of what stood in the nature of a trust fund, and the plaintiff recovers only a little over one-fourth thereof in case the judgment on the referee's report be affirmed. We simply decide the case now before us. As to other questions discussed in the defendant's brief, we have carefully considered them, and we think there was no error in the result arrived at by the referee.

The order of the general term is therefore reversed and the judgment entered upon the report of the referee is affirmed, with the costs to the plaintiff at general term and in this court. All concur. Judgment accordingly.

FIRST NAT. BANK OF PAWNEE CITY v. SPRAGUE.

(Supreme Court of Nebraska, 1892. 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644.)

Action by H. W. Sprague against the First National Bank of Pawnee City to recover the proceeds of a certain draft. Verdict and judgment for plaintiff. New trial denied. Defendant brings error.

POST, J. On the 3d day of February, 1888, at Pawnee City, in this state, the defendant in error drew a sight draft on Davis & Wedd, residing at Canon City, Colo., of which the following is a copy: "$85.75. First National Bank, Pawnee City, Neb., Feb. 3, 1888. Pay to the order of First National Bank of Pawnee City, Neb., eighty-five and 75-100 dollars, with exchange and collection charges; value received; and charge the same to account of H. W. SPRAGUE. To Mess. Davis & Wedd, Canon City, Colo. No. C. 5238." The said draft was by the drawer left with the plaintiff in error at its banking house in Pawnee City for collection, and by it forwarded for collection to the exchange Bank of Canon City, Colo., and by the latter collected in full from the drawees. The last-named bank failed, without having remitted the proceeds of said draft; and no part thereof has been paid, either to the plaintiff or the defendant in error. There is no controversy with reference to the facts on this branch of the case. Defendant in error was a customer of the bank, and was in the habit of shipping butter to parties at distant points, and making sight drafts therefor, payable to its order, credit being given him for the proceeds thereof when collected. It further appears that defendant in error was permitted by the bank to overdraw his account by reason of such collections. It does not appear that plaintiff in error was in the habit of making any charge for collecting said drafts. * * * There is no pretense that the bank in this case was guilty of negligence in forwarding the draft, in the selection of its correspondent, or in giving instructions to the latter with reference to the collection, or remittance of the money when collected.

The only question for consideration is whether the plaintiff in error, in view of the facts stated, is answerable for the default of the

bank at Canon City. The court, on its own motion, gave the following instruction: "The court instructs the jury that when a home bank receives for collection merely a draft drawn upon a person residing in another place, which draft, from the nature of the business and general usage in such cases, will have to be transmitted for collection to some correspondent bank at the place where the debtor resides, and for the collection of which draft the home bank will receive only the customary exchange, in the absence of any express agreement between the parties to the contrary, the home bank, if it exercises due and ordinary care in selecting such correspondent bank, and transmits such draft for collection to such correspondent bank, will not be liable for the default or failure of such correspondent bank to remit moneys collected by it upon such draft." If this instruction correctly states the law applicable to the case, the motion for a new trial should have been sustained. The courts, as well as text-writers, differ widely upon the question presented. It is held by the courts of the United States, New York, New Jersey, Ohio, Indiana, Minnesota, and perhaps others, following the English cases, that where a note or bill is received for collection by a bank, and by it transmitted to a correspondent at a distance for presentment and demand, the latter is the agent of the transmitting bank only, which will be liable for the defaults of its correspondent. * * * The leading case holding this is Allen v. Bank, 22 Wend. 215, 34 Am. Dec. 289, in which, by a vote of 14 to 10 senators, the opinion of Chancellor Walworth in the same case was overruled, and which has since then been followed and approved by the Court of Appeals in numerous cases. It will be observed, too, that when this rule was adopted by the Supreme Court of the United States (Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392), dissenting opinions were filed by Justices Miller, Clifford, and Bradley. Mr. Freeman, in a note to Allen v. Bank, 34 Am. Dec. 315, while expressing a preference for the rule above stated, says: "The preponderance of authority is against the principal case and in favor of the rule that the liability of a bank taking a note or bill for collection, which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the corresponding bank is the agent, not of the transmitting bank, but of the holder, so that the transmitting bank is not liable for the default of the correspondent where due care has been used in selecting such correspondent." * * * A discussion of the reasons which have so often been advanced by courts in support of the opposing views of the question involved will not be profitable in this connection. In our opinion, the rule stated in the instruction given by the court and set out above is not only in accord with the weight of authority, but is sustained by reasons sounder in themselves, and more in consonance with the principles which underlie and determine the relations of principal and agent.

This is believed to be a typical case, and to be fairly illustrative of the method of making collections through the agency of banks in this country at this time. Whatever may have been the reasons arising out of the business methods existing at the time Allen v. Bank was decided for the rule adopted therein, the reason for such a rule is wanting in view of the present changed conditions. Banks, as a general rule, have now no facilities for making collections at distant

points, not enjoyed by the business public at large. Formerly they may have enjoyed a monopoly of information relative to location, names, and credit of banks at distant or remote points. To-day, however, business men, by means of the information derived from the press and the numerous directories at their command, may collect their bills through the medium of banks at the place of payment as cheaply, safely, and expeditiously as their local bank. It is more convenient, and therefore more frequent, for customers to deposit drafts and acceptance with their home banks for collection, paying therefor the cost of exchange only. In this case, for instance, the bank not only made the collections for defendant in error without charge, but allowed him to overdraw on account thereof, thus realizing on his paper at once. As said by Chancellor WALWORTH in Allen v. Bank, there is, in cases like this, no consideration sufficient to support an undertaking by a bank to answer for the default of a correspondent where it has, without fraud or negligence, in proper time forwarded the paper to a reputable correspondent, with proper instructions, and when the loss is not occasioned by the act or omission of any of its immediate agents or servants.

The theory of those cases which hold the remitting bank liable in such cases is that the advantage of exchange between different points is a sufficient inducement for banks to assume the liability sought to be imposed. This may be conceded, so far as the inconvenience and costs of collection is concerned, but to us it seems wholly inadequate as a consideration for an implied undertaking to insure against loss on account of the fraud or insolvency of a correspondent. The Supreme Court of Tennessee, in Louisville Bank v. First Nat. Bank, 8 Baxt. 101, 35 Am. Rep. 691, after a thorough examination of the cases on the subject, summarizes as follows: "The more reasonable and just construction of the undertaking of the bank in which the bill is deposited for collection is that, when the bill is payable at another and distant place, the bank so receiving the bill discharges itself of liability by transmitting the same, in due time to a suitable and reputable bank or other agent at the place of payment; and in such case it is manifest that a sub-agent must be employed; and the assent of the principal is implied, as it cannot be said that the receiving bank was expected or bound to send one of its own officers to the distant point of payment for the purpose of personally attending to the collection for the very inadequate compensation usually paid to banks for such service." To the views thus expressed we give our unqualified assent. The motion for a new trial should have been sustained.

The judgment of the district court is reversed, and the case remanded for further proceedings by the district court. The other judges concur.

SECTION 2.—RIGHTS OF THE AGENT AGAINST THE PRINCIPAL

FOX v. RYAN.

(Supreme Court of Illinois, 1909. 240 Ill. 391, 88 N. E. 974.)

Action by John F. Fox against Patrick Ryan. Plaintiff had judgment, and defendant appeals.

FARMER, C. J. This is an action of assumpsit begun in the superior court of Cook county to recover $4,000 commissions claimed by appellee, plaintiff below, to be due him for services as a broker in effecting a sale of mining stock for appellant. The declaration contained the common counts only, to which the general issue was pleaded. * * *

The second proposition asked by the appellant was that merely procuring a person to enter into a contract for the purchase of property does not entitle a broker to commissions unless such person was ready willing, and able to make the payments, including deferred payments, named in the contract. The court modified this proposition by adding, "unless the defendant accepted the purchaser." The proposition as modified was correct. Where a broker is employed to sell property by the owner, if he produces a purchaser within the time limited by his authority who is ready, willing, and able to purchase the property upon the terms proposed by the seller, he is entitled to his commissions, even though the seller refuses to perform the contract on his part. In such case, however, it is necessary for the broker to prove the readiness, willingness, and ability of the purchaser to take the property on the terms proposed. But, where the seller accepts the purchaser and enters into a valid contract of sale with him, the broker's commission is earned whether the purchaser subsequently fails to perform his contract and makes the payments agreed upon or not. There are cases in other states holding otherwise, but in Wilson v. Mason, 158 Ill. 304, 311, 42 N. E. 134, 136, 49 Am. St. Rep. 162, this court refused to follow those cases, denominating them as extreme and exceptional. * * *

Judgment affirmed.

CLARK v. HOVEY.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 485, 105 N. E. 222.)

RUGG, C. J. This is an action to recover for services as a real estate broker. The plaintiff was employed by the defendant to sell certain real estate, and he procured a purchaser who executed a contract for sale of it with the defendant. Simultaneously with this contract the following agreement was entered into between the plaintiff and the defendant: "It is agreed by and between Ewen A. Clark, broker, and Freeland E. Hovey, owner, that concerning the agreement for sale of property # 2 and # 6 Cambridge street, Boston, from Hovey to Jeremiah Green, for the sum of $60,000, that said Clark agrees to accept the sum of $500 in full payment of commission and for his full compensation in the matter, and said Hovey agrees to pay said sum.

It is further agreed by both parties that this $500 shall not be paid from the first $5,000 paid Hovey, of which $500 has been paid to-day, but shall be paid by Hovey to Clark from the first $500 received by Hovey from Green after the $5,000 has been paid. In other words, Clark will not make any claim for commission unless Hovey receives more than $5,000 in cash from the sale."

The contract for sale was never carried out because the defendant could not give a good title by reason of certain restrictions. The question is whether, under these circumstances, the plaintiff is entitled to his commission.

The rights of the parties depend upon the terms of their agreement, which is in writing and not ambiguous. It fixes the price which the plaintiff was to receive. It stipulates in unequivocal words that the compensation shall not be paid by the defendant until after he has received $5,000 on account of the sale. As matter of construction, this means that it is a condition to his being able to recover any commission that the defendant shall have received $5,000 in cash from the sale. Its effect is not, as in some of the cases relied on by the plaintiff, to fix a time beyond which the broker shall not be called upon to wait for his pay, but it establishes a moment before the arrival of which he cannot ask for his compensation. There is nothing in the record to indicate that the employer of the broker has failed through any volition of his own to carry out the contract.

The written agreement between the parties supersedes the ordinary rule that the broker has earned his commission when he has procured the execution of a valid agreement for sale. It follows that the judgment of the lower court was wrong. * * *

Judgment for the defendant.

LABINSKS v. HOLST.

(Supreme Court of New York, Appellate Term, 1903. 84 N. Y. Supp. 991.)

BLANCHARD, J. The plaintiff was employed by one Greenstein as a bookkeeper, and he brought this action against the defendant to recover $100 for commissions which he claims to have earned by having induced his employer, Greenstein, to enter into two contracts with the defendant. The court below found in his favor, and the defendant appeals.

A reversal of the judgment is asked on several grounds, but only one need be considered. The appellant contends that the plaintiff is not entitled to the commissions for the reason that said commissions would be in derogation of his employer's interest. This contention is supported by abundant authority. The plaintiff had no right, while in the employment of Greenstein, to use his influence to induce his employer to make any contract in which the plaintiff had a personal interest, without first fully disclosing the fact of such interest to his employer, * * * and the evidence that the plaintiff's employer had knowledge of such personal interest of the plaintiff must be clear and convincing. Greenstein denied positively that he had such knowledge. If the commissions are due and payable at all, Greenstein would seem to be entitled to them, and not the plaintiff. Howe v. Savory, 49 Barb. 403, affirmed 51 N. Y. 631.

The judgment appealed from should be reversed, and a new trial ordered. * * *

LOCKWOOD et al. v. ROBBINS.

(Supreme Court of Indiana, 1890. 125 Ind. 398, 25 N. E. 455.)

MITCHELL, J. Leon Robbins filed a claim for three years and six months' work and labor against the estate of Alonzo Lockwood, deceased. * * * The material facts as returned in a special verdict were that the plaintiff, a minor about 12 years old, without father or other guardian, entered the decedent's service in 1876, and continued therein until March, 1880, during which time he performed service for the latter at his instance and request, of the value, after deducting board, clothing, washing, and mending furnished by the decedent, of $80. The services were not performed under any contract between the plaintiff and decedent, nor between the latter and any other person authorized to contract for the plaintiff.

Upon the facts found, the court very properly entered judgment for the plaintiff. It does not appear that the plaintiff was taken into the decedent's family and cared for and treated as a member thereof. On the contrary, he entered his service and performed labor at the decedent's instance and request, and, although there was no special contract for remuneration, the law raises an implied obligation to pay what the services were reasonably worth. * * * Where one is taken into the family of another, and is regarded and treated in every respect as a member of the household, then, even though there may be no ties of blood, there is no implied obligation to pay for services rendered on the one hand, nor for board furnished on the other. * * * The present is, however, not such a case.

The judgment is affirmed, with costs.

McMULLAN v. DICKINSON CO.

(Supreme Court of Minnesota, 1895. 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 400, 51 Am. St. Rep. 511.)

CANTY, J. On the 25th of February, 1892, the plaintiff entered into a written agreement with the defendant corporation, whereby it agreed to employ him as its assistant manager, from and after that date, as long as he should own in his own name 50 shares of the capital stock of said corporation, fully paid up, and the business of said corporation shall be continued, not exceeding the term of the existence of said corporation, and pay him for such services the sum of $1,500 per annum, payable monthly during that time, and whereby he agreed to perform said services during that time. He has ever since owned, as provided, the 50 shares of said stock, and performed said services ever since that time until the 28th of October, 1893, when he was discharged and dismissed by the defendant without cause. He alleges these facts in his complaint in this action, and also alleges that he has been ever since he was so dismissed, and is now, ready and willing to perform said services as so agreed upon, and that there is now due him the sum of $125 for each of the months of March and April, 1894, and prays judgment for the sum of $250. The defendant in its answer, for a second defense, alleges that on March 2, 1894, plaintiff commenced a similar action to this for the recovery of the sum of $512, for the period of time from his said discharge to the 1st of March, 1894, alleging the same facts and the same breach,

and that on April 16, 1894, he recovered judgment in that action against this defendant for that sum and costs, and this is pleaded in bar of the present action. The plaintiff demurred to this defense, and from an order sustaining the demurrer the defendant appeals.

The plaintiff brought each action for installments of wages claimed to be due, on the theory of constructive service. The doctrine of constructive service was first laid down by Lord Ellenborough in Gandell v. Pontigny, 4 Camp. 375, and this case was followed in England and this country for a long time (Wood, Mast. & Serv. 254), and is still upheld by several courts (Isaacs v. Davies, 68 Ga. 169; Armfield v. Nash, 31 Miss. 361; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8). It has been repudiated by the courts of England (Goodman v. Pocock, 15 Adol. & E. [N. S.] 574; Wood, Mast. & Serv. 254), and by many of the courts in this country (Id.; and notes to Decamp v. Hewitt, 43 Am. Dec. 204), as unsound and inconsistent with itself, as it assumes that the discharged servant has since his discharge remained ready, willing, and able to perform the services for which he was hired, while sound principles require him to seek employment elsewhere, and thereby mitigate the damages caused by his discharge. His remedy is for damages for breach of the contract, and not for wages for its performance. But the courts, which deny his right to recover wages as for constructive service, have denied him any remedy except one for damages, which, if seemingly more logical in theory, is most absurd in its practical results. These courts give him no remedy except the one which is given for the recovery of loss of profits for the breach of other contracts, and hold that the contract is entire, even though the wages are payable in installments, and that he exhausts his remedy by an action for a part of such damages, no matter how long the contract would have run if it had not been broken. * * *. No one action to recover all the damages for such a breach of such a contract can furnish any adequate remedy, or do anything like substantial justice between the parties.

By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment, and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the general rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur. This is not in conflict with the rule that, in an action for retrospective damages for such a breach, the burden is on the defendant to show that the discharged servant could have found employment. In that case, as in others, reasonable diligence will be presumed. When it appears that he has not found employment or been employed, there is no presumption that it was his fault, and, under such circumstances, it will be presumed that the exceptional has happened. But to presume that the exceptional will happen is very different. In an action for such a breach of a contract for services, prospective damages beyond the day of trial are too contingent and uncertain, and cannot be assessed. * * * Then, if the

discharged servant can have but one action, it is necessary for him to starve and wait as long as possible before commencing it. If he waits longer than six years after the breach, the statute of limitations will have run, and he will lose his whole claim. If he brings his action within the six years, he will lose his claim for the balance of the time after the day of trial. Under this rule, the measure of damages for the breach of a 30 year contract is no greater than for the breach of a 6 or 7 year contract. Such a remedy is a travesty on justice. Although the servant has stipulated for a weekly, monthly, or quarterly income, it assumes that he can live for years without any income, after which time he will cease to live or need income. The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent. * * *

It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial. * * * But the wrongdoer can have no such election. He should not be allowed to take advantage of his own wrong, and, for the purpose of preventing the use of any adequate remedy and defeating any adequate recovery, to insist that his own breach is total. The order appealed from should be affirmed. So ordered.

BACON v. FOURTH NAT. BANK.

(City Court of New York, Trial Term, 1889. 9 N. Y. Supp. 435.)

MCADAM, C. J. The fees paid to the attorneys in Boston were expended under circumstances from which the law implies a request to pay for them on the part of the plaintiff. Legal advice and services may be as necessary to protect the property as the aid of a physician or surgeon is to protect life. Neither may prove serviceable in some cases, in others extremely so, depending in a measure on results. Prudence requires their employment in all cases wherein property or life is imperiled. It would be negeligence not to to employ professional aid in cases requiring it. The result does not determine the propriety of the employment. The condition of things at the time must decide that. A party who acts according to the best lights that can be obtained at the moment is not negligent, but discreet. It is elementary that an agent is not permitted to reap any of the profits of his agency properly belonging to his principal; so, on the other hand, he is entitled to be indemnified against all losses which have been innocently sustained by him on the same account. * * * The naked depositary ought neither to be injured nor benefited in any respect by the trust undertaken by him. In an emergency he has an implied authority to incur expenses on behalf of the owner for the preservation of the property. * * *

It is a familiar rule that an agent has the duty of taking such steps as are reasonably necessary for the protection of his principal's interests, and for the preservation of his principal's property, and that, having made outlays for that purpose, he is entitled to reimbursements at the hands of his principal. * * * The reason of the rule is that a request on the part of the principal is inferred where the advances are made in the regular course of business, or even on the spur of some pressing urgency not provided for by any rule, since the employer may fairly be taken to have authorized the employed to make the expenditure under any circumstances that a prudent man would conceive necessary for the safeguard of his interest. * * * In Harter v. Blanchard, 64 Barb. 617, the rule was applied to the case of a horse which, while in the bailee's possession, had his leg broken; and it was held that the bailee had, from the nature of the case, an implied authority to contract in behalf of the bailor with a competent farrier for the care of the animal. Indeed, this just rule of implied authority and indemnity pervades the law of principal and agent, and of bailments as well. The expenditure made by the Maverick National Bank was the proper exercise by it of the discretion conferred by the nature of the transaction. It was reasonable in amount, the services rendered were necessary, and there is no principle of justice that requires that it should lose the amount so paid. The expenditure was to protect the plaintiff's interest in the property; was made for his sole benefit, at a place far distant from his residence, and impliedly at his request. The expenditure, being a proper one, was legally authorized, and is a good counterclaim against the plaintiff; and, the cause of action for the balance of his demand having been legally discharged by payment into court, it follows that there must be judgment for the defendant, with costs from the time of such payment. * * *

NEW YORK CENT. R. CO. v. WHITE.

(Supreme Court of the United States, 1917. 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.)

PITNEY, J. A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the Workmen's Compensation Law of that state, to recover compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the Appellate Division of the Supreme Court for the Third Judicial Department, whose order was affirmed by the Court of Appeals without opinion. * * *

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes forty-two groups of hazardous employments, defines "employee" as a person engaged in one of these employments upon the premises, or at the plant, or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines "employment" as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By section 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in section 50, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under the act, or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his employment, or that the injury was due to contributory negligence.

Compensation under the act is not regulated by the measure of damages applied in negligence suits, but, in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death, the compensation is known as a death benefit, and includes funeral expenses, not exceeding $100, payments to the surviving wife (or dependent husband) during widowhood (or dependent

widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. Provision is made for the establishment of a Workmen's Compensation Commission with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested. The award or decision of the Commission is made subject to an appeal, on questions of law only, to the Appellate Division of the Supreme Court for the Third Department, with an ultimate appeal to the Court of Appeals in cases where such an appeal would lie in civil actions. A fund is created, known as "the state insurance fund," for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the Commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total pay roll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve.

Elaborate provisions are laid down for the administration of this fund. By section 50, each employer is required to secure compensation to his employees in one of the following ways: (1) By insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) "by furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself, in which case the Commission may, in its discretion, require the deposit with the Commission of securities of the kind prescribed in section 13 of the Insurance Law, in an amount to be determined by the Commission, to secure his liability to pay the compensation provided in this chapter." If an employer fails to comply with this section, he is made liable to a penalty in an amount equal to the pro rata premium that would have been payable for insurance in the state fund during the period of noncompliance: besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by section 11.

In a previous year, the legislature enacted a compulsory compensation law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation without regard to fault. * * * This was held by the Court of Appeals in Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517, to be invalid because in conflict with the due process of law provisions of the state Constitution and of the Fourteenth Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914. * * *

In December, 1913, the Legislature enacted the law now under consideration. * * * The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that, under the present system, the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed, * * * yet, as pointed out by the Court of Appeals in the Jensen Case (215 N. Y. 526, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. * * * The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of

negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. * * *

The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim respondeat superior. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent—in disobedience, it may be, of the employer's positive and specific command—the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are Murray v. South Carolina R. Co. (1841) 1 McMul. L. 385, 398, 36 Am. Dec. 268; Farwell v. Boston & W. R. Corp. (1842) 4 Metc. (Mass.) 49, 57, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; Hutchinson v. York, N. & B. R. Co. (1850) L. R. 5 Exch. 343, 351, 19 L. J. Exch. N. S. 296, 299, 14 Jur. 837, 840, 6 Eng. Ry. & C. Cas. 580. * * * The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. * * * It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them; in either of which cases he does assume them, if he continues in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not, in ordinary cases, assume the special risk. * * * Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation,

in which the states differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. * * *

The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. * * *

The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject matter are not placed by the Fourteenth Amendment beyond the reach of the lawmaking power of the state; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing

more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power—a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer.

Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. * * *

The provision for compulsory compensation, in the act under consideration, cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards

the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as co-adventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that, in modern industry, the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract. * * * We recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. * * *

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. * * *

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the Fourteenth Amendment. The denial of a trial by jury is not inconsistent with "due process." * * *

The objection under the "equal protection" clause is not pressed. The only apparent basis for it is in the exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. * * *

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By section 50, this may be done in one of three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or association; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and with the sanction of the Commission, deposited securities to the amount of $300,000, under section 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under section 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of section 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the Commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its pay roll (about $50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the state might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

CHAPTER V

RELATIONS OF THE AGENT AND THIRD PERSONS

Section.
1. Rights of the Agent Against Third Persons.
2. Rights of Third Persons Against the Agent.

SECTION 1.—RIGHTS OF THE AGENT AGAINST THIRD PERSONS

ROWE v. RAND.

(Supreme Court of Indiana, 1887. 111 Ind. 206, 12 N. E. 377.)

NIBLACK, J. * * * An agent may sue in his own name—First, when the contract is in writing, and is expressly made with him, although he may have been known to act as agent; secondly, when the agent is the only known or ostensible principal, and is therefore, in contemplation of law, the real contracting party; thirdly, when, by the usage of trade, he is authorized to act as owner, or as a principal contracting party, notwithstanding his well-known position as agent only. But this right of an agent to bring an action in certain cases in his own name is subordinate to the rights of the principal, who may, unless in particular cases where the agent has a lien or some other vested right, bring suit himself, and thus suspend or extinguish the right of the agent. * * *

NAMQUIT WORSTED CO. v. WHITMAN et al.

(United States Circuit Court of Appeals, First Circuit, 1915. 221 Fed. 49, 136 C. C. A. 575.)

Action by William Whitman and others against the Namquit Worsted Company. Judgment for plaintiff, and defendant brings error.

The action was on a contract for the sale of "50,000 lbs. 3-grade white worsted yarn for delivery during Oct., Nov., and Dec., '09."

PUTNAM, Circuit Judge. This case was submitted to the District Court with the statutory waiver of a jury. The plaintiffs, now the defendants in error, executed the contract sued on in their own names. The real principal whom they represented was the Arlington Mills. The evidence shows that the plaintiffs were selling agents of all its product, and, of course, they were entitled to their commission on the transaction.

By the settled rules of the English courts, which have been adopted in the United States, the plaintiffs were entitled to sue in their own names, both because they executed the contract in their own names, and because they had an interest in the contract to the extent of their commission. The rule is exceptional, as stated in Chitty on Contracts (11th Am. Ed.) pp. 316, 317, and also as stated more fully in Mechem on Agency (2d Ed.) § 2024. In the notes to the latter there is a list of cases showing that the rule has been fully adopted by the courts in

the United States. As it appears in the authorities cited, the suit brought in the name of an agent covers the interests of both agent and principal; and the form of proceedings is anomalous, as shown by Mechem, and also in Colburn v. Phillips, 13 Gray (Mass.) 64, 66. On the latter account, the practice shows that the pleadings which were made in this case are sufficient; and we add no comment in reference to them.

Where there are so many errors assigned in comparison with the substantial matters in question as we find here, each will, as usual, be treated briefly. The first point made by the plaintiff in error is based on the proposition that there is no evidence that the plaintiffs were agents of the Arlington Mills. The court found that J. H. Merrill, who signed the contract with the plaintiffs, "was duly authorized to sign, and did sign, on behalf of the Namquit Worsted Company." The contract itself which Merrill signed used the words, "from Arlington Mills," and the court found that the parties had previously executed contracts similar to this one, and had had extensive dealings of a similar character. We think, therefore, there can be no doubt that the Namquit Company assumed and understood that the contract was for the benefit of the Arlington Mills.

The point is also made that the damage alleged was not capable of being estimated under the contract and the testimony; but, in view of the fact that the court adopted the lowest scale of damages suggested in the case, there is no difficulty on this point. Nor do we find any difficulty in the other matter of fact which was made an element in the errors assigned that a certain approval of the plaintiffs was lacking. * * *

The judgment of the District Court is affirmed, with interest; and the costs of appeal are allowed to the defendants in error. * * *

MISSOURI PAC. RY. CO. v. PERU-VAN ZANDT IMPLEMENT CO.

(Supreme Court of Kansas, 1906. 73 Kan. 295, 85 Pac. 408, 6 L. R. A. [N. S.] 1058, 117 Am. St. Rep. 468, 9 Ann. Cas. 790.)

Action by the Peru-Van Zandt Implement Company against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error.

The Port Huron Engine & Thresher Company, of Port Huron, Mich., manufactures threshing machines and sells them throughout the country through local agents. The plaintiff, defendant in error, is its agent at Hutchinson, Kan. By the contract of agency, it is the duty of the Peru-Van Zandt Implement Company, to advertise, introduce, and sell the machines to those desiring to purchase, and, when a sale is made, an order is taken from the purchaser, in writing, directing the Port Huron Company to ship the machinery desired, stating price, manner of payment, and other particulars constituting the conditions of sale, which order is signed by the purchaser and delivered to the local agent. This order is forwarded to the Port Huron Company by the agent making the sale. Upon this order the machinery is shipped by the designated route and consigned to the local agent. It is the duty of the agent to receive the machinery and hold possession thereof until payment is made or secured as stipulated in the order of the buyer. In completing the sale the agent takes in payment

cash, notes, mortgages, or other security as directed, but delivers the machinery only after the sale has been approved by the Port Huron Company. Until such approval and delivery, the title to the machinery does not pass from the seller. The Peru-Van Zandt Company receives for its services in making such sales a commission of 40 per cent. of the selling price. * * * The Peru-Van Zandt Company, under this employment, sold two machines for the aggregate sum of $920, and took from the purchasers written orders therefor, which were duly forwarded to the Port Huron Company. Upon receipt of the orders, the machines were shipped over the road of the plaintiff in error, consigned to the Peru-Van Zandt Implement Company, at Larned, Kan., with stopover to partly unload at Seward, Kan., being the points where the purchasers lived. The bill of lading contained nothing to indicate the relation existing between the consignor, the Port Huron Company, and the consignee, whether that of vendor and vendee, or principal and agent. The machines were shipped June 12, 1903, and in ordinary course would have arrived at destination within 10 days, but on account of negligent delays they did not arrive until some time in the month of August, long after the threshing season had closed and the sale contracts had, for that reason, been canceled. By the contract of shipment, the freight was payable before the delivery of machinery to consignee. The consignee declined to pay the freight, claiming that the damages suffered on account of delay far exceeded the amount of the freight bill. The carrier refused to deliver the goods until the freight was paid. Thereupon the defendant in error demanded that the machinery be delivered to it without payment of freight, and, upon refusal, commenced this suit. The demand was made in the name of the Port Huron Company, by the Peru-Van Zandt Company as agent. The petition alleges that the plaintiff is the agent and factor of the Port Huron Company, and avers the facts constituting their relationship, substantially as hereinbefore set forth. In the first cause of action the plaintiff asks judgment for the amount of commission lost by it, and in the second cause of action it demanded judgment for the value of the machines. The carrier retained, and still keeps, possession of the machines. The plaintiff recovered judgment for the price for which the machines were sold. Plaintiff in error brings the case here for review.

GRAVES, J. * * * It is insisted that the plaintiff has no interest in the machinery in controversy, and, therefore, cannot maintain an action for its conversion. * * * There is considerable confusion among the authorities as to whether the consignee or consignor is the proper party plaintiff in an action against a carrier, but the rule that a suit for the conversion of goods must be brought by the owner, or one having a beneficial interest in the property converted, seems to be fairly well established. Hutchinson on Carriers, §§ 731–734. * * * The consignee is always presumed to possess the necessary ownership, until the contrary is shown. * * * The ownership need not be extensive. An agent, factor, broker, bailee or other person having rights in the property to be protected, may maintain an action, and recover both for himself and the general owner. * * *

We think the plaintiff in this case had sufficient interest in the property to enable it to maintain this action. In Railroad v. Mower Co., 76 Me. 251, a case very similar to this, the court said: "Ordinarily, when a plaintiff sustains his action, it is presumed that the

whole amount of damages recovered will belong to him. In fact, the injury to him or to his property is the measure of his damages. But, while this is the general rule, there are exceptions, not to the extent or measure of damages, but to the interest the plaintiff may have in them. It is true that an action cannot be maintained unless the plaintiff has an interest in the subject-matter of the suit, but he may do so when he is not interested to the full extent of the damages to be recovered. Such are the familiar cases of injury to property in which there is a general and special owner, as bailor and bailee, consignor and consignee, principal and factor. * * * In the case of Express Co. v. Armstead, 50 Ala. 352, it is said: "The consignee of goods has a right to sue for their loss by the carrier, notwithstanding another party may be the owner of them. The obligation is to deliver to him. Generally the property vests in him by the mere delivery to the carrier. Although the absolute or general owner of personal property may support an action for any injury thereto, if he have the right of immediate possession, this does not necessarily divest the right of the consignee to sue, notwithstanding he has never had the actual possession."

A judgment in favor of the plaintiff can work no harm, as it is a bar to an action for the same injury by the Port Huron Company. * * * The plaintiff holds in trust for the Port Huron Company, whatever remains of the amount recovered, after payment of its commission. A consignee has a right to withhold freight bill when its damages exceed that amount, and in such a case the refusal of the carrier to deliver the goods until the freight is paid amounts to a conversion. * * *

No error appearing, the judgment of the district court is affirmed. * * *

MORAN v. DUNPHY.

(Supreme Judicial Court of Massachusetts, 1901. 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289.)

Action by one Moran against one Dunphy, in which plaintiff sought to recover of defendant for making statements to one Cowan, by whom plaintiff was employed, of such a character that Cowan discharged the plaintiff. The superior court sustained defendant's demurrer, and plaintiff appealed.

HOLMES, C. J. * * * We cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort. * * *

We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant who has controlled the employer's action to the plaintiff's harm. The notion that the employer's immunity must be a nonconductor, so far as any remoter liability was concerned, troubled some of the judges in Allen v. Flood [1898] App. Cas. 1, but is disposed of for this commonwealth by the cases cited. * * * So, again, it

may be taken to be settled by Plant v. Woods, 176 Mass. 492, 501, 502, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 30, that motives may determine the question of liability; that, while intentional interference of the kind supposed may be privileged if for certain purposes, yet, if due only to malevolence, it must be answered for. On that point the judges were of one mind. * * * Finally, we see no sound distinction between persuading by malevolent advice and accomplishing the same result by falsehood or putting in fear. In all cases the employer is controlled through motives created by the defendant for the unprivileged purpose. It appears to us not to matter which motive is relied upon. If accomplishing the end by one of them is a wrong to the plaintiff, accomplishing it by either of the others must be equally a wrong.

It follows from what we have said that we are of opinion that both counts of the declaration disclose a good cause of action. * * *

Demurrer * * * overruled.

SECTION 2.—RIGHTS OF THIRD PERSONS AGAINST THE AGENT

FARMERS' CO-OPERATIVE TRUST CO. v. FLOYD.

(Supreme Court of Ohio, 1890. 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846.)

WILLIAMS, J. * * * The courts of this country and of England, with few exceptions, adhere to the doctrine so clearly laid down by Mr. Justice Story in his Commentaries on the Law of Agency, where it is said:

"Wherever a party undertakes to do any act as the agent of another, if he do not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal. There can be no doubt that this is, and ought to be, the rule of law in the case of a fraudulent representation made by the agent, that he has due authority to act for the principal; for it is an intentional deceit. The same rule may justly apply where the agent has no such authority, and he knows it, and he nevertheless undertakes to act for the principal, although he intends no fraud. But another case may be put, which may seem to admit of more doubt; and that is, where the party undertakes to act as an agent for the principal, bona fide, believing that he has due authority, but in point of fact he has no authority, and therefore he acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude.

"This whole doctrine proceeds upon a plain principle of justice; for every person so acting for another, by a natural, if not by a necessary, implication, holds himself out as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement. * * * If he has no such authority, and acts bona fide, still he does a wrong to the other party; and if that wrong produces an injury to the latter, owing to his confidence in the truth of an ex-

press or implied assertion of authority by the agent, it is perfectly just that he who makes such an assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party, who has been misled by it. Indeed, it is a plain principle of equity, as well as of law, that where one of two innocent persons must suffer a loss, he ought to bear it who has been the sole means of producing it, by inducing the other to place a false confidence in his acts, and to repose upon the truth of his statements." Story, Ag. § 264. In the note to this section many cases which sustain the text are cited. And in the notes to Thomson v. Davenport, in 2 Smith, Lead. Cas. pt. 1, commencing on page 408 of the eighth edition, a number of the cases on the same subject are collected. In addition to those, other cases might be referred to, among them the following: Walker v. Bank, 9 N. Y. 582; White v. Madison, 26 N. Y. 117; Weare v. Gove, 44 N. H. 196. In the last case cited above it is held, that "although no fraud or wrongful motive can be imputed to the agent, still his act is an affirmation that he has authority to make the contract, and he may justly be held responsible for the truth of it; and it is no more than reasonable that he should suffer the consequences of his mistake rather than the party who is misled by it, because, before holding himself out as such agent, it is his duty to ascertain whether his claim so to act is well founded or not; and he surely cannot be heard to complain that others have confided in his assertion of authority, and upon the strength of it have entered into reciprocal engagements with him. Even if wholly innocent of any wrongful purpose, his case falls within the familiar principle that when one of two innocent persons must suffer a loss it ought to be borne by him who has been the means of causing it, by inducing the other to confide in the truth of his representations."

While, however, the authorities generally agree that where a person, not having in fact authority to make a contract as agent, yet does so under the bona fide belief that such authority is vested in him, is nevertheless personally responsible to those who contract with him in ignorance of his want of authority, a diversity of opinion is found in the cases in regard to the exact nature of the liability, and the character of the action by which it may be enforced. In Jenkins v. Hutchinson, 13 Adol. & E. (N. S.) 746, it is intimated by Erle, J., that an action of deceit would lie in such cases, notwithstanding the good faith of the agent, and some authorities may be found to that effect. Another class of cases hold that the liability is upon the contract; but it is believed that whether the agent is so liable depends upon the intention of the parties as discovered from the contract itself; and on this question the form of the agreement and the mode of signature may be quite conclusive. The rule, as stated in Story on Agency, is that an agent cannot be sued on the very instrument itself, as a contracting party, unless there be apt words to charge him. Section 264a. Still another class of cases establish the rule, which we are inclined to adopt, that in cases like the one we are considering the agent is liable upon his implied promise that he possesses the authority he assumes to have. 2 Smith, Lead. Cas. (8th Ed.) pt. 1, p. 408, and cases there cited; Lewis v. Nicholson, 83 E. C. L. 512. In White v. Madison, supra, in a learned opinion, it is held that the liability of the agent in such cases rests upon the ground that he warrants his authority, and not that the contract is to be deemed his own. * * *

THILMANY v. IOWA PAPER BAG CO. et al.

(Supreme Court of Iowa, 1890. 108 Iowa, 357, 79 N. W. 261, 75 Am. St. Rep. 259.)

Action to recover the purchase price of a car load of paper shipped to the Iowa Paper Bag Company. Defendant Daggett having signed the Iowa National Bank's letter of guaranty of the bag company's obligations on account of the paper, was made a defendant in this case. From a judgment dismissing plaintiff's petition, he appeals.

DEEMER, J. * * * We now turn to the main point in the case, and first to the proposition that defendant Daggett is liable because of the form of the guaranty. It is signed, "Iowa National Bank, by William Daggett, V. P." Clearly, this is an obligation of the company; and the form of the signature just as clearly indicates that Daggett signed it in a representative capacity, and not as an individual. To hold that the contract binds Daggett personally, we must eliminate the preposition "by" and hold that the initials "V. P." are "descriptio personæ." This we cannot do, as it is not our province to make contracts for parties. The use of the pronouns "we" and "our" in the letter of guaranty is of no significance. They are often used in referring to a corporation as a collection of individuals. There is no question in our minds but that all parties to this contract regarded it as the obligation of the bank, and not of the defendant Daggett in his individual capacity; and as this is the proper legal construction of the instrument, nothing further need be said on the first proposition urged by appellant's counsel.

As to the second proposition, the rule has been broadly stated over and over again that when an agent contracts in excess of his authority, or acts without authority, or assumes to have authority when he has none, or for any reason fails to bind his principal he is himself bound. * * * That this is the general rule must be conceded, and as applied to the facts of the cited cases, it is correct. But, like nearly every other general rule, it is subject to exceptions, some of which we will notice.

The reasons generally given for the rule are: (1) That as the agent assumes to represent a principal, he cannot be heard to say that he had no authority, or that there was in fact no principal to be bound; for if he assumes to represent another, he impliedly warrants that there is such another, and that he has authority to represent him. If, then, there is no principal, or the agent has no authority to act for him, an action will lie for deceit or misrepresentation. (2) The law assumes that the contract was intended to bind some one, and if the principal is not bound, the contract must be that of the agent. This last rule is generally applied to executed contracts. In such cases action will lie for benefits received by the agent. Some cases go to the extent of rejecting all parts of the contract relating to the obligation of the principal, and then treat it as the personal contract of the agent. * * * A third reason for the rule is that the agent impliedly warrants his authority to act for his principal, and if he has no such power, an action lies for breach of warranty. Now, it is apparent that if the party with whom the agent contracts has notice of the facts relating to the authority of the agent, and is as fully advised as to his authority as the agent himself, there can be no action for deceit. And so the text-writers have generally stated this as an excep-

tion to the general rule. Mechem on Agency, at sections 545 and 546, thus states the law:

"Sec. 545. * * * Of course, if the other party knew, or by the exercise of reasonable care might have discovered, the want of authority, he cannot recover. This implied warranty by the agent of his authority must ordinarily be limited to its existence as a matter of fact, and not be held to include a warranty of its adequacy or sufficiency in point of law.

"Sec. 546. Where, however, the agent, acting in good faith, fully discloses to the other party at the time all the facts and circumstances touching the authority under which he assumes to act, so that the other party, from such information or otherwise, is fully informed as to the existence and extent of his authority, he cannot be held liable. It is material, in these cases, that the party claiming a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as are sufficient to put him upon inquiry, and he fails to avail himself of such knowledge, or of the means of knowledge reasonably accessible to him, he cannot say that he was misled simply on the ground that the other assumed to act as agent without authority. Of course, if the agent conceals or misrepresents material facts to the detriment of the other party, he cannot claim exemption."

Judge Story, in his valuable work on Agency, section 265, says: "This doctrine, however, as to the liability of the agent, where he contracts in the name and for the benefit of the principal, without having due authority, is founded upon the supposition that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act by the principal. But circumstances may arise in which the agent would not or might not be held to be personally liable, if he acted without authority, if that want of authority was known to both parties or unknown to both parties."

Abundant authorities are cited by each author in support of these propositions. The same thought is equally applicable to the third reason above given for the general rule. And it may be further said that the implied warranty of the agent does not relate to the power of the principal to enter into the particular contract. He simply covenants that he has authority to act for his principal, not that the act of the principal is legal and binding. Hence, it has been justly said that the contract must be one which the law would enforce against the principal, if it had been authorized by him, else the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract, when a breach of the contract itself, if it had been authorized, would have furnished no ground of action against the principal. * * *

In the case now under consideration the defendant Daggett made no representations as to his authority save that contained in the letter itself. He is guilty of no actionable deceit, unless it be found in the fact that he signed the letter of guaranty as vice-president, and thus represented that he had authority to represent his bank. He had this authority, if any officer of a national bank has it, for no question is made as to his authority to represent the bank in the making of any contract it is authorized to execute. The action is not, then, based upon any misrepresentation as to his authority, but upon the invalidity of

the contract itself as between plaintiff and the bank. There was no actionable deceit, for the plaintiff is presumed to know as much about the powers of national banks as the defendant. There is, as we have said, no implied warranty by an agent that his principal has authority to make the contract. As a rule, that is a question of law, of which each party has equal knowledge. In the case against the bank we held that national banks have no authority to enter into such contracts, and as the plaintiff has no right of action against the bank upon a contract of guaranty, such as the one in suit, no recovery should be permitted against the agent; for this would hold every agent to a warranty of legality of his principal's contracts. As we have seen, this is not the obligation of the agent. The second reason sometimes given for the general rule of liability of the agent does not appear to us to be sound. By the application of this principle a new contract is made for the parties. An engagement is created which the parties did not intend to assume, and the decided weight of authority is against such rule. * * *

We do not think that Daggett, the agent, is personally liable under the facts disclosed, and the judgment is affirmed.

CLARK et al. v. O'ROURKE.

(Supreme Court of Michigan, 1896. 111 Mich. 108, 69 N. W. 147, 66 Am. St. Rep. 389.)

Assumpsit by Clark, Farnham & Co., a partnership, against C. O'Rourke and others, who were the building committee of an unincorporated church association, for lumber furnished for the erection of a church. The lumber was charged to the church association. Defendants contended that credit had been extended to the association and to defendants personally, and that plaintiffs had agreed to look for their pay to funds to be raised by church subscriptions, donations, and fairs. Judgment for plaintiffs. Defendants bring writ of error.

GRANT, J. The church organization had no legal existence. It could neither sue nor be sued. The members of the society were not partners. Those of the society who were actually instrumental in incurring the liabilities for it are liable as either principals, or agents having no legal principal behind them. Members of the society who either authorized or ratified the transactions are liable, while those who did not are exempt from liability. * * *

The testimony does not justify the conclusion that the plaintiffs agreed to trust to the proceeds of fairs, etc., for their pay. * * * Neither can we accede to the proposition that there was evidence tending legitimately to show that the credit was given to this unincorporated and irresponsible society. It was natural that plaintiffs should enter the account upon their books as they did, but a jury would not be justified in drawing the conclusion from this alone that they agreed to look to such members of this society as they might be able to show authorized or ratified the purchase from them. In both reason and authority, this is of no particular significance. The alleged principal was a myth, and the entry means no more than that the credit was given to those forming the association, or to those who stood sponsors for it, and were conducting its business and obtaining the credit. * * * These defendants were the active managers, and, with the other two members of the committee, were in sole charge of

the work, and, under the law and the facts, were properly held responsible. The law does not, under such circumstances, leave the creditors to search out the individual members of the society who have authorized the transaction, but holds those liable who have dealt with the creditors in the capacity of agents or principals. * * *

The judgment is affirmed.

LEE v. MATHEWS.

(Supreme Court of Alabama, 1846. 10 Ala. 682, 44 Am. Dec. 498.)

Trover for the value of slaves. By a deed of marriage settlement, the slaves were conveyed to a trustee for the benefit of Mrs. Battle. Battle and wife, removing from North Carolina to Alabama, took the slaves with them. A sheriff sold the slaves as the property of Battle. Defendant, acting as agent of Rebecca Shamburger, bought the slaves at sheriff's sale. The slaves were delivered to defendant soon after the sale. Judgment below for defendant. Plaintiff brings writ of error.

ORMOND, J. * * * The slaves being conveyed by the antenuptial contract, to the trustee, for the sole and separate use of the wife, no inference can arise from the fact, that they were in the joint possession of herself and her husband; such must of necessity be the case, when the husband resides under the same roof with his wife. * * * From these considerations, it appears, that the slaves were not subject to sale, as the property of Battle, and it follows, that the purchaser is liable to the trustee, in an action of trover for the value.

It is further argued that this action cannot be maintained against the present defendant, because in the purchase of the slaves he acted as the agent of Mrs. Shamburger, disclosed his agency at the time, and took the bill of sale in her name, and did not retain the possession but for a short period as such agent, the slaves having been delivered up to his principal, long before this suit was brought. Our first impression was, that the defendant, having acted merely as the agent of another person, and having parted with the possession before he received notice of the title of the plaintiff, was not responsible in this action, but that the suit must be brought against the principal. Subsequent reflection has satisfied us that we were mistaken, and that the principle upon which we relied, does not govern such cases as this.

The general rule of law, that agents properly authorized, acting for a known principal, without any personal undertaking, are not individually responsible, does not apply to torts, because no one can lawfully command another to commit a wrong. It is also clear, that every unlawful intermeddling with the goods of another is a conversion; and it is no answer to the true owner, that the person so receiving the goods, was ignorant of his title, or that he received them for the use or benefit of another. The taking, or receiving of them, being a conversion, his subsequent disposition of them, will not exonerate him from liability. It is equally certain, that the title of the true owner cannot be divested, without his consent, the only exception to this rule being, that of a purchase in market overt, which has no application here. These principles are fully asserted in the cases of Perkins v. Smith, 1 Wils. 328, and Stephens v. Elwall, 4 Man. & Sel. 259.

In both these cases the action was brought against a servant, who had received the goods of a bankrupt for his employer, and had parted

with them before the action was brought. In the last cited case, the act of bankruptcy was secret, and the defendant merely received the goods from another agent of the principal, who purchased them after a secret act of bankruptcy, and had transmitted them to his principal in the United States, before any demand was made of him, or he was apprised of the facts of the case; yet he was held liable to the assignee of the bankrupt. Lord Ellenborough, in giving the opinion of the court, thus expounds the law: "The only question is, whether this is a conversion of the clerk, which was undoubtedly so in the master. The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but nevertheless, his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with my property, and disposes of it; and it is no answer, that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case." Although, therefore, this may appear to be a hard case, it is perfectly clear the defendant, in receiving the slaves, was guilty of a conversion, although he was ignorant of the title of the plaintiff, and was acting merely as the agent of another, and consequently liable to be sued in this form of action. * * *

Let the judgment be reversed, and the cause remanded for further proceedings.

ILLINOIS CENT. R. CO. et al. v. COLEY.

(Court of Appeals of Kentucky, 1905. 121 Ky. 385, 89 S. W. 284, 1 L. R. A. [N. S.] 370.)

Action by Mary Coley against the Illinois Central Railroad Company and another. From a judgment for plaintiff, defendants appeal.

HOBSON, C. J. On August 7, 1902, appellee, Mary Coley, then Mary Koerner, was being driven in a spring wagon across the Tennessee street crossing of the Illinois Central Railroad in Paducah. The wagon was struck by a backing engine on the railroad. Two of the occupants of the wagon were thrown out and killed, and Mary Coley sustained painful and serious injuries, to recover for which she filed this action against the railroad company and the engineer in charge of the engine. * * *

If Kotheimer [the engineer, a defendant] negligently ran the engine against the wagon in which appellee was riding, and hurt her, he is liable to her for her injuries. The fact that he did not own the engine, or that he was operating it in the service of the railroad company, makes him none the less liable for his personal wrong. If, in operating the engine, he was acting as the agent of the railroad company, and his act was its act, then it is also responsible to her upon the principle that he who does an act by another does it himself. If both he and it are liable for the wrong, they were both wrongdoers, and, being wrongdoers, may be sued jointly. A person injured in this state is not required to bring separate actions against the wrongdoers, but he may sue any or all of them at his election, the jury may find separate verdicts, and he may recover against some and not against others. * * *

Judgment affirmed.

BAIRD v. SHIPMAN.

(Supreme Court of Illinois, 1890. 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504.)

PER CURIAM. The following opinion of the appellate court fully presents the question arising upon this record:

GARNETT, P. J. This is an appeal from a judgment for damages, founded on the alleged negligence of appellants, by which the death of Joseph Garnett, appellee's intestate, is said to have been caused. The place where the injury happened was in a barn situated on premises on Michigan avenue, in Chicago, belonging to Aaron C. Goodman, who was then, and for several years before had been, a resident of Hartford, Conn. Appellants were his agents for renting the premises during the years 1884 and 1885, and during both years were carrying on the real estate business in Chicago. On the trial, evidence was given tending to show that they had in fact complete control of the premises, with the residence and barn thereon, repairing the same, in their discretion; and there was no proof that in such matters they received any directions from the owner. The property was rented by appellants to Emma R. Wheeler and A. R. Tillman from April 1, 1884, to April 30, 1885, and to Emma R. Wheeler from May 1, 1885, to April 30, 1886. Both leases were in writing, and by the terms of each lease the tenants covenanted to keep the premises in good repair. The tenant in the last lease rented the premises to Nellie E. Pierce, who occupied the same from April 28 to September, 1885. The evidence tends to prove that when the lease was made to Emma R. Wheeler the large carriage door to the barn was in a very insecure condition, and that appellants, through one Warner, the manager of their renting department, verbally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done to improve the condition of the door; and on June 12, 1885, while the deceased, an expressman by occupation, was engaged in delivering a load of kindling in the barn for one of the parties living in the house, the door, weighing about 400 pounds, fell from its fastenings, and injured him to such an extent that he died the next day.

"Appellants make two points: (1) That the verdict is clearly against the weight of the evidence; (2) that they were the agents of the owner, (Goodman,) and liable to him only for any negligence attributable to them. There is nothing more than the ordinary conflict of evidence found in such cases, presenting a question of fact for the jury; and the finding must be respected by this court, in deference to the well-settled rule.

"The other point is not so easily disposed of. An agent is liable to his principal only for mere breach of his contract with his principal; but he must have due regard to the rights and safety of third persons. He cannot in all cases find shelter behind his principal. If, in the course of his agency he is intrusted with the operation of a dangerous machine, to guard himself from personal liability, he must use proper care in its management and supervision, so that others, in the use of ordinary care, will not suffer in life, limb, or property. * * * It is not his contract with the principal which exposes him to, or protects him from, liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance

upon the duties of agency; nor can its breach be excused by the plea that his principal is chargeable. * * * If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot escape this duty by abandoning its execution midway, and leaving things in a dangerous condition, by reason of his having so left them without proper safeguards. * * * A number of authorities charged the agent, in such cases, on the ground of misfeasance, as distinguished from nonfeasance. Mechem, in his work on Agency, § 572, says: 'Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them, because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing, as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances—does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law, as a responsible individual, in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation.' * * *

"The rule * * * is sufficient to charge appellants with damages, under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago, and attended to his own leasing and repairing. In that respect, appellants remained in control of the premises until the door fell upon the deceased. There was no interruption of the causal relation between them and the injured man. They were, in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property was concerned. The principle that makes an independent contractor, to whose control premises upon which he is working are surrendered, liable for damages to strangers caused by his negligence, although he is at the time doing the work under contract with the owner, * * * would seem to be sufficient to hold appellants. * * * When appellants rented the premises to Mrs. Wheeler in the dangerous condition shown by the evidence, they voluntarily set in motion an agency which, in the ordinary and natural course of events, would expose persons entering the barn to personal injury. Use of the barn, for the purpose for which it was used when the deceased came to his death, was one of its ordinary and appropriate uses, and might, by ordinary foresight, have been anticipated. If the insecure condition of the door fastening had arisen after the letting to Mrs. Wheeler, a different question would be presented; but, as it existed before and at the time of the letting, the owner or persons in control are chargeable with the consequences. * * * Neither error is well assigned, and the judgment is affirmed."

We fully concur in the legal proposition asserted in the foregoing opinion, and deem it unnecessary to add to what is therein said in support of that proposition. The judgment is affirmed.

LANDELL v. LYBRAND et al.

(Supreme Court of Pennsylvania, 1919. 264 Pa. 406, 107 Atl. 783, 8 A. L. R. 461.)

Trespass by Edwin A. Landell, Jr., against William M. Lybrand and others, copartners trading as Lybrand, Ross Bros. & Montgomery. From a judgment for defendants, plaintiff appeals.

PER CURIAM. Appellees, defendants below, are certified public accountants, and, as such, audited the books and accounts of the Employers' Indemnity Company for the year 1911. The appellant, plaintiff below, averred in his statement of claim that he had been induced to buy 11 shares of the capital stock of that company, at the price of $200 per share, on the strength of the report made by the appellees as to its assets and liabilities at the close of the year 1911; the report having been shown to him by some one who suggested that he purchase the stock. A further averment was that the report was false and untrue, that the stock purchased by him on the strength of it is valueless, and for the loss he sustained he averred the defendants were liable. To enforce this liability an action in trespass was brought against them. In their affidavit of defense they averred that the statement of claim disclosed no cause of action, and asked that this be disposed of by the court below as a matter of law. * * * It was so disposed of by the court below in entering judgment for the defendants.

There were no contractual relations between the plaintiff and defendants, and, if there is any liability from them to him, it must arise out of some breach of duty, for there is no averment that they made the report with intent to deceive him. The averment in the statement of claim is that the defendants were careless and negligent in making their report; but the plaintiff was a stranger to them and to it, and, as no duty rested upon them to him, they cannot be guilty of any negligence of which he can complain. * * * This was the correct view of the court below, and the judgment is accordingly affirmed.

FOLWELL v. MILLER et al.

(United States Circuit Court of Appeals, Second Circuit, 1906. 145 Fed. 495, 75 C. C. A. 489, 10 L. R. A. [N. S.] 332, 7 Ann. Cas. 455.)

WALLACE, Circuit Judge. The trial judge in the court below directed a verdict for the defendant, upon the ground that it appeared by the evidence that the defendant had not participated in the publication of the libel which was the subject of the action. The principal assignment of error challenges the correctness of this ruling.

The facts proved upon the trial were these: The libel was published in the New York Times, a newspaper owned by a corporation in which the defendant was the principal stockholder, and of which he was the president. The defendant was also at the time editor in chief of the newspaper, having general supervision of the editorial and news departments; but the news department was under the immediate charge of a subordinate editor. The libel consisted of a news item, which was received by the news editor during the night of April 5th, and was published in the issue which went to press on the morning of April 6th. The defendant was absent during the period cov-

ered by the reception and the publication of the libel from the editorial rooms and the building in which the newspaper was printed, and had no knowledge of the publication until a subsequent day.

That the defendant was not liable merely because he was president of the corporation and a stockholder is a proposition which does not require extended discussion. The president of the corporation is an agent of very extensive, but not unlimited, powers. He is not personally liable because of his official capacity, any more than are the directors or stockholders, for torts committed by the corporation, in the absense of personal participation in the tortious act. As an agent he is not liable for the acts of misfeasance or nonfeasance of his subordinate agents or employees. * * *

Whether the defendant was liable because of his relation to the newspaper as editor in chief, notwithstanding the libel was published without his knowledge or complicity, is a more debatable question. If that relation is one in which the editor is merely an agent and the proprietor is the principal, and the liability of the editor is to be tested by the ordinary rules of the law of principal and agent, it is plain, as has been already stated, that he would not be liable for any tortious act committed without his privity by another agent of the principal, whether such other agent be one of higher or lower grade. On the other hand, if the liability of the editor is coextensive with that of the proprietor, it is not affected or qualified by the circumstance that the publication was made without any personal participation on his part. It has long been the settled rule that when a libel is published in a newspaper the fact alone is sufficient evidence to charge the proprietor with the guilt of its publication, and he is not permitted to show in exculpation that he was not privy nor assenting to, nor encouraging, the publication. Although it may have been published, contrary to his express orders, by a servant, if this was in the usual course of the servant's employment, the proprietor is liable. * * * It has never been distinctly decided that the liability of the editor is coextensive with that of the proprietor.

Some of the text-writers indulge in general statements which imply that the liability is coextensive, but the authorities which they cite do not justify the implication. The only carefully considered adjudication upon the point which we have been able to find is Smith v. Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620. In that case the court declared: "That the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences in a civil action for the publication of the libelous article; and this is so whether he knew of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense." * * *

Notwithstanding these adjudications, we are not convinced that the editor's liability is commensurate with that of the proprietor. Of course, he is liable equally with the proprietor when he has personally assisted in any manner in the preparation, revision, or otherwise of the publication of the libel. There is doubtless a presumption of fact that the managing editor has supervised the contents of the newspaper, and performed the duties of his office in that behalf. So doubtless when it appears that he has actually done so, the fact that he has omitted to notice some of the contents will not relieve him from the consequences of his participation. But when it appears affirmatively

that he was not on duty during any part of the time between the reception of the libelous matter by the newspaper and the publication, and could not have had any actual part in composing or publishing, we think he cannot be held liable without disregarding the settled rule of law by which no man is bound for the tortious act of another over whom he has not a master's power of control. The action of libel is not based upon neglect of duty, but is for a positive tort; and there is no reason upon which an editor, any more than any other individual, can be held responsible for such a tort when it appears that he was actually innocent of all complicity in it. * * *

The owner of the newspaper is liable for whatever may be published in it, because all those who are engaged in preparing and publishing it are his servants, and the publication is an act within the scope of their employment. It is therefore deemed the act of the owner himself, and, although done without his knowledge, or contrary to his express instructions, he must bear the consequences. The same principle applies to every tort committed by a servant in the course of his employment, whether it is a mere neglect or a tort of a willful and malicious quality. The editor, however, exercises a delegated authority for the owner, and consequently is but an agent of the owner, even though he be the editor in chief. His subordinates are not his agents or servants, because the power to select them and discharge them belongs to the owner, and they are not under his control when that power resides in a higher agent, notwithstanding he is permitted to control them when the owner does not see fit to intervene. It is impossible to differentiate the relation of an editor and proprietor from that of an agent and principal. We conclude that the trial judge correctly ruled that the defendant was not liable for the act of his subordinate under the circumstances of this case. * * *

RAY COUNTY SAVINGS BANK v. HUTTON.

(Supreme Court of Missouri, 1909. 224 Mo. 42, 123 S. W. 47.)

LAMM, J. Suit for fraud and deceit. Defendant was vice president of a corporation known as "Strahorn-Hutton-Evans Commission Company." It will be called the "company." Plaintiff will be called the "bank." The bank bought at a discount from the company a note known as the "Huntley note," for which it paid $5,856.49. Failing to collect from the payors or the indorser (the company), the bank sues to recover that sum from defendant. A jury being waived, the court gave judgment for $6,882.07, filing the following memorandum: "While a decision for the plaintiff in this case must necessarily result in great hardship to the defendant, yet it is the duty of the court to declare the law as announced by the Supreme Court of the state, and under the facts and the law as thus declared the judgment must be for the plaintiff." From that judgment, defendant appeals.

The pith of the petition is that the bank was doing a general banking business at Richmond; that the company had an office in Kansas City, Kan., under the control of defendant, one of its executive officers; that the company on May 26, 1903, "was in a failing condition, all of which was well known to said T. S. Hutton"; that in September, 1901, William M. and Kate Huntley were the owners of 1,180 head of cattle ranging near Rush Springs, Ind. T., and executed a

chattel mortgage on them to secure to the company their notes aggregating about $20,000; that subsequently such shipments were made of said cattle to the company that "on the ——— day of December, 1902" the cattle were reduced to 545 head; that on said day in December the company took possession of said remnant and sold them to one Peery, who, in turn, executed a chattel mortgage on certain cattle, including said remnant, to secure his note to the company for $12,041.65; that all security was thereby withdrawn from the Huntley chattel mortgage; that the Huntleys were then and are now insolvent; that afterwards, on the 29th of April, 1903, said company "by direction of the defendant, well knowing that the security originally given by the chattel mortgage * * * was no longer available and had been exhausted either by sale, death, theft, or by straying of cattle away, and with intent to cheat and defraud, did procure from William M. Huntley, acting for himself and as agent for Kate Huntley, their certain promissory note" a renewal note; that "defendant, for the purpose of selling said renewal note to plaintiff, falsely and fraudulently represented * * * that said note was secured on 1,180 head of cattle" by its form of chattel mortgage, "and falsely and fraudulently pretended that said cattle were then at or near Rush Springs, Ind. T., and subject to said mortgage, all of which was untrue." These false and fraudulent representations are alleged to have been made by a letter of date May 26, 1903. The recitals in the note are then set forth; one of them being: "That this note is given in renewal of unpaid indebtedness, secured by a chattel mortgage on 1,180 head of cattle, given by (Kate Huntley, by W. M. Huntley, agent, and W. M. Huntley) to Strahorn-Hutton-Evans Commission Company, date September 21, 1902, filed for record at Ardmore, I. Ty., on 27th day of September, 1901." In connection with that recital in the note inclosed with defendant's letter, it is charged * * * that the letter states as follows: "You will note that all these are renewals except one note, for which ample provision is made in our form of mortgage, and all this paper will be met promptly at its maturity." It is next charged that by such statement in said letter "defendant fraudulently intended to cause plaintiff to believe and did cause plaintiff to believe that said note was a renewal of unpaid indebtedness" secured on the 1,180 cattle, as recited in said note. It is next alleged that the bank relied on such fraudulent and false representations, pretenses, and statements contained in said note "and set forth in said letter," and, believing the same to be true, bought said note "at the request of defendant and at his request paid" said sum therefor; that shortly thereafter the company "proved to be insolvent, and was at the time of said purchase and now is insolvent, which fact was and is well known to defendant." The answer was a general denial. * * *

If Hutton is liable, it is on the wording of his letter of May 26, 1903, as vice president, and not because of any other specification of fraud in the petition.

There is a promise in that letter to the effect that all the paper inclosed for discount would be met promptly at maturity. Something is made of that phrase by respondent's counsel. It is suggested as an element in the fraud, or, if not an element, at least a bit of color painting the fraud a darker hue. But we know of no principle of law making a promise to pay a debt when due or an assertion that a debt will

be paid promptly when due an actionable element in fraud. Frauds, either in civil or criminal law, are not based on prognostications. Who may know what a day will bring forth? No man stands condemned in the law because hope springs in his breast, or because out of the fullness of his heart his mouth speaketh in that regard. Therefore the law does not interdict prophesying the expression of sanguine business hopes and beliefs in events to come. The suggestion in hand comes with ill grace from the plaintiff. It jauntily took gainful chances, resting in futuro, somewhat on the very edge of conservative banking; for it not only dealt in cattle paper, but in a sense it dealt in paper cattle—"sight unseen"—cattle roaming in unknown far-away pastures, purporting to be owned by men unknown to the bank. Preliminary to investing it clapped an eye on no hoof of cattle, but its course of dealing with the company must be held to have rested largely on the relation of indorser and indorsee. It took paper expecting the indorser would protect it in the first instance at least. * * *

Finally, we come to this proposition: Is defendant personally liable because of the statement in the letter that, "You will note that all these are renewals except one note, for which ample provision is made in our form of mortgage"? Counsel argue that taking that statement in the letter in connection with the narration in the Huntley note inclosed a case is made. We do not think so. This because: (a) The petition counts on fraud and deceit. In that form of action the scienter is an indispensable element. The petition therefore alleges guilty knowledge in Hutton—knowledge that the narrations in the Huntley note were false—and an averment is made that his letter of May 25th, 1903, was intended to make and did make those false narrations effective. As we have seen there was an utter failure of proof on the scienter strictly speaking. (b) But counsel say (and this proposition may be conceded to them) that there may be such recklessness in stating facts as takes the place of actual guilty knowledge, stands as and for a technical scienter, and amounts to fraud and deceit. In this behalf they argue that the narrations in the Huntley note, coupled with the statement in the letter, amount to an assertion that the enclosed note was actually secured by 1,180 cattle at the very time, and that, conceding Hutton was ignorant of the facts, yet his statement of fact, as a fact, being itself false, amounts to proof of the allegation that he "falsely and fraudulently represented the said note was secured on 1,180 head of cattle," and "falsely and fraudulently pretended that said cattle were then at or near Rush Springs, Ind. T., and subject to said mortgage."

Attending to this view of the case, what does the letter itself say? The alleged poisonous words are: "You will note that all these are renewals, except one note, for which ample provision is made in our form of mortgage." As a preliminary remark, it is proper to say that we should solve all doubts in favor of good faith, and not wring a fraudulent meaning from the words by enlarging the meaning by an interpretation either too loose or too bland. Now, the notes inclosed in the letter, save one, were "renewals." Hence there was neither false suggestion nor suppressio veri in using that term. The words "for which" refer back to the word "renewals." Hence those words may, without alteration in sense, be amplified into "for which renewals." What kind of provision was made? The answer is: "Ample provision." Where was ample provision made? The answer is:

"In our form of mortgage." What does "provision" mean except a clause contractual in character or dealing with the subject-matter (i. e., renewals)? In the connection it is used, "ample" means full, complete, sufficient. So that on just analysis the language of the letter must be held to mean: "All these notes (save one) are renewal notes, for which renewals there is a full mortgage clause or provision inserted in the form of chattel mortgages used by this company"—which is no more and no less than to say that the company's form of mortgage is so written as to contemplate and provide for renewal notes. The sum of it all being as said, we find the record discloses that the mortgage had such provision. Therefore, taken by or large, the language complained of in the letter was literally true. As we have seen, then, the words of the letter do not import that the very note inclosed was at the very time the note was sent in to the bank secured on 1,180 head of cattle at or near Rush Springs, I. T., and subject to the mortgage, as alleged in the petition and as argued here.

But learned counsel for respondent argue, as said, that the narrations of the letter must be read in connection with the narrations of the inclosed Huntley note, and that, read together, they assert that the Huntley renewal note was secured by that number of cattle then at the above point in the Indian Territory and subject to the mortgage. The first question to settle in this view of the case is whether the representation made by the Huntleys in their note is a representation by Hutton. Is it the law that when the president of a bank signs a letter prepared, say, by the cashier, and incloses in the letter a bundle of instruments or documents furnished by the cashier to be sent as an inclosure with the letter, that the president makes all the recitations in these documents and instruments his own by merely inclosing them with his letter? And this, too, to fasten actual fraud upon him? If we take that view of it, an agent of a corporation assumes a liability and responsibility hitherto unhinted at and undreamed of in the philosophy of the law. We deem the proposition unsound on its face; for the law must comport with reason. To know the law one must know the reason of the law, and what says our Lord Coke? "He who knoweth the law, and knoweth not the reason thereof, soon forgetteth his superfluous learning." * * * If we were to hold (which we shall not, in this form of action counting on actual fraud) that Hutton was charged with notice of what the books showed had become of the whole 1,180 cattle, yet that does not fasten such recklessness upon him as would amount to proof of the scienter and therefore of fraud. It would be a novel proposition in ethics and a most anxious and vexing precedent in commercial law to hold that Hutton, ignorant of the facts and innocent of wrongful intention, could be held so reckless as to be guilty of fraud in stating what he personally did not know to be true, when, in the usual course of the company's business, a trusted employee (presumably familiar with all the facts) prepared a statement for him to sign and which he did sign in good faith relying on such employee.

We shall not swell this opinion by extended excerpts from decided cases, but content ourselves with quoting from the syllabus of a leading case decided in the House of Lords, and which, as pointed out by learned counsel, met the approval of this court in Bank v. Byers, 139 Mo. 653, 41 S. W. 325. The case referred to is Derry et al. v. Peek, 14 App. Cas. (L. Rep.) 337. The syllabi correctly formulate the propositions ruled and are apposite and lucid statements of acceptable

law—in part reading as follows: "In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false. A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but it does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit." The doctrine of the Derry Case accords with the doctrines of this court. * * * And, applying that doctrine to the facts here, we must acquit defendant of actual fraud or of such recklessness in statement as supplies proof of the scienter and amount to such fraud. Says Bleckley, J., in Hull v. Myers, 90 Ga. 677, 16 S. E. 654: "Good sense, good morality, and good law are one and the same so long as they are not sundered violently by legislation or ignorantly by judicial error." And in our opinion it is good sense, good morality, and good law to rule as announced.

It is settled law that an agent, such as Hutton was, is not liable to third persons for mere negligence in nonfeasance. In such cases the rule is: Let the master answer (respondeat superior). But no agent masquerading under the cloak of a corporate name may escape liability for an actual fraud working an injury to a third person. The general rule is that in matters ex contractu a third person dealing with the known agent of another, whether that other be a person or a corporation is deemed to deal (not on the credit of the agent, but) on that of the principal. If that rule does not obtain in a given case, it is because fraud avoids the rule, and thereby the door to liability swings wide open to an action ex delicto. Now, fraud is commonly deeply hid away. Often it can only be got at by inference. It is scarcely ever proved by admissions; for it blows no trumpet. One cannot put his finger on it and say, "Lo, here it is!" or "There it is!"—palpable to the touch. But it is got at by following its tracks from results back to the inception of the affair or from the inception of the affair forward to results. Nevetheless actual fraud is malevolent and willful act. The difficulty of proving it does not dispense with the necessity of the proof. It must not be deduced from mere suspicion. It is not proved by insinuation and innuendo. It is never given body and form by mere presumptions. So that, where one of two views are open, as in the case at bar, the one noble and the other ignoble, courts of justice out of tenderness to humanity will not belittle mankind by taking the ignoble rather than the noble view. Applying that doctrine to this case it is clear the judgment against the defendant is wrong. * * *

PART III

NEGOTIABLE INSTRUMENTS

Chapter

Introduction.
I. Formal Requisites.
II. Right of the Holder to Complete, to Sue Upon, and to Negotiate the Instrument.
III. Who are Holders in Due Course.
IV. Rights of the Holder Against the Maker and Acceptor.
V. Rights of the Holder Against Indorsers and the Drawer.
VI. Presentment, Notices of Dishonor, and Protest.
VII. Discharge.

INTRODUCTION

The commercial world is familiar with a number of instruments of credit, which are usually negotiable: Promissory notes; bills of exchange; certificates of deposit; corporate bonds; checks; drafts; trade acceptances; bank acceptances; certain types of bills of lading; warehouse receipts, etc. Not all of such instruments possess the characteristic of negotiability, but generally such instruments are negotiable.

All of these instruments may be classified into one of two groups: Notes and bills of exchange. The distinguishing characteristic is that on a note there are two parties, the maker and the payee, while on a bill of exchange there are three parties, the drawer, the drawee, and the payee.

It is important to understand and to keep in mind throughout the study of negotiable instruments the primary purpose which is sought to be accomplished by their use. The leading object is to give to certain kinds of obligations, evidenced by a writing, attributes and characteristics which will make these instruments perform the function of money. Negotiable instruments are used instead of money. It is absolutely necessary to do so, because there is an insufficient supply of money in the country to supply the needs of business. A comparison of bank clearings with the figures showing the volume of gold, silver, and paper money in circulation, shows emphatically that a great bulk of business transactions is carried through by means of credit instruments. Very few purchases are actually paid for in money. Throughout the study of the law of negotiable instruments we must therefore keep in mind the fact that these instruments are called upon to do the work of money. If that point is noted, it will explain many detailed rules, which otherwise might seem purely arbitrary

It has been said that negotiable instruments are used in place of money. It is perfectly apparent, of course, that the personal obligation of any individual is not as valuable as gold and silver coin, or the various issues of paper money. The promise of A. to pay a specified sum of money is not as valuable as the promise of the United States government to pay the same amount of mon-

ey. The law of negotiable instruments does not attempt the impossible task of making the obligation of a person who signs a note or bill of exchange as valuable as a gold certificate, but there are a great many things which the law can do to induce people to take negotiable instruments instead of money.

At this point it is well to recall some of the principles of the law of simple contracts. We saw in our study of contracts that there are a great many kinds of cases where one person may think that he has a right to recover a sum of money from another person, but where the law denies him a right of recovery. It may be because there was no valid offer in the first place. It may be because there was no acceptance of a valid offer. It may be that there was no consideration to support the promises which resulted from the acceptance of an offer. It may be that, although in the beginning there was an enforceable contract between the parties, the obligor subsequently discharged his obligation by payment or otherwise. We also examined a number of cases where, in the beginning, there was a binding contract, but where the obligee's right to demand performance by the obligor was dependent upon the obligee's performing his obligation. In such a case the obligor's promise was simply conditioned upon the performance of a promise by the obligee. Again, we found cases where the obligee had obtained the promise of the obligor by fraudulent representations.

With all of these phases of the law in mind, we then took up the study of the assignability of contract rights, and we found that the obligee could, in many instances, but not in others, sell his right to a third party. Such a transaction is called an assignment. As a general principle, it appeared that the assignee of such chose in action acquired no rights which were superior to those possessed by his assignor. To put the proposition in other words, we discovered that the obligor, if he had any of the defenses, such as want of consideration, failure of consideration, payment, fraud, or prior breach of contract, could, when he was sued by the assignee, set up any of these defenses. The assignee could recover from the obligor only when the assignor could have recovered from the obligor.

We have now approached a little nearer to the law of negotiable instruments. It is apparent that a business man would not be willing to take the note or check or other bill of exchange from the payee, or from one to whom the payee had sold the instrument, if he incurred all of the risk that an assignee of an ordinary chose in action incurs. A business man, if he is taking the obligation of a third party whom he does not know, would want to feel at least that there was no question but that that individual owed the amount of money which was called for by the instrument. He may be willing to take the risk of that person's solvency, but he would like to be free from all of the ordinary defenses which are available in suits on simple contracts. And so

the law of negotiable instruments has taken an entirely different view of the rights of the person who purchases the obligation of a third party.

The most fundamental doctrine in the whole law of negotiable instruments is the proposition that the purchaser of a negotiable instrument before it is due, who has no knowledge of the existence of a defense between the original parties, takes it free from all these defenses. Except in a very few cases, such as forgery of the maker's or drawer's name, the bona fide purchaser before maturity can rest assured that the instrument evidences the unquestioned legal obligation of the parties whose names appear thereon. The only risk the purchaser takes is that the parties are insolvent. The elimination of all these personal defenses goes a long way toward making commercial instruments as valuable as money. Having regard for the enormous volume of business done, the risk of insolvency is relatively small. In this way, therefore, the law has singled out certain kinds of choses in action which we call negotiable instruments, and has given to them attributes which are not common to ordinary choses in action. The effect is to make them much more desirable and valuable than they otherwise would be. There are a great many rules in the law of negotiable instruments, but most of them are subordinate to this one doctrine, or they are the natural outgrowth of its application to varied situations.

The above statement explains in general what we mean by the term "negotiable," and we find that in its most important sense the term "negotiable" means the attribute or quality of assignability free from equities or defenses. There are two ideas here: First, the idea that the owner of a negotiable instrument has the power to sell it. The second idea brings out the legal effect of such sale, that the purchaser takes it free from the ordinary defenses which exist between the original parties. The term "negotiable" also carries with it the idea that it is assignable in a particular way, viz. by indorsement, or in some cases by delivery. The law has simply prescribed a number of ways by which an owner may dispossess himself of title and vest that title in another. The different methods of indorsement and the legal effect of each will be developed in the cases. It is simply necessary at this point to call to mind the fact that the term "negotiable" carries with it the notion that the instrument so described is assignable by indorsement.

We shall also come to find out that, when a person brings a suit upon an instrument which is described as negotiable, the law raises a presumption that the instrument evidences a then existing legal obligation. The importance of this rule of presumption is that the plaintiff is under no obligation to introduce any evidence to support his right to sue upon the instrument, other than the bare introduction in evidence of the instrument which is the subject of the action. When a person brings an action for breach of

an ordinary simple contract, the plaintiff is required to introduce affirmative proof that there was an offer, that it was accepted, that there was consideration, that he performed his part of the contract, and that the defendant did not perform. In a suit upon a negotiable instrument, the plaintiff, in the first instance, is not required to do this. The plaintiff makes out his case by merely introducing the note in evidence. Eventually, of course, he may be required to introduce testimony to rebut what the defendant has put in the way of defense, but he is not required to do so in the first instance.

The law of negotiable instruments has had a history somewhat different from the history of other branches of the law. If we go back to the period of English history from the time of William the Conqueror on down to the beginning of the seventeenth century, we shall not find in the law of that period anything which resembles what we to-day know as the law of negotiable instruments. For reasons not necessary to recount here, the law pertaining to contracts and the methods of enforcing them was apparently not suitable for the needs of business. And so we find a special branch of law called the Law Merchant. Perhaps it is not correct to speak of it as law at all. We do find a great number of commercial practices, customs, and understandings recognized by merchants of that time, in accordance with which they conducted their business. Furthermore, we find that these understandings were enforced by special courts. These courts were not parts of the judicial system of England, but were special tribunals organized and presided over by merchants themselves. Not only do we find these special merchants' courts in England, but also on the continent of Europe. To the customs and practices of the merchants during this early period has been applied the term "Law Merchant." In the Law Merchant we find the roots of the law of negotiable instruments as we know it to-day. The Law Merchant, however, dealt with many matters other than practices concerning bills of exchange, but we are interested in it here only in so far as it is necessary to note the origin of the law of Negotiable Instruments.

From the beginning of the seventeenth century on down until the middle of the eighteenth century, a development in the Law Merchant occurred. The special courts disappeared and we find the common-law courts of England performing the functions theretofore performed by the special courts. The customs of the merchants did not become laws of England. Instead, we find that when one merchant sued another merchant in the common-law courts the parties were allowed to prove that they were merchants, and then they were allowed to prove the mercantile custom in accordance with which merchants had theretofore acted. When such customs and rules were proved to exist, the common-law courts would adjudicate the rights of these parties upon the basis of the Law Merchant and not upon the rules of the common

law. Oftentimes to-day the parties to a suit are allowed to prove the existence of a custom, and when so proved the courts will hold that the parties evidently entered into their transaction in the light of this particular custom, and in this way the custom becomes an effective and binding rule of law, at least, as far as that case is concerned. It was the same with respect to the rules of the Law Merchant during the period of which we are now speaking. The parties were allowed to prove the custom and as such it governed the transaction.

From the time of Lord Mansfield, about the middle of the eighteenth century, on down, extending over considerable periods of time, a further development in the Law Merchant occurred. Instead of enforcing mercantile custom merely as a custom, the custom became a binding rule of law. It was due, very largely, to the commanding influence of Lord Mansfield that the customs of merchants were thus incorporated into the great body of the common law. It must not be understood, however, that the customs of the merchants worked their way into the common-law system without change. These customs had to adjust themselves to an already existing legal system. A great many changes were brought about as a result of the introduction of these new rules. From this point, the middle of the eighteenth century, on down until nearly the close of the nineteenth century the development of the law of negotiable instruments was similar to that which occurred in other branches of the law; i. e., by judicial decisions.

Near the close of the nineteenth century a further development occurred. At this time the law of negotiable instruments, in England as in the United States, was to be found almost entirely in the decisions of the courts. There were hundreds of such decisions. Access to this body of the law was possible only for those who were trained in the methods of finding it. It was therefore thought desirable to collect the rules from the numerous cases and to put them into the form of a statute so that the general principles of the law might be more readily available. Accordingly a statute was drawn and enacted by the British Parliament in 1882. Shortly after this event the movement for codification of certain branches of the law became an active one in the United States. Under the auspices of the American Bar Association, there was organized the body of Commissioners on Uniform State Laws. This Commission was charged with the duty of ascertaining what branches of the law should be reduced to statutory form and of drafting the acts. It was thought that the enactment, into the form of a statute, of certain portions of the law would bring about substantial uniformity throughout the several states and that there would be some gain in simplicity of statement and in rendering the general principles more accessible. One of the first subjects approached by the Commissioners on Uniform State Laws was that of negotiable instruments. Having the model of the English Bills of Exchange Act of 1882 before them an act was

drawn up which was called the Negotiable Instruments Law. The act, finally approved by the Commissioners on Uniform State Laws, was recommended for passage to the several states in 1896.

At the present time (1921) the act has been adopted in all of the states of the Union except Georgia. The Negotiable Instruments Law should not, therefore, be thought of as something new, which came into existence at the date of its passage in a particular state. In the main, the rules of law which theretofore existed in judicial decisions were not changed, but were simply restated in statutory form. In a number of instances, however, prior to the act, conflicts in the decisions had developed on particular points. For example, some states held that if a completed instrument, payable to bearer was stolen before delivery, it would not be a valid contract in the hands of an innocent holder. But in other states the courts held that such an instrument could be enforced by the innocent holder. Throughout the whole law, wherever conflicts of decisions had developed, the Commissioners on Uniform State Laws adopted what in their opinion was the better rule. In a particular state, therefore, the adoption of the Negotiable Instruments Law may have had the effect of changing some existing rules, though perhaps not many.

The development which is going on to-day is the interpretation of the numerous sections of the act by judicial decisions, and we shall find in our study of the cases that there is still some conflict in the decisions of the courts. It is impossible, of course, to have absolute uniformity, because individuals, even courts, will not always attach the same meaning to words and phrases that other individuals and other courts do. The most that can be hoped for is uniformity in general principles and this has been attained to a considerable degree. Nevertheless, for the individual who has a particular lawsuit upon a particular bill or note, it is of considerable importance to him to know how the courts of his state will interpret the law with respect to this instrument, and also to know that other courts in other states may decide differently with respect to the same instrument under the same set of facts.

The study of the law of negotiable instruments is not altogether easy. The first difficulty is a difficulty which is not peculiar to the law of negotiable instruments, viz. the natural inherent difficulty in applying language to varying states of fact. For example, when a rule of law states that an instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money, each word in the definition contains the germ of an infinite number of lawsuits. In ordinary discourse it is not necessary that words be used with technical accuracy at all times, and even if we do not, no great harm results, but whenever a suit is brought upon an instrument, the situation is quite different. In such case the court is called upon to state with considerable exactness what sorts of transactions fall within or without certain specified words, phrases or statements of general principle.

The other difficulty in the study of the law of negotiable instruments arises from the fact that there are several parties whose names appear on such instruments. Unless one is careful to note the relation of the plaintiff and of the defendant with respect to the paper the case will not be understood. It is very important at the outset, to make certain who the plaintiff is, whether he is maker of a note, drawer of a bill of exchange, drawee or payee or indorser, and, likewise to determine who the defendant is. In this connection it might be well to recall the various parties to negotiable paper and the names which are commonly employed to describe them. In a promissory note the promisor is called the **maker**. His name will usually appear in the lower right hand corner. The party to whom he owes the money and to whom the instrument was delivered is the **payee**. His name appears, usually, in the center of the instrument on the blank line there provided. When the payee sells the instrument to a third party, the payee generally must indorse the instrument. The payee by such act dos not cease to be a payee, but in addition he becomes an **indorser**. The party to whom he sold the note is then called an **indorsee**. On the face of a bill of exchange there are always three parties. The person who draws it, that is the person who issues the order to another to pay money for him, is called the **drawer**. The person who was ordered by the drawer to pay money for the drawer is called the **drawee**. The drawer's name usually appears in the lower right hand corner, the drawee's name sometimes appears in the lower left hand corner, sometimes at the top of the instrument. The party to whom the instrument is made payable, is called the **payee**. Sometimes a bill of exchange is drawn not for immediate payment but for acceptance, the time of payment being postponed. In such a case as this, the person upon whom the bill has been drawn is called the **drawee**, at least he is so called until the time he agrees in due form to pay the bill. After that time the drawee becomes an **acceptor**. The acceptor of a bill of exchange occupies the same position with respect to the instrument that is occupied by the maker of a note. We are dealing therefore, with makers of notes, payees of notes and payees of bills of exchange, indorsers of notes, indorsers of bills of exchange, indorsees of notes, indorsees of bills of exchange, and, drawers and drawees of bills of exchange.

It appears, therefore, that, in the main, the law of negotiable instruments is a part of the general law of contracts. The larger problems in this branch of the law, are to determine, in the light of the uses to which negotiable instruments are put: (1) What kinds of instruments may properly be called negotiable; (2) what are the rights and liabilities of the parties to negotiable instruments in the various situations which may be presented. The first chapter is devoted to the first question, the remaining chapters are concerned with the second.

CHAPTER I

FORMAL REQUISITES

Section
1. Introduction.
2. Writing and Signature.
3. Necessity for a Promise or Order.
4. The Promise or Order Must be Unconditional.
5. Time of Payment Must be Certain.
6. The Instrument Must be Payable in Money.
7. The Sum to be Paid Must be Certain.
8. The Instrument Must be Payable to Order or Bearer.
9. Provisions Not Affecting Negotiability.
10. Designation of Parties to Negotiable Instruments.
11. Date of the Instrument.
12. Interpretation of Ambiguous Instruments.
13. Consideration.
14. Delivery.

SECTION 1.—INTRODUCTION

We have already noted that negotiable instruments possess certain characteristics which do not attach to ordinary claims for money. The purchaser of such an instrument may acquire rights against the maker, acceptor, or indorsers which were not possessed by the seller. It is perfectly clear, therefore, that if the negotiable instrument creates rights fundamentally different from the rights created by non-negotiable claims the law must define with considerable exactness what kinds of claims are to be treated as negotiable. This point deserves considerable emphasis. It is the function of the courts and legislatures to draw the line between negotiable contracts and non-negotiable contracts so distinctly that one will be able to note the fact at a glance. Of course this is an ideal not capable of actual realization but nevertheless the law attempts to draw the line sharply and distinctly. The twilight zone between negotiable and non-negotiable instruments must be made as narrow as possible.

As far as the general definition of a negotiable instrument is concerned, it is simple; but the application of the general principles to varied states of fact causes considerable difficulty. It makes a great deal of difference to the parties whether the instrument is negotiable or not. If the instrument is non-negotiable, defenses available to the maker may be successfully interposed against the purchaser from the original payee.

There is a natural tendency to think that any instrument is negotiable if it appears that the parties have made use of some printed form of a note, check, or other bill of exchange. Perhaps most of such forms are negotiable, but many of them are not. On the other hand, one may execute and deliver a negotiable instrument and not know that one is doing so. A debtor, in writing a letter to his creditor, may inadvertently, perhaps, employ the language

which converts his letter into a negotiable instrument. Sometimes documents of considerable length are made use of in connection with some business transaction which at first sight appear to be simple contracts but there may be contained therein the necessary language to make the instrument negotiable.

What, then, is the definition of a negotiable instrument? To put the question in other words: What language **must** appear on the instrument if it is to have the characteristics of negotiability? What language **must** not be inserted in the instrument? What language **may** be incorporated therein without affecting negotiability? The answers to these questions will not be taken up in just this order, but the sections of the Negotiable Instruments Law and the cases following may be looked at from these three points of view. The specific requirements of negotiability represent attempts to carry out into details the broad requisite of certainty.

SECTION 2.—WRITING AND SIGNATURE

The **Negotiable Instruments Law** provides:

Section 1, subsec. 1. That an instrument to be negotiable must be in writing and signed by the maker or drawer.

Section 132. The acceptance must be in writing and signed by the drawee.

Obviously there must be such a requirement as that here specified. May the writing be in pencil, or by rubber stamp? It has been held that such is a writing. What is a signature? The signing of one's name, yes. But what is his name? Suppose a man by the name of John Smith signs a note with the name George Edwards. May John Smith be sued? Yes, because, for the purpose of this instrument, his signature is that of George Edwards. Suppose John Smith signs, in the space provided for the signature, the number 123; is John Smith bound? Other cases may be presented, but such questions rarely arise. Does the word "signature" carry with it the requirement that it shall appear in any particular place, such as the lower right-hand corner? If he signs his name at the top, or on the back, has he signed the instrument?

SECTION 3.—NECESSITY FOR A PROMISE OR ORDER

N. I. L., Section 1, subsec. 2. An instrument to be negotiable must contain * * * a promise or order.

What is a promise? What is an order? A debtor hands to his creditor a paper bearing his signature on which is written "I owe you, A. B., $100." Is this a promise? No; because the debtor has simply acknowledged that he owes a debt but he has not promised to pay it. Suppose the instrument read: "I owe you, A. B., $100, due on demand." Is this a promise? The debtor has not

used the word "promise;" but has he not used language the equivalent of the word "promise"? Probably so, because the words "due on demand" carry with them by implication the meaning that if the creditor does demand, the debtor will pay; therefore, the debtor has promised. What is the principle involved? Suppose an instrument contains these words: "Please let the bearer have $100." Is this an order? Hardly; it is more like a request for a loan of money. "Please pay A. $100." Is this an order? Yes; because the word "pay" is imperative and it is an order although modified by the use of respectful language.

SECTION 4.—THE PROMISE OR ORDER MUST BE UNCONDITIONAL

We come now to one of the most important and at the same time one of the troublesome questions connected with our study of formal requirements of negotiable instruments. When is a promise or order unconditional? Before the enactment of the Negotiable Instruments Law, the courts were confronted with this question with considerable frequency. The Negotiable Instruments Law attempted a definition, and it will be our purpose in the cases which follow to discover what promises have been held to be conditional and what promises are regarded by the courts as unconditional. The sections of the Negotiable Instruments Law bearing on this question are as follows:

Section 1, subsec. 2. An instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money.

Section 3. An unqualified order or promise to pay is unconditional within the meaning of this Act though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.

It will be noticed that Section 3 does not lay down rules separate and distinct from the rule of Section 1, subsection 2. Section 3 merely defines more particularly what constitutes a conditional promise or order under certain circumstances.

FIRST NAT. BANK v. LIGHTNER.

(Supreme Court of Kansas, 1906. 74 Kan. 736, 88 Pac. 59, 8 L. R. A. [N. S.] 231, 118 Am. St. Rep. 353, 11 Ann. Cas. 596.)

The First National Bank of Hutchinson brought this action against George W. Lightner on a check and an order, of which the latter reads as follows:

"Hutchinson, Kansas, Aug. 10, 1903.

"G. W. Lightner, Offerle, Kansas—Dear Sir: Pay to the order of the First National Bank of Hutchinson, Kansas, on account of contract between you and the Snyder Planing Mill Co. $1,500.

"The Snyder Planing Mill Co.,
"Per J. F. Donnell, Treas.

"Accepted. G. W. Lightner."

Defendant contended that said orders were nonnegotiable, and were subject to the same defenses in the hands of the First National Bank of Hutchinson, Kan., as if they had remained in the hands of the Snyder Planing Mill Company.

PORTER, J. The main controversy is whether the orders given by the planing mill company to the bank, and accepted by defendant, are negotiable instruments. * * * Each of them, therefore, possesses all the essential elements of a bill of exchange unless the words quoted make them payable out of a particular fund and conditionally so that the acceptance is thereby qualified. The law is well settled that a bill or note is not negotiable if made payable out of a particular fund. * * * But a distinction is recognized where the instrument is simply chargeable to a particular account. In such a case it is beyond question negotiable; payment is not made to depend upon the sufficiency of the fund mentioned, and it is mentioned only for the purpose of informing the drawee as to his means of reimbursement. * * *

The test in every case is said to be: "Does the instrument carry the general personal credit of the drawer or maker, or only the credit of a particular fund?" * * * A promise to pay a certain sum "out of my next quarter's mail pay, which becomes due January 1, 1883," was held in Nichols v. Ruggles, 76 Me. 25, to be an absolute promise to pay a certain sum of money. In Haussoullier v. Hartsinck, 7 T. R. (Durnford & East), 733, it was held that an instrument promising to pay a certain sum "being a portion of a value, as under deposit in security for the payment hereof," was a promissory note payable at all events. In Pierson v. Dunlop, 2 Cowp. 571, an order which was to be charged "to freight" was held negotiable. A note expressed to be in payment of certain tracts of land was held negotiable. Bank v. Michael, 96 N. C. 53, 1 S. E. 855. Likewise a note which stated that it was given in consideration of certain personal property, the title of which was not to pass unless the note was paid. Chicago Railway Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349. * * * In Corbett v. Clark and another, 45 Wis. 403, 30 Am. Rep. 763, an order to pay a certain sum "and take the same out of our share of the grain," referring to grain harvested or growing on certain farms, accepted by the drawee, was said to be a valid bill of exchange, and the order and acceptance absolute, the words above quoted merely indicating the means of disbursement. In Redman v. Adams, 51 Me. 429, a bill directing the drawee to charge the amount against the drawer's share of fish caught on a certain schooner is held valid and negotiable. One of the leading cases is Macleed v. Snee, 2 Strange, 765. There a bill of exchange was dated May 25th for the payment of a certain sum one month after date, "as my quarterly half-pay to be due from 24th of June to 27th of September next, by advance." This was held a negotiable bill of exchange. In Spurgin v. McPheeters, 42 Ind. 527, an instrument in the following form

was said to possess all the requisites of a bill of exchange: "Greencastle, Ind., Aug. 22d, 1870. Mr. D. M. Spurgin—Sir, please pay to Jesse McPheeters, or order, the sum of one hundred and nineteen dollars on said bill of 1¾ in. lumber, and oblige the firm of Geo. W. Hinton & Co."

In Whitney v. Eliot National Bank, 137 Mass. 351, 50 Am. Rep. 316, the drafts or bills of exchange were in the ordinary form except that they contained the direction to "charge the same to account of 250 bbls. meal ex schooner Aurora Borealis." The court said: "This direction to charge the amount of the bills to a particular account, we think, does not make them payable conditionally, or out of a particular fund; they are still payable absolutely, and are negotiable, and do not constitute an assignment of a particular fund, or of a part of a particular fund. * * *"

Our negotiable instrument law * * * is merely declaratory of the common law upon the subject. * * * Plaintiff and defendant agree upon the abstract proposition of law involved in the controversy. Counsel for defendant concedes that an instrument, negotiable in itself, is not changed in character, or rendered nonnegotiable "by a recital of the consideration or a direction as to how the drawee shall reimburse himself"; but insists that the insertion of the words "on account of" has the same effect as the words "out of the proceeds of." The controversy is thus narrowed down to whether the words "on account of contract between you and the Snyder Planing Mill Co." amount to a direction to pay out of a particular fund, or, on the other hand, are to be considered as simply indicating the fund from which the drawee, Lightner, might reimburse himself. Many of the cases attach but little importance to the words "account of," and give the same effect to them as to the words "out of." 7 Cyc. 579. * * * We are of the opinion that these orders cannot be construed as drawn upon a particular fund. Beyond question, there are many authorities which hold similar expressions to indicate an intention to charge a particular fund. * * * Averett's Adm'r v. Booker, 15 Grat. (Va.) 163, 76 Am. Dec. 203; Rice v. Porter's Adm'rs, 16 N. J. Law, 440; 7 Cyc. 578 (b).

The weight of authority and reason supports the proposition that the words amount to no more than an indication of the fund from which the drawee is to reimburse himself. The words used are substantially the same as though the orders read "and charge to account of contract with Snyder Planing Mill Company," or "credit to account of contract," etc. * * *

In our view they were negotiable and the language, moreover, not even ambiguous. It follows that defendant was not entitled to recoup his damages for the failure to complete the barn; and the findings of the court, therefore, require a judgment for plaintiff for the amount due upon the order.

NATIONAL BANK OF NEWBURY v. WENTWORTH.

(Supreme Judicial Court of Massachusetts, 1914. 218 Mass. 30, 105 N. E. 626.)

BRALEY, J. * * * The plaintiff bank is the indorsee, and the presiding judge was warranted upon the evidence in finding that it is a holder in due course unless the words written by the defendant on the face of each note, "value received as per contract," make his

promise as maker conditional upon the performance by the payee of the preceding contract between them appearing in the record, for the sale and shipment of lumber. * * * If the words had been, "subject to the contract for lumber," or even "subject to the contract," the principle invoked would have been applicable. The notes would not have been the defendant's unconditional promise to pay a definite sum. * * *

But while the defendant doubtless intended to guard against the payment of money for which in the future he did not receive an equivalent, * * * the language used does not affect the payment of the amounts shown by the notes. By their position, the words well might lead the plaintiff who is not charged with actual notice to understand that they were not to be disconnected and applied to an independent outstanding agreement by which the promise was to be modified or restricted, but they referred solely to the consideration for which the notes were given. * * * We are unable consequently to distinguish the case at bar from Taylor v. Curry, 109 Mass. 36, 12 Am. Rep. 661, where the phrase relied on to destroy negotiability was, "for value received on policy No. 33,386." It was said by Mr. Chief Justice Chapman in delivering the opinion of the court: "The words * * * do not express any contingency as to the payment of the notes, or refer to any fund out of which they are to be paid, but appear to refer to the consideration for which they are given. Such a reference may be for mere convenience, or for any other reason, but it cannot be interpreted as a modification of the promise." * * *

By the terms of the report judgment is to be entered for the plaintiff for the amount of each note with interest from maturity, and costs.

FIRST NAT. BANK OF SNOHOMISH v. SULLIVAN et al.

(Supreme Court of Washington, 1911. 66 Wash. 375, 119 Pac. 820, Ann. Cas. 1913C, 930.)

ELLIS, J. * * * The only question presented for our consideration is that of the negotiability or nonnegotiability of the note. * * * The note here in question obviously conforms to this definition, unless it is made conditional as to amount or uncertain as to time by the following sentence: "This note is given to take up the freight and rehandling of N. P. car 43607 and proceeds from resale of said car shall apply on this note." It is clear that the note, exclusive of this sentence, is not obnoxious to the definition in either of these particulars. * * * They do not stipulate either expressly or by any implication, necessary or otherwise, that the note shall be payable only out of the proceeds of the resale of the car of shingles. Nor do they make the payment contingent upon or subject to a resale. There is no provision that demand shall be postponed to a resale. This note like every other written instrument must be construed as a whole so as to give effect to every part of it if possible. This can only be done by holding the whole amount due and payable on demand, and that the proceeds of the sale of the shingles in case of a resale before demand shall be applied on the amount, but, in case of resale after demand, the proceeds shall go to reimburse pro tanto the makers of the note. This gives effect to every word in the note, and makes it an absolute

promise to pay on demand with the designation of a fund to reimburse the maker for such payment. * * *

The third section of the negotiable instrument act * * * defines an unconditional promise as follows: "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay only out of a particular fund is not unconditional." This section is held but declaratory of the common law. * * *

The reference to the consideration of the note and the direction to apply the proceeds of the resale of the shingles thereon must therefore be construed in the same manner, and as having the same effect as under the law merchant at common law. The true test in every case is and was at common law, Does the general credit of the maker accompany the instrument? If it does, the note is negotiable; otherwise it is not. * * * In an early case, Haussoullier v. Hartsinck, 7 Durnford & East's Reports, p. 733, decided by the Court of King's Bench in 1798, the note read as follows: "No. 300. Original Security Bank London No. 300. 35 Cornhill. This 7th day of September 1797. £25. On the 19th day of November next and after that date on demand we promise to pay to ——— or bearer £25, being a portion of a value as under deposited in security for the payment hereof, according to the receipt in our hands. Hartsinck and Co." The ground of defense was the same as here, and is reported as follows: "That the notes were not payable at all events, but payable out of a particular fund alluded to in the notes, in case that fund should be sufficient. That the sum secured by one of them was described as 'a portion of a value as,' etc., in terms pointing out the fund out of which it was to be paid. That the payee was, of course, to resort to that fund, and not to the makers at all events." "But," continues the report, "the court said they were clearly of opinion that, though as between the original parties to the transaction the payment of the notes was to be carried to a particular amount, the defendants were liable on these notes which were payable at all events."

It cannot fail to be noted that the language used in the note in that case was much more capable of the construction contended for than that of the note before us. In Walker v. Woolen, 54 Ind. 164, 23 Am. Rep. 639, a note reading "six months after date, or before, if made out of the sale of Drake's horse hay-fork and hay carrier, I promise to pay," etc., was held to be an absolute promise to pay, and the note was held negotiable. * * * The negotiability of notes and drafts is favored in law, and, whenever the promise can be held unconditional without doing violence to the ordinary meaning of the language used, it will be so held. * * * Following the decisive trend of authority, both ancient and modern, we hold the note here in question a negotiable instrument.

The judgment is affirmed.

SIEGEL et al. v. CHICAGO TRUST & SAV. BANK.

(Supreme Court of Illinois, 1890. 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51.)

Assumpsit by the Chicago Trust & Savings Bank against Siegel, Cooper & Co. Judgment for plaintiff affirmed by the appellate court. Defendants appeal.

SHOPE, C. J. This was an action of assumpsit, by appellee against appellants, upon the following instrument: "Form B. Dalziel's Railway Advertising. $300.00. Chicago, March 5, 1887. On July 1st, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size ——— x ———, in one end of each of 159 street-cars of the North Chicago City Railway Co. for a term of three months from May 15, 1887. No. ———. Siegel, Cooper & Co."—which was indorsed by Dalziel, the payee, to appellants, for value, on the day of its execution.

The first question presented is, is this instrument negotiable? And this question has been answered affirmatively by the circuit and appellate courts. The appellate court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon certificate of importance, granted by that court. It appears that, before the time when the privilege of advertising was to commence, Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellant; and it is insisted that the instrument is a simple contract only, and that therefore the same defense, failure of consideration, is available against the indorsees of the paper for value and before due, as might be interposed against such paper in the hands of the payee. It is also insisted that the instrument shows on its face that payment depended upon a condition precedent to be performed by the payee, and therefore the indorsees took it with notice, and, by the failure of the payee to perform the condition, no right of recovery exists in the indorsees.

It is not contended that the indorsees had any other notice than that contained in the instrument itself; and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the maker. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated. That is, it is a promise to pay a sum certain on a particular day, in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

But the question remains whether the statement, or the recital of the consideration, on the face of the instrument, impairs its negotiability, and in this instance amounted to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional

or uncertain, either as to the time of payment or the sum to be paid." * * * The most that can be said of a recital in the instrument itself of the consideration upon which it rests is that the indorsee, taking it before maturity, is chargeable with notice of the recital. Such recital, however, is not sufficient of itself to advise him that there was, or would necessarily be, a failure of consideration, but that, if at the time of the indorsement the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and, in connection with other facts, amount to notice. * * * The case at bar does not, however, fall within the rule just stated; for the assignment was made the same day the note was made, and by the terms of the recital it was apparent the payee was required to do no act till the 15th of May following, an interval of 70 days. * * *

If therefore, it be conceded, as it must, that a condition inserted in a promissory note postponing the day of payment until the happening of some uncertain or contingent event will destroy its negotiability, and render the instrument a mere agreement, yet, under the authorities, if by the instrument the maker promises to pay a sum certain, at a day certain, to a certain person, or his order, such instrument must be regarded as negotiable although it also contains a recital of the consideration upon which it is based, and although it further appear that such consideration, if executory, may not have been performed. Here the money was payable absolutely on the 1st day of July, 1887, a time when the contract for the advertising could not have been complete. If the instrument had remained the property of the payee, and upon its maturity suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired, and for the reason that the promise of the makers was based upon the promise of the payee to perform his undertaking at a time subsequent to the day fixed for payment. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsees upon inquiry at the time indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsees of the future breach of the contract by Dalziel. The presumption of law would be that the contract would be carried out in good faith, and the consideration performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel; and we are aware of no rule by which they can hold these indorsees for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. * * *

The judgment of the appellate court will be affirmed.

FLEMING v. SHERWOOD.

(Supreme Court of North Dakota, 1912. 24 N. D. 144, 139 N. W. 101, 43 L. R. A. [N. S.] 945.)

Early in May, 1908, one H. Q. Turner, a collecting agent for Fetzer & Co., telephoned from Fargo to defendant, a farmer at Verona, that in settling up the Fetzer & Co. business in North Dakota he had two drills which he proposed to sell the defendant for $50. It was agreed that the drills should be delivered to the defendant at Verona, N. D., in the June, following. A note dated May 12, 1908, was sent by Turner to the defendant and was signed by the defendant and returned by mail. The note was as follows: "October 1st after date I promise to pay to Fetzer & Co. or order, fifty and no/100 dollars with interest at seven per cent. per annum from maturity until paid, with all attorneys fees for collection of this note unless not collectible by law. Value received, waiving all right of valuation or appraisement law, homestead or other exemption as to this debt. Payee's ownership of goods account of which this note is given, the account thereof and contract condition of original sale are not affected by accepting this note until receipt of full amount due thereon." This note was on June 9, 1908, sold to the plaintiff, who testifies that at such time he had no knowledge of any defenses thereto. The evidence showed that Fetzer & Co. did not ship the drills to defendant at any time, nor did the defendant ever receive such property. The jury thereupon rendered a verdict in favor of the defendant, judgment was rendered in favor of the defendant. Plaintiff appeals.

BRUCE, J. * * * The principal error is that alleged to have been committed by the trial court in holding that the note in controversy was not negotiable. * * *

We are of the opinion that the note was not negotiable. The question before us is an exceedingly difficult one to determine, as are usually all questions which involve a construction of the statutes. In considering the same we must bear in mind that we are construing the provisions of the so-called Uniform Negotiable Instruments Act, and not of the former statutes of this state nor of the law merchant. We must, however, consider, to a greater or less degree, these former statutes and the law merchant, as their provisions and interpretation are all that we have to go by in construing many of the doubtful provisions of the codified, uniform law. We, in fact, have been able to find no cases since the adoption of the uniform act in this state which have directly passed upon the question before us. * * *

The specific question which we are called upon to decide is whether the special clause in the instrument before us to the effect that "payee's ownership of goods account of which this note is given, the account thereof and contract condition of original sale are not affected by accepting this note until the receipt of the full amount due thereon," has the effect of neutralizing the otherwise positive agreement to pay and of destroying the negotiability of the instrument. The Uniform Negotiable Instruments Act * * * provides, among other things, that "an instrument to be negotiable * * * (2) must contain an unconditional promise or order to pay a certain sum in money." * * * This latter provision, however, is qualified by section 3, which provides, * * * that "an unqualified order or promise to pay is unconditional within the meaning of this chapter though

coupled with * * * a statement of the transaction which gives rise to the instrument." The question, then, before us resolves itself into the question whether the promise to pay is unconditional.

There is a conflict in the authorities under the law merchant, and under the statutes which were based upon it, as to the effect of a reservation of title in the vendor of goods which is noted on the face of the instrument. Some of the cases make the distinction turn upon the fact of possession. Some hold that where the right of possession is in the vendee, and the seller has merely a naked title subject to the interest of the buyer, while the buyer has the right of possession and the contingent right to a title which would vest absolutely on the payment of the agreed price without further act on the part of the seller, the transaction is a security transaction and not a conditional sale, and that the note is none the less negotiable. They hold, however, that where the possession is retained by the seller until the full payment of the purchase price, as well as the title, the note is not negotiable, since the agreement to pay is conditioned upon the fact of delivery, which is within the control of the vendor, and who, on the failure to pay at maturity, might cancel the agreement and retain the property. They, in short, hold that in such cases there is no positive agreement to pay, but rather that the transfer of title and possession and payment shall be simultaneous acts. Some reach this conclusion even where the possession is in the vendee, holding that the transfer of title is contingent upon payment and the promise to pay is therefore conditional. Others hold that the reservation of title in an instrument incorporates into the same a dual contract, and for this reason renders it nonnegotiable. Others still hold that the reservation of title, even though coupled with possession or the right to retake possession even after delivery if the vendor feels himself insecure, and this whether before or after the time when the payment has become due, does not have the effect of rendering the instrument nonnegotiable, provided that the promise to pay is in itself unconditional. There can be no doubt, however, that the weight of authority under the law merchant and the former statutes is against the negotiability of a note which upon its face retains title in the vendor, and this whether the possession is retained by the vendor or not. 7 Cyc. 581; Sloan v. McCarty, 134 Mass. 245. * * *

A much stronger case, of course, for nonnegotiability, is presented where both the title and the right of possession are reserved in the vendor, and this seems to be the case with the note before us. It is to be noted that the reservation in the instrument is a reservation to the vendor of the "ownership" of the goods. * * * We thus find a note before us which reserves in the vendor the right to use and possess. The term, in fact, is broader than either the term "title" or "possession," and includes both. "The owner of property is one who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and to do with as he pleases, either to spoil or destroy it as far as the law permits, unless he is prevented by some agreement or covenant which restrains his right." * * * We thus have in the case at bar a promissory note which reserves to the vendor the right to the possession of the goods, as well as the title, and which also is open to the charge of uncertainty in that it refers to the terms and conditions of a contract, the exact nature of which is undisclosed. Even under the most liberal rule, such a contract or

note does not evidence an unconditional promise to pay, and, though the evidence discloses that there was a parol agreement that delivery of the goods should be made, the written note negatives this agreement, and the facts disclose that no such delivery was ever made.

We realize that * * * the Negotiable Instruments Act provides that an unqualified order or promise to pay is unconditional within the meaning of the chapter though coupled with "a statement of the transaction which gives rise to the instrument." We have in this case, however, something more than the statement of the transaction. In fact, there is no statement of the transaction at all. We have a "reference" to a transaction and to a contract which may be entirely inconsistent with an unconditional promise to pay, and an express agreement of reservation of ownership which in itself makes the agreement to pay conditional. The contract disclosed is that of a conditional sale, and not of a security transaction. Whether even a security transaction was intended to be permitted by the statute is a matter which is of no little doubt. Those interested in the preparation of the original Uniform Act certainly were in doubt on the question. See Brannan's Negotiable Instruments Law, p. 6 [3d Ed., p. 17]. We may certainly rest assured that a reservation of ownership was never intended by the Legislature. Not only are we led to this conclusion from an examination of the authorities, but from a perusal of the act itself. If such reservation was intended to be permitted, why did the act * * * specially provide that an authorized sale of collaterals should not affect the negotiability of the instrument, and say nothing of the reservation of title or ownership, or the right of possession of the principal article sold. Those who adopted the instrument could not have been blind to the state of the law upon the question—to the fact that even upon the question of the reservation of title there was a conflict in the authorities, and that there were no authorities in favor of the assumption of negotiability where both the title and the entire right of possession were reserved. A few words might have settled the controversy in favor of the negotiability, but they were not spoken. Numerous other mooted questions were settled by the act, among them the effect of a provision for payment out of a specified fund, the authorization of a confession of judgment, etc., all of which were mooted under the law merchant and the former statutes. The silence of the Legislature on the question involved in this case is to us almost, if not entirely, conclusive. * * *

Judgment affirmed.

WELCH et al. v. OWENBY.

(Supreme Court of Oklahoma, 1918. 175 Pac. 746.)

PRYOR, C. This is an action brought by C. A. Owenby against Harry Welch, M. Van Matre, and J. N. Moore, on a promissory note in the sum of $600. The defense to the note was that the execution of the same was procured by fraud and deceit. At the close of the evidence the trial judge directed the jury to return a verdict for the plaintiff which the jury did, and judgment was rendered thereon. From this judgment defendants appeal.

The plaintiff became the holder of the note in due course before maturity, for a valuable consideration, and without notice of any defenses or equities. The defendants admit that the correctness of the

judgment of the trial court depends upon whether or not the note is negotiable. The note is as follows:

"$600.00 Ft. Smith, Ark., Sept. 20, 1911.

"On or before the 1st day of October, 1914, for value received, the undersigned promise to pay to Ark. Valley Breeding Co. or order six hundred 00/100 dollars with 8 per cent. interest per annum from date until paid, negotiable and payable at Little Rock, Ark.; it being given for Percheron stallion named Robert, No. 40681, with the understanding and agreement between the maker of this note and Ark. Valley Breeding Co., that the above described property is and shall remain in said Ark. Valley Breeding Co., with full power of disposition without notice, in such manner as he may see fit, until paid for. This note is the first of a series of three, and if default is made in the payment of one, then all shall become due and payable at once.

"P. O.—Keota, Okl. [Signed] Harry W. Welch.
"M. Van Matre.
"J. N. Moore.
"T. D. Smith."

Indorsed: "Ark. Valley Breeding Co., W. H. McMurray, Sec't."

It will be observed that this note is certain as to amount, date of maturity, and the promise to pay is unconditional; that it is a perfect negotiable instrument in every particular, unless the subjoined statement that the note is given for stallion which is delivered to the maker of the note with the understanding that the stallion shall remain the property of the payee with full power to dispose of the same, until the note is paid, renders it nonnegotiable. There is nothing in this subjoined statement that makes any of the provisions of the note conditional or qualifies them; it is just a mere statement of what the note is given for and the security for the payment of the note. There is nothing in the statement which accelerates or retards the maturity of the note.

This note was executed after the taking effect of the Negotiable Instruments statute. Section 4053, Revised Laws of Oklahoma of 1910, provides that promise to pay is unconditional, though coupled with a statement of the transaction which gives rise to the instrument. * * * In the case of Chicago Ry. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, the Supreme Court of the United States, in holding that a subjoined statement in a promissory note similar to the one in the note under consideration would not affect its negotiability, used the following language: "* * * The agreement by which the vendor retains the title, and by which the notes are secured on the cars, is collateral to the notes, and does not affect their negotiability. It does not qualify the promise to pay at the time fixed, any more than would be done by an agreement, of the same kind, embodied in a separate instrument, in the form of a mortgage. * * *"

In the light of the statute and the foregoing authorities, the subjoined statement in said note did not render said note conditional or uncertain as to any of the essentials of a negotiable instrument. * * * The court therefore committed no prejudicial error in holding that the defenses interposed were not good against said note in the hands of an innocent purchaser.

The judgment of the trial court therefore should be affirmed.

FARMERS' NAT. BANK OF TECUMSEH v. McCALL.

(Supreme Court of Oklahoma, 1910. 25 Okl. 600, 106 Pac. 866, 26 L. R. A. [N. S.] 217.)

WILLIAMS, J. The following questions are raised by this record: (1) Was the note of December 19, 1905, which is claimed to have been secured by the mortgage on the wagon and two mules, negotiable in character and entitled to all the privileges and exemptions of negotiable paper? [The note contained the following clause: "Additional security wagon and two mules."]

It was uniformly held by the Supreme Court of the territory of Oklahoma that a note containing a stipulation for the payment of an attorney's fee is not negotiable. * * * The rule, however, has been changed by statute, which, however, does not apply to this case. * * * In the case at bar the note on its face is negotiable, but it is insisted by the defendant in error that the mortgage securing payment of same provides for an attorney's fee in the event of foreclosure and that such provision also shall be construed as included in the note, thereby rendering it nonnegotiable. There is a conflict of authority on this question. The great weight seems, however, to be against the contention of defendant in error, supporting the rule that a covenant or mortgage which is framed purely for the purpose of security and for enforcement of which resort could be had only to the property mortgaged and not a part of any debt by virtue of the note, but on account of the terms of the mortgage, the terms and conditions thereof being limited to providing security for the indebtedness, does not affect the negotiability of the note. Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003. * * * The highest court of California * * * holds that such stipulation in a mortgage to secure a note negotiable on its face renders the same nonnegotiable. Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110. In this case, however, the decision was rendered by a divided court, four members supporting and three dissenting. In Michigan, the adjudications are not in harmony. In Missouri, North Dakota, Pennsylvania, and Wisconsin the governing rule is contrary to that of California, and harmonizes with the case of Thorp v. Mindeman. * * * The Kansas decisions also seem to be in harmony with them. However, when the provisions of the mortgage by direct stipulation in the note are made a part thereof, the same in that event may be rendered nonnegotiable. But that is not now before this court. * * * The adjudications of the highest court in Nebraska also seem to be in accordance with the rule announced above as appearing to be supported by the weight of authority. * * *

It is further insisted, however, that section 793, Wilson's Rev. & Ann. St. Okl. 1903, which provides, "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together," concludes this question in favor of the defendant in error. This section was borrowed by the lawmakers of the territory of Oklahoma from the statutes of Dakota Territory. The same statute was retained in force in the state of North Dakota. In the case of First National Bank of St. Thomas v. Flath, 10 N. D. 281, 86 N. W. 867, * * * this section was construed and held to constitute a rule of interpretation merely and united several contracts into a single contract only for such purposes, and that

a real estate mortgage and the notes secured thereby did not constitute a single contract, but remained as separate contracts, except for the purposes of interpretation. No authority is cited by the defendant in error construing such provision otherwise. We necessarily conclude that the stipulation in the mortgage regarding attorney's fees does not render the note of December 19th nonnegotiable. * * *

BATCHELDER v. COUNCIL GROVE WATER CO.

(Court of Appeals of New York, 1892. 131 N. Y. 42, 29 N. E. 801.)

Action on certain bonds by Benjamin F. Batchelder against the Council Grove Water Company. From a judgment whereby it was adjudged that plaintiff was not entitled to recover the principal of said bonds, plaintiff appeals.

RUGER, C. J. This action was brought in September, 1889, to recover the principal and interest of three several mortgage bonds for $1,000 each, payable July 1, 1912. It is therefore apparent that the action, except on the coupons for interest, was prematurely brought, unless there are other circumstances appearing in the case, showing that an earlier day for the payment of the bonds had been provided. It is claimed that these circumstances appear from a clause in the bond, reading as follows: "In case of default in the payment of any of the interest coupons attached to this bond in the manner provided in the trust deed and mortgage hereinafter mentioned, then, and in that case, the principal sum of this bond shall become due in the manner and with the effect provided in the said trust deed or mortgage." Default having been made in the payment of the coupons, the plaintiff claims that the bond became absolutely due, and entitled him to enforce its payment in any way available to any holder of a past-due obligation. This claim would, undoubtedly, be sustainable, provided the bond had stopped with the words, "the principal sum shall become due"; but it did not, in fact, stop there, but continued with the following qualification of the previous sentence: "In the manner and with the effect provided in the said trust deed or mortgage."

It therefore becomes necessary to refer to the trust deed or mortgage to determine the extent and character of the qualifications, for it cannot be disputed but that this clause made the provisions of the trust deed an essential part of the contract between the bondholder and his obligor. The clause in the trust deed to which the bond referred reads as follows: "If default be made by the said party of the first part in any half year's interest on any of said bonds, and the warrants or coupons for such interest shall have been presented and its payment demanded, and such default shall have continued for six months after such demand, without the consent of the holders of such coupon or bond, then and thereupon the principal of all of said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding, and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding shall proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale of said property, or otherwise, as herein provided." This

clause plainly limits the effect of the provision making the principal of the bonds due upon the failure to pay semiannual interest, and it prescribes the manner in which such a breach of the contract shall be made available. It authorizes the trustee, upon the request of a majority of the bondholders, to foreclose the mortgage and distribute the proceeds realized thereby equally among the bondholders.

By prescribing the effect which the clause shall have on the contract, and the particular manner in which a default in the payment of interest shall be availed of, it impliedly excludes all other methods, and confines the bondholder to the remedies expressly authorized. If the method provided by the mortgage be pursued, it subjects the action to be taken by the bondholders to the will of a majority, and insures that course of action, with respect to the property of the debtor, which will inure to the best interest of the bondholders as a class. This prevents individual bondholders from pursuing an individual course of action, and thus harassing their common debtor, and jeopardizing the fund provided for the common benefit. The manifest equity and justice of such a proceeding indicates the intent of the parties in drafting the form of the bond. The plaintiff's right of action is based solely upon the language of his contract, and, if he does not make out a right to recover by virtue of its terms, his action must necessarily fail.

We think that the reasonable construction of the contract requires us to hold that the principal sum of the mortgage debt, upon the failure to pay interest thereon, was not intended to be made payable except in the manner specifically provided by the terms of the mortgage. * * * Any other holding would authorize the individual bondholders to pursue the company and strip it of its present funds and rights of action, and destroy its capacity to carry on its business, and thereby protect its creditors. It is not reasonable to suppose that the bondholders, as a class, intended to make a contract which should lead to that result. It was, of course, correct for the trial court to authorize judgment to be given for the past-due coupons, as, by the express terms of the contract, as manifested by the mortgage, bond, and coupon, the interest was made payable unconditionally on a specified day; and this was entirely consistent with the holding that the principal sum was not due, because, by the terms of the contract, it was not made unconditionally payable on the happening of the event mentioned.

It follows, from these views, that the judgment below should be affirmed. * * *

The conflict of authority as regards the interpretation of the term "condition" concerns two distinct matters: (1) There is an absence of entire unanimity of opinion as to what words will have the effect of rendering a promise in an instrument expressly conditional. (2) There is a more serious conflict on the question whether the term "condition" is to be so interpreted as to include conditions implied in law as well as express conditions or whether its meaning is to be confined exclusively to express conditions. With respect to the first, all courts would agree that a promise reading, "I promise to pay P. or order $100 upon condition that P. performs a contract this day entered into by the maker and the payee," would be a conditional promise and the instrument would

accordingly be nonnegotiable. In place of the expression "upon condition that," if there be substituted the phrase "subject to," the same result would be reached. If, instead of the words "subject to," there be used the words "as per" there would be some disagreement as to whether these words should be given the same effect as the words "upon condition that" or "subject to." Most courts would hold that the words "as per" are not the legal equivalent of the words "upon condition that" or "subject to." This type of conflict of authority is not, however, a serious matter, nor can it be entirely removed; for the question as to what words are to be treated as synonymous with other words is one upon which there is likely to continue a justifiable difference of opinion.

The conflict of authority which is chiefly featured in the preceding cases is of a more serious nature because it is the result of a difference of opinion as to which of two possible fundamental theories is applicable to the situation. Some courts proceed upon the theory that the only way in which a promise or order in an instrument may be rendered conditional is by the insertion, in such promise or order, of words which expressly qualify the promise. Other courts proceed upon the theory that such promise or order may be rendered conditional by implication, that is, by resort to the doctrine of conditions implied in law. The typical situation arises when the instrument contains a recital of the contract, mortgage, pledge or other transaction or of language which refers to some extrinsic agreement, which gave rise to the execution and delivery of the instrument. It is to be remembered that the words, "I promise to pay P. or order," etc., or the words, "Pay P. or order," etc., appearing on an instrument, constitute a promise or an order which is wholly separate and distinct from any other promise appearing on the same or other instrument, although the promisee may be the same in each. For convenience, the former may be called the commercial specialty promise or order. The other will usually be simple contractual promises or promises contained in a mortgage, pledge, or other agreement, or will consist of some language referring to such extrinsic instruments.

The courts that proceed upon the theory that the commercial specialty promise or order may be rendered conditional by a condition implied in law arrive at this result apparently in the following manner, to illustrate: M. executes and delivers his promissory note to P. The commercial specialty promise reads: "I promise to pay P. or order, $100," there being no language connected with this promise which in any sense expressly qualifies the duty therein evidenced. The same instrument, let us suppose, contains a recital of an executory contract between the maker and the payee, and also contains an assertion that the note grew out of this contract transaction. Looking at the simple contract alone, if it be found that under the law of simple contracts, there exists therein any condition, either express or implied in law, precedent

or subsequent to the duty of M. to perform his simple contract obligation, it is possible to urge that this condition will also operate to qualify the commercial specialty promise. This result can be reached only by holding that the commercial specialty promise may be rendered conditional by the application of the doctrine of conditions implied in law. And this is true even in a case where the recital of the simple contract shows that there is an express condition precedent or subsequent to the duty of M. to perform his simple contract obligation. In such a situation the maker, M., has simply made two promises to pay that which, from a business point of view, is a single debt. The fact that he has expressly conditioned one of these promises—the simple contract promise—does not thereby evidence an intention to condition the commercial specialty promise. In fact, the contrary inference is the more reasonable.

It is believed that the better theory is that a condition implied in law should not render the commercial specialty promise or order conditional; that the only way to condition such a promise or order is by the definite incorporation, in the commercial specialty promise, of appropriate language which is sufficient to create an express condition precedent or subsequent to the duty of the maker or drawee to pay. Such a rule will be commercially more desirable, because a purchaser may then be able to decide more readily whether the instrument offered to him is, or is not, negotiable. If commercial instruments are to be rendered conditional by every kind of conditions implied in law, the free circulation of commercial paper is clogged beyond a point which is desirable or necessary. Moreover, the interpretation here indicated tends to bring this portion of the law into greater harmony with the rule that a purchaser for value before maturity of a negotiable instrument will take free from personal defenses and equities of ownership unless he takes in bad faith. The same considerations of commercial expediency underlie both rules. One who purchases an instrument which is conditioned only by implication of law is not in the situation analogous to that of a purchaser in bad faith. A purchaser of an instrument conditioned only by implication is in substantially the same position, as far as operative facts are concerned, as a purchaser of an unquestioned negotiable instrument with constructive notice of outstanding equities and defenses. The purchaser with constructive notice is not deemed to be a purchaser in bad faith. On parity of reasoning, one who purchases an instrument which contains a promise or order conditioned only by implication arising from real conditions in a different contract, mortgage, or other transaction, should take the instrument as it appears to be—as an unconditional promise or order.

SECTION 5.—TIME OF PAYMENT MUST BE CERTAIN

Commercial paper would not be suitable for circulation if the holder is unable to ascertain at what time the right to demand payment is to arise. The law, therefore, requires certainty in the time of payment. But what degree of certainty will satisfy this requirement? This question is one of considerable difficulty. Before the adoption of the Negotiable Instruments Law, the test of certainty was not clearly worked out; nor has the present statute done very much toward solving some of these questions.

There are four possible ways of fixing maturity: (1) By designating a future day; e. g., June 1, 1935. (2) By giving an option to the holder to demand payment at any time. (3) By giving an option to the obligor—maker, acceptor, etc.—to pay when he sees fit. (4) By declaring that the instrument shall mature upon the happening of some event over which neither of the parties has any control. Combinations of these various methods of fixing a time of maturity may be made. An instrument may bear a fixed maturity, subject to an earlier payment (a) at the option of the maker; (b) at the option of the holder; (c) upon the performance of a specified act by the maker or upon the occurrence of some extrinsic event.

The sections of the Negotiable Instruments Law involved are as follows:

Section 1, subsec. 3. An instrument to be negotiable must be payable on demand or at a fixed or determinable future time.

Section 7. An instrument is payable on demand: (1) When it is expressed to be payable on demand, or at sight, or on presentation; or (2) in which no time of payment is expressed; (3) where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

Section 4. An instrument is payable at a determinable future time within the meaning of the act, which is expressed to be payable: (1) At a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable and the happening of the event does not cure the defect.

By implication, the following section is involved:

Section 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid * * * (2) by stated installments; or (3) by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due.

Before passing to a consideration of the cases, it may be well to note here that we are now discussing a series of situations anal-

ogous to, but essentially different from, the problems taken up under the head of conditional promises. A promise to pay upon condition is different from an unconditional promise to pay at some indeterminate future time. It is important to note this because the requirement of certainty in the time of payment adds another element. Proof that the promise is unconditional is not sufficient. The proof must go further and show that this unconditional promise is payable at some fixed or determinable future time.

Section 7 of the Negotiable Instruments Law, above quoted, shows that there are two general situations where an instrument is payable on demand; i. e., where the instrument is made expressly payable on demand, and where by implication the instrument is payable on demand. Where the words "payable on demand," "payable at sight," or "payable on presentation" are used the instrument is expressly made payable on demand. It is perhaps more common to find the words "on demand" in promissory notes, and the words "at sight" in bills of exchange. No doubt other words could be used which would have the same legal effect as those which are here referred to.

An instrument will be deemed payable on demand wherever there is no language used thereon which deals with the matter of the time of payment. A fair interpretation of such an instrument is that it was intended to confer upon the holder the right to demand payment at any time. So the law provides that where no time of payment is expressed the instrument is payable on demand. A check furnishes a common illustration.

It appears from an examination of sections 4 and 2, that there are two general situations which satisfy the requirement that the instrument be payable at a fixed or determinable future time: (1) Where the instrument has but one date of maturity and that date is fixed, either (a) by designating it in the usual way by the date of month and year, or (b) by fixing it with reference to some event which is bound to happen, though the time of happening is uncertain; or (2) when the instrument bears two possible dates of maturity, the one, usually the later one, being fixed in accordance with rule (1) (a) or (b) the other or earlier date of maturity being fixed by the performance of some act by the holder, or by maker, or, by the occurrence of some specified event which is not wholly within the control of either party.

To restate the situation, we have two general questions: (1) When is an unconditional promise or order payable on demand? (2) When is an unconditional promise or order payable at a determinable future time? No independent consideration of question 1 need be given, for this question is sufficiently adverted to in the cases following which deal primarily with situations involving the second question. The principal difficulty arises when the question presented is: What constitutes a determinable future time? This question is involved in the two situations noted above:

JOSEPH v. CATRON.

(Supreme Court of New Mexico, 1905. 13 N. M. 202, 81 Pac. 439, 1 L. R. A. [N. S.] 1120.)

Action by Thomas B. Catron against Antonio Joseph. Judgment for plaintiff. Defendant brings error.

POPE, J. * * * The contract here sued on * * * is as follows: "Fernando de Taos, New Mexico, November 22, 1873. Upon the confirmation by the Congress of the United States of that certain land grant known as the Cañon de Chama, otherwise called San Joaquin del Rio de Chama Grant, I promise to pay Mr. Samuel Ellison or order the sum of Five Hundred Dollars in current funds of the United States. Antonio Joseph. Frederick Muller." * * *

We come now to consider the third proposition, to which the briefs of counsel and the oral argument have been mainly directed. Is the instrument here sued on a negotiable instrument? If it is such an instrument, then it is presumed to have been given upon valuable consideration. and, having been acquired before maturity by a bona fide purchaser for value, could not be subject to any defenses existing between the original parties of which plaintiff had no notice. If, on the other hand, the instrument was not negotiable, very different questions supervene.

The rule is recognized by each of the parties that, in order to constitute a negotiable instrument, the fact of the maturity of the instrument at some time must be morally assured; it must be certain to accrue. * * * The cases bearing upon this precise point are not numerous, and those cited by the parties in their briefs are, as a rule, not in point, for the obvious reason that death is an absolute certainty, and a note contingent upon death is thus contingent upon something which is bound to occur. Equally as apart from this proposition are the cases relied upon by plaintiff known as the "Southern War cases," involving questions as to the negotiability of notes payable within a certain time after the cessation of war between the Confederate States and the United States of America, or the establishment of peace between those then contending portions of our reunited nation. Such obligations were likewise contingent upon an event which was morally certain to happen. In human experience, no war has ever existed which has not come to an end, and none can be conceived of that will not have at some time a termination. * * * But does the confirmation of a land grant by Congress stand upon the same basis?

It is urged by the plaintiff that it does, for the reason pointed out in one or two English cases of great antiquity. The first of these is the case of Andrews v. Franklin, 1 Strange, 22, wherein the condition of the note was "payable two months after a certain ship of His Majesty's service should be paid off." This note was objected to as depending upon a contingency which might never happen, but the court held otherwise upon the ground that the "paying off of a ship" is a thing of public nature. Also there is cited the case of Evans v. Underwood, 1 Wils. 262, wherein a note was held negotiable, the terms of which were, "I promise to pay to George Pratt or order eight pounds, upon the receipt of his, the said George Pratt's wages due from His Majesty's ship, the Suffolk." In that case the court contented itself with citing and following the case of Andrews v. Franklin. We have been referred to no American cases in which the doctrine of Andrews v.

Franklin has been followed or, indeed, countenanced. * * * On the other hand, wherever these two cases have been cited by the text-writers or the reports, it has been to question their soundness. Indeed, doubts have even been expressed as to whether Andrews v. Franklin was ever actually decided, and Evans v. Underwood has been particularly criticised upon the ground that, while the paying off of a public ship may be a moral certainty, it is by no means to be considered equally certain that a particular person will receive wages therefrom. * * *

But indulging to these two cases the high respect which must be accorded them, both because of their age and the high character of the English tribunal enunciating them, we are of opinion that they do not lead to the conclusion that the confirmation of a land grant by Congress is a moral certainty. The United States has never become bound by treaty nor by international law to the confirmation of all private land claims in the territory of New Mexico, nor for the confirmation of all claims which may be asserted by interested parties to be land grants. The extent to which the nation went in the treaty of Guadalupe Hidalgo was to pledge itself that, in the territories conveyed by the treaty, property of every kind should be inviolably respected. This was simply a declaration of international morals. But the manner of that recognition in the case of an imperfect grant—and plaintiff, in his brief, concedes and contends that this was such—was exclusively for Congress to determine. * * * The presence of these possibilities establishes that at the time this obligation was made a confirmation was not bound to occur; it was not a moral certainty; the instrument was not payable at a time fixed, beyond peradventure; the instrument was not negotiable. * * *

The case will be reversed and remanded for further proceedings in accordance with this opinion.

NATIONAL BANK OF COMMERCE v. KENNEY et al.

(Supreme Court of Texas, 1904. 98 Tex. 293, 83 S. W. 368.)

GAINES, C. J. * * * The question * * * presents itself, is the note in question a negotiable promissory note? The Court of Civil Appeals held that it was not. In this ruling, however, we do not concur. The ground upon which it is claimed that the note is nonnegotiable is that the time of its payment is uncertain. This claim is predicated upon the following provision in the note: "The makers and endorsers hereof hereby severally waive protest, demand and notice of protest, and non-payment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to holder." If, as is argued, the effect of the stipulation is to give the right to the maker without the consent of the holder, or to the holder without the consent of the maker, to appoint another day of payment and thereby extend the time, it may be that it would render the instrument not negotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend the note. It merely makes a provision in case the time of payment may be extended. How extended? It seems to us the extension meant is that which takes place when the debtor and creditor make an agreement upon a

valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the provision, taken as a whole, was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties upon the paper. Therefore what was meant by the stipulation as to the extension of time was simply that, in case the holder and the maker should agree upon an extension, the sureties and indorsers should not be discharged. The holder and maker of any note may at any time agree upon an extension; therefore the fact that they may have that right does not affect the negotiability of the paper. It is usually said that, in order to make an instrument negotiable under the law merchant, the time of payment must be certain. But a note payable "on or before" a certain date is negotiable. The maker of such a note has the right to pay before the day named, but the holder cannot demand payment before that day. So, in that case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that, if the holder has the absolute right to demand payment at a certain day, the note is negotiable. This is but an illustration of what we understand to be the general rule. There being nothing in the stipulation under consideration which gave any one the right to demand of the holder of the note an extension of the time of payment, we think the time at which he could demand payment was fixed, and that therefore it was a negotiable note. * * *

HOLLIDAY STATE BANK v. HOFFMAN.

(Supreme Court of Kansas, 1911. 85 Kan. 71, 116 Pac. 239, 35 L. R. A. [N. S.] 390, Ann. Cas. 1912D, 1.)

PORTER, J. The bank brought this action on a promissory note given by C. B. Hoffman to the Merchants' Refrigerating Company for shares of its capital stock. Hoffman admitted the execution of the note and alleged a total failure of consideration. On the trial he introduced evidence tending to show that the stock for which the note was given was valueless, and that he was induced to purchase the same by the false and fraudulent representations of J. E. Brady, president of and acting for the refrigerating company. The plaintiff introduced evidence tending to show that it purchased the note in due course, without notice of defenses. At the close of the evidence, the court directed a verdict for the plaintiff for the amount of the note, with interest. The defendant appeals.

The case turns upon the question whether the note is negotiable. It reads as follows: "$4,500.00. No. ———. Kansas City, Mo., Sept. 18th, 190—. Due ———, Six months after date for value received I promise to pay to the order of Merchants' Refrigerating Company, Kansas City, Missouri, forty five hundred and no/100 dollars at the office of the Merchants' Refrigerating Company, Kansas City, Mo., with interest from maturity until paid at the rate of six per cent. per annum. To secure the payment of this note and of any and all other indebtedness which I now owe to the holder hereof, or may owe him at any time before the payment of this note I have hereto attached, as collateral security the following: Stock certificate

No. 137 of the capital stock of the Merchants' Refrigerating Company, calling for 50 shares of the stock; par value $5,000. The above collateral has a market value of $6,250.00. If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise this note shall mature at once. Any assignment or transfer of this note, or obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement. And I hereby authorize the holder hereof on default of this note, or any part thereof, according to the terms hereof, to sell said collateral or any part thereof, at public or private sale and with or without notice, and by such sale the pledgor's right of redemption shall be extinguished. C. B. Hoffman." * * *

The defendant contends that * * * the note is nonnegotiable for three reasons: (1) It is not for a sum certain; (2) it is not due at a fixed or determinable future time; (3) it contains promises to do acts in addition to the payment of money. * * *

In our opinion the most serious objection to the form of the note, the particular provision which most clearly destroys the negotiable character of the instrument, is the agreement as to matters other than the payment of money. This is the stipulation by which the maker agrees to deliver, when demanded, additional collateral security to the satisfaction of the holder, in default of which the note shall mature at once. It would hardly be different if the note recited that it was secured by a chattel mortgage upon certain live stock, and contained an agreement that in case their value should depreciate, and the holder should deem the security insufficient, the maker would, on demand, execute and deliver to the holder a mortgage upon certain real estate for such amount as would satisfy the holder, and that otherwise the note should mature at once. * * *

The negotiable instruments law, which is merely declaratory of the mercantile law on the subject, contains a provision which, as we construe it, makes the note in the instant case nonnegotiable. Section 5258 of the General Statutes of 1909 reads: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable." The section then enumerates certain things which are not to be regarded as falling within the inhibition. None of these exceptions cover such a promise as the one under consideration.

The note is nonnegotiable for the further reason that the same provision renders doubtful and uncertain the time at which it shall become due. If the maker shall fail when demanded to furnish additional security to the satisfaction of the holder, the note shall mature at once. It is argued that this is no different in principle from the provision that default in the payment of any installment shall accelerate the maturity of the note, and cases are cited in which we have held that a similar provision will not render the note nonnegotiable. * * *

* * * The negotiable instruments law itself expressly declares that a negotiable instrument may contain provisions of this kind. * * * The distinction between such a stipulation and the one in question lies in the fact that in the one instance the maturity is accelerated by the default of the maker alone, and the default is to consist in his failure to pay money. Here the maturity of the note is to be

accelerated by the failure of the maker to do something in addition to the payment of money, and both contingencies are made to depend upon something over which he has not the absolute control. It is within the power of the holder, by refusing assent to what the maker has done, arbitrarily to make the note due at any time between the date of its execution and six months thereafter. If the holder is not satisfied with the additional security, the note matures at once, and thus the time at which it may mature would depend upon the time at which the holder declared himself dissatisfied with the security delivered by the maker. The effect of this stipulation is to leave the time when payable uncertain and indefinite. * * *

The law of commercial paper, like all other substantive law, is the creature of growth. Founded on the custom and usages of merchants, it is the combined result of reason and experience slowly modified by the necessities and changes in commercial affairs. The methods of modern business and the interests of maker and holder alike require the deposit of collateral securities, with the power in the holder to sell the same at maturity. * * * The statute (negotiable instruments act) provides that an instrument otherwise negotiable is not affected by a provision which "(2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of the obligor."

In former opinions this court has frequently referred to the conflict of authority in the decisions respecting the effect of collateral provisions of this character in promissory notes and bills of exchange. * * * The adoption in recent years of the negotiable instruments law by so many of the states was in response to the general desire for uniformity in respect to commercial paper. The application, however, by the courts of legal principles to particular facts has not reached scientific exactness, and never will. It is hardly to be expected. therefore, that the courts of the different states which have adopted the act will always agree in the construction and application of its provisions. Actual uniformity in the law of negotiable instruments will remain a dream more or less iridescent; substantial uniformity is all that can be hoped for. The conclusions we have reached with respect to the instrument in question are in harmony with the former decisions of this court and accord with our view of the proper construction to be given to the language of the statute.

The trial court erred in holding the instrument negotiable and in directing a verdict. The judgment will therefore be reversed. * * *

FINLEY v. SMITH, Banking Com'r.

(Court of Appeals of Kentucky, 1915. 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777.)

CARROLL, J. * * * The remaining question is: Was this note a negotiable instrument within the meaning of the Negotiable Instruments Law? * * *

Looking to these pertinent sections 1, 2 and 5, for the description of a negotiable instrument, the argument is made that this note is not a negotiable instrument, because, in addition to containing an unconditional promise to pay the $2,500 four months after date to the Madisonville Savings Bank, it contains the further promise that, if the collateral deposited as security for the payment of the note should

depreciate in value, the maker "will deposite and pledge with said bank such additional security as it may from time to time require, and in default of such deposit * * * this note, at the option of the bank, shall become due and payable."

Accordingly, it is said that the promise to pledge, if required, additional security, and the condition that the note should become due upon the failure to pledge additional security demanded, take it out of the class of negotiable instruments, because it is provided in section 5, supra, that: "An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable."

It will be observed that the note is, in the first place, an unconditional promise to pay, at a fixed time, a certain sum of money, to the order of a specified person. So that the qualities of the paper to which attention is drawn as rendering it nonnegotiable are to be found in the clauses following what we may call the terms of the note proper. This arrangement, however, of the matter contained in the paper, does not affect the question raised, because the whole of the paper must be considered in ascertaining its character as a negotiable or nonnegotiable instrument. * * *

It will be observed that under section 2 the fact that a note is payable in stated installments, with a provision that upon default in the payment of any installments the whole should become due, does not affect its negotiable character. It will also be noticed that section 5 provides that the negotiable character of a note is unaffected by a provision authorizing the sale of collateral security, or a provision that gives the holder an election to require something to be done in lieu of the payment of money. So that the only provision in this note that can be said not to be expressly authorized by the Negotiable Instrument Law is the clause pledging the maker to deposit on demand additional security under penalty of precipitating the maturity of the paper.

We may therefore limit the inquiry involving the negotiable character of this paper to the consideration of two questions: (1) The promise of the maker to pledge, if required, additional security; and (2) the provision that the failure to do this should, at the option of the holder, accelerate the maturity of the paper. This brings before us for decision new questions in the construction of the Negotiable Instrument Law, and it is rather unfortunate that the decisions of other courts of last resort, to which these questions have been submitted, are not harmonious. The purpose of the author of this law was to secure uniform legislation throughout the United States, on the subject of commercial paper, so that a person in any one state might, by examining the law on this subject in his own state, be advised as to the condition of the like law in other states. And, so far as legislation is concerned, it may be said that the desired end to be secured by uniform legislation has been accomplished. But uniform legislation on any subject necessarily loses much of its value and usefulness unless it is followed by uniform construction by the courts to which the legislation is submitted for construction.

This uniformity of construction, however desirable, is scarcely possible of attainment, because a court of last resort, when new questions involving the construction of statutes are presented, will very reasonably and naturally adopt that construction that it conceives to be proper, while another court of last resort in considering the same question

of construction might with the same honesty of purpose reach an entirely different conclusion. This condition is forcibly illustrated in the conflicting views of the courts upon the particular question now before us. For example, the Supreme Court of Kansas, in the case of Holliday State Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1, held that an otherwise negotiable note, with collateral security attached, which provided that, "if in the judgment of the holder of this note said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise this note shall mature at once," was rendered nonnegotiable by this additional promise, and for the further reason, as stated by the court, that the time of the maturity of the note was rendered doubtful and uncertain by the provision that upon the failure of the payee to deliver the additional security the note, at the option of the holder, should mature at once.

On the other hand, the United States Circuit Court of Appeals for the Seventh Circuit, in Kennedy v. Broderick, 216 Fed. 137, 132 C. C. A. 381, L. R. A. 1915B, 472, ruled that a condition in a note that, "if in the judgment of the holder of this note said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise this note shall mature at once"—did not affect its negotiable quality. * * *

Without citation of further authority, we are inclined to adopt the view that the conditions relied on as destroying the negotiable character of this note do not accomplish that purpose. The essential things pointed out in section 1 of the act are: (1) That the instrument must be in writing, signed by the maker; (2) must contain an unconditional promise to pay a sum certain in money; (3) must be payable on demand or at a fixed future time; (4) must be payable to the order of a specified person or to bearer. And the independent promise in this note pledging the holder upon demand to put up additional collateral did not substantially affect any of these requirements. The promise to strengthen the collateral under penalty of the note maturing at once did not change the date of its maturity any more than would the provision in a note payable in installments that upon default in the payment of the installment the whole should become due.

We think the promise to do an act in addition to the payment of money that will render the note not negotiable must be a promise that conflicts with some one of the essential characteristics of a negotiable note; or, as applied to the case in hand, it must be a promise to do something that would affect the unconditional promise contained in the body of the instrument as the time fixed for its maturity. The Negotiable Instrument Law, in section 2, permits a note to be made payable in installments with a provision that upon default in the payment of any installment the whole shall become due. Under this provision, if any installment of a note payable in installments at a fixed time is not paid, this delinquency precipitates the maturity of the note and thereby changes the time fixed for its maturity as certainly as does the stipulation that, if the value of the collateral is impaired, other collateral should be supplied or else the note will become due.

It is quite usual to pledge collateral as security for the payment of a negotiable note, and we do not think that any narrow construction

of the law should be adopted that would have the effect of impairing the value of this kind of security or that would deny to the holder the right to insist that, if the value of the collateral deposited should become impaired, the maker must strengthen it or else precipitate the maturity of the paper. This condition in the note is merely supplementary to the fixed and controlling promises and is really nothing more than additional security for the payment of the instrument. It is not, strictly speaking, "an order or promise to do an act in addition to the payment of money," but is rather an order or promise to do an act that will better secure the promise to pay the money stipulated at the time fixed in the note. If this condition or promise would disturb the negotiability of commercial paper, the effect would necessarily be to lessen the value of collateral as security, because holders of paper would not be disposed to accept collateral, much of which has a fluctuating value, if they were denied the right to insist that its value should be maintained in an amount sufficient to serve the purpose for which it was accepted.

Being of the opinion that the instrument sued on was negotiable paper, the judgment is reversed, with directions for a new trial in conformity with this opinion.

NICKELL v. BRADSHAW et al.

(Supreme Court of Oregon, 1919. 94 Or. 580, 183 Pac. 12, 11 A. L. R. 623.)

Belle Nickell brought this action against R. H. Bradshaw, as the maker, and against Effie May Terrill, as an indorser, of a promissory note. Involuntary judgment of nonsuit against Belle Nickell. The plaintiff appealed.

On August 9, 1910, R. H. Bradshaw delivered to Effie May Terrill his promissory note which reads as follows:

$2,000. Medford, Oregon, Aug. 9th, 1910.

"Five years from date without grace, I promise to pay to the order of Effie May Terrill for value received, with interest from date, payable annually at the rate of 6 per cent. per annum, until paid, principal and interest payable in U. S. gold coin, at Farmers' & Fruit Growers' Bank of Medford, Oregon; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum of money as the court may adjudge reasonable as attorney's fees in such suit or action. R. H. Bradshaw.

"Due if ranch is sold or mortgaged."

HARRIS, J. * * * It is contended that the note sued upon is a nonnegotiable instrument. This contention proceeds upon the theory that the words, "due if ranch is sold or mortgaged," made the time of payment so uncertain that it cannot be said that the note was payable "at a fixed or determinable future time." * * *

The three sections of our Code to which attention has been directed correspond with sections 184, 1, and 4 of the Uniform Negotiable Instruments Law which has been adopted by all the states of the Union except Georgia and Texas. * * * If the words, "due if ranch is sold or mortgaged," are omitted from the instrument, it concededly becomes a negotiable promissory note within the meaning of section 6017, L. O. L., because it contains a promise to pay "five years from date," which is, speaking as of the date of the note, a fixed future time. If,

on the other hand, the words, "five years from date," are erased, the paper is admittedly transformed into a nonnegotiable instrument, because it then becomes payable "if ranch is sold or mortgaged," which, if standing alone and viewed by itself, was at the time of the execution of the instrument a "contingency" within the meaning of section 5837, L. O. L. We are not permitted, however, to cancel any word found in the instrument, and hence the whole of the paper must be considered in determining whether the instrument is or is not negotiable. Finley v. Smith, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777, 780. It will be observed that the writing does not in express terms say that the debt becomes due if the ranch is sold or mortgaged before "five years from date," and yet such is the obvious intent and meaning of the whole writing. The debt becomes due at all events "five years from date," and the debt cannot extend beyond that fixed, certain, and definite period because the moment the five-year period ends the debt is due and any other interpretation of the writing would completely nullify the words "five years from date"; but, if the ranch is sold or mortgaged prior to the expiration of that fixed future time, then the promisor agrees to pay the debt at the time of such sale or mortgage. * * *

The words, "due if ranch is sold or mortgaged," do not extend the date of payment, but upon the contrary they serve only to accelerate the maturity of the debt. Stated broadly, the overwhelming weight of authority is to the effect that, where a note is made payable on a definite day and also contains a conditional promise to pay at an earlier time, the instrument is not rendered nonnegotiable by the acceleration clause. * * * The books contain a variety of cases involving acceleration clauses. More common illustrations are found in instruments which provide that a default in the payment of interest or in the payment of an installment shall mature the debt. Other familiar examples are furnished by adjudications where a series of notes have been given for a single debt with a provision in each note that default in the payment of any one shall mature all the unpaid notes. While nearly all the courts have decided that a default in the payment of interest or in the payment of an installment or a failure to pay one of a series of notes is such an acceleration clause as does not destroy the negotiability of an instrument, yet there are recorded instances where courts have held that acceleration clauses of the kind mentioned impair the negotiability of the instruments otherwise negotiable.

As already stated, the general principle has been firmly established, in despite of occasional dissenting voices, that an acceleration clause does not necessarily destroy the negotiability of an instrument. The chief difficulty, however, is encountered whenever an attempt is made to formulate a rule by which to determine the validity of all acceleration provisions; and it is probably impossible to formulate, even in the most general language, any rule which will include all acceleration provisions that have been held sufficient, and at the same time serve as a safe and certain guide in all jurisdictions. This difficulty is neither greater nor less now than it was previous to the adoption of the negotiable instruments law. For example, there is a class of cases dealing with instruments having provisions to the effect that if at any time the holder of the note deems himself insecure he may declare the debt due; or to the effect that the holder may, if he deems himself insecure,

call upon the maker for additional security when the value of the security given at the time of the execution of the writing becomes impaired, and if the maker fails to respond with additional security the holder may declare the debt due.

The adjudications assignable to this class are divided in their views; but the majority of the cases decided under the provisions of the negotiable instruments law, as well as the majority of those decided in jurisdictions where the negotiable instruments law had not yet been adopted, have ruled that this kind of a condition in an acceleration clause renders the instrument nonnegotiable. * * * Holliday State Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1. * * * Contra: Empire National Bank v. High Grade Oil Refining Co., 260 Pa. 255, 103 Atl. 602; Finley v. Smith, 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777. * * * The cases holding that an instrument is not negotiable if it contains a clause giving the holder the right to declare the debt due if he deems himself insecure are based primarily upon the objection that the date of maturity is placed wholly under the control of the holder, is completely dependent upon his whim or caprice, and is independent of any act done or omitted by the maker; and, if there is the further stipulation that the maker will furnish added security when called upon, then there is, of course, an affirmative promise of the maker to do an act in addition to his promise to pay money. * * *

It is apparent from what has already been said that some jurisdictions go further than others in their approval of acceleration clauses; and consequently a rule containing language as broad as the rule in some jurisdictions would be too broad for others, and a formula which is only broad enough for the latter would not be broad enough for the former. In this jurisdiction the holding in Reynolds v. Vint, 73 Or. 528, 144 Pac. 526, and in Western Farquhar Mach. Co. v. Burnett, 82 Or. 174, 161 Pac. 384, condemns acceleration clauses which are entirely under the control of the holder and completely dependent upon his whim or caprice independent of any act of the maker; but, since neither of those decisions condemns all acceleration clauses, we have no hesitancy in declaring that we prefer to keep company with the majority of the other jurisdictions by giving approval to certain kinds of acceleration clauses.

What we deem to be the better rule is best expressed by language found in Ernst v. Steckman, 74 Pa. 13, 15 Am. Rep. 542, where a note, payable "twelve months after date (or before, if made out of the sale of W. S. Coffman's Improved Broadcast Seeding Machine)," was held to be negotiable. In concluding the opinion the court there said: "The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time, or the event, for its ultimate payment, must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day." * * *

The respondent has argued that the debt represented by the note automatically became due when the conveyance was made to Frederick

T. Lewis on January 18, 1913; but the answer is that the thoroughly established and indeed almost universal, if not the universal, rule is that the acceleration clause is not self-executing, but it merely confers an option upon the holder to treat the debt as due. * * *

To summarize the situation with respect to the requirement of certainty in the time of payment, the actual state of the law is open to a double criticism. In the first place, it may well be urged that section 4, subsection 3, is too great a relaxation of the requirement of certainty in the time of payment. This section has merely codified existing law. Even if the case of an instrument made payable within a specified time after the death of a designated person be regarded as sufficiently certain—and the policy of this rule may be doubted—still the opportunity thus afforded to hold that other events such as the arrival of a ship or the maturing of a crop operate as continual temptations to override the requirement of certainty in the time of payment. As has been well said by Professor Chafee,[1] with reference to this class of commercial instruments, "* * * the obligors on the instrument ought to know the time of payment definitely, so that the primary party may have funds ready as the day approaches, and the secondary parties may watch him and protect themselves if he appears unprepared to pay. Good business policy requires that men shall foresee the maturity of their obligations and adjust their affairs accordingly. Because of these specific objections, the paper is unsuited to rapid circulation in the legitimate money market."

A second criticism may be directed at the view that an instrument bearing a fixed maturity but subject to acceleration into an earlier maturity upon the happening of some event, in form extrinsic, but in reality conferring an option on the holder to demand payment, is payable at an uncertain time. Where the instrument is made to mature before the fixed date (a) when the holder deems himself insecure, or (b) when the obligor does any act calculated to impair the security, or (c) upon the depreciation of collateral deposited by the obligor with the holder, the event is not so far contingent as to require the holding that the time of payment is uncertain. In legal effect the instrument is payable at the fixed date but subject to earlier maturity at the option of the holder. As far as the holder is concerned, the instrument is demand paper. Of course an instrument which bore a fixed date of maturity, but was subject to an earlier maturity upon the happening of some event wholly contingent, as for example, an instrument payable at a fixed date but subject to an earlier payment if the price of cotton on the exchange dropped below a specified figure, may be regarded as uncertain in the time of payment, though even here it is possible to take the view that the existence of the fixed

[1] Acceleration Provisions in Time Paper, 32 Harvard Law Review, 754.

date saves the instrument from the perils of uncertainty. Indeed, under the Negotiable Instruments Law as in force in Wisconsin, such an instrument would be negotiable. The Wisconsin statute contains the following clause which is not found in the Uniform Act: "An instrument is payable at a determinable future time, within the meaning of this act which is expressed to be payable at a fixed period after date or sight, though payable before then on a contingency."

Professor Chafee, in the same article, has suggested the following rules with respect to acceleration provisions:

I. An instrument with an acceleration provision in order to be negotiable must conform to the following requirement: The ultimate time of payment must be obvious from the bare inspection of the instrument; and payment can be accelerated only by the performance of an act regularly incident to the collection of the paper.

II. The ultimate time of payment is the maturity of the instrument for all purposes with respect to persons who have not received notice that the fact which was to accelerate payment has occurred.

III. The time fixed by the acceleration provision is the maturity of the instrument for all purposes with respect to persons who have received notice that the fact which was to accelerate payment has occurred.

SECTION 6.—THE INSTRUMENT MUST BE PAYABLE IN MONEY

N. I. L., Section 1, subsec. 2. An instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money.

N. I. L., Section 132. The acceptance of a bill must not express that the drawee will perform his promise by any other means than the payment of money.

N. I. L., Section 6, subsec. 5. The validity and negotiable character of an instrument are not affected by the fact that it designates a particular kind of current money in which payment is to be made.

What is money? Until recently this question was frequently litigated, and its solution occasioned considerable difficulty. The courts were by no means agreed as to what kinds of media of exchange were to be included in the term "money." To-day the question is of much less practical importance; but it still exists, and, inasmuch as the Negotiable Instruments Law has not attempted a definition, the old question is occasionally presented.

How may the question be presented? Suppose we take the case of a promissory note. The promise therein may read: (1) I promise to pay A. or order one hundred bushels of wheat, or (2) one hundred dollars, or (3) one hundred dollars in current funds

or in currency, or (4) particular kind of media in circulation, such as national bank notes, Federal Reserve notes, gold certificates, Federal Reserve Bank notes, gold coin, United States notes, Liberty bonds, or (5) one hundred dollars in British pounds sterling, or (6) one hundred British pounds sterling. Do any or all of these things fall within the meaning of the word "money"? Where the instrument is payable in dollars, the problem is easy, for whatever constitutes a dollar will be money, and the instrument will be negotiable, although it may not be clear what sort of media of exchange may be validly tendered in satisfaction of the debt. In that question we are not interested here. We are interested only in determining what language used in description of a particular kind of medium of exchange when expressly incorporated in the instrument will have the effect of taking away the important characteristics of negotiability.

The cases which gave rise to the greatest difficulty were those where the instrument provided that the debt evidenced thereby was to be paid in currency, or current funds or in some specified kind of circulating media such as national bank notes. Professor Greely, in reviewing these early cases, has said:[2] "Prior to federal legislation virtually prohibiting the issue of state bank notes much litigation arose involving the negotiability of instruments payable in 'current funds,' 'current bank notes,' 'currency,' etc. At that time the money in actual use was, in many places, state bank notes which were depreciated, and had largely or completely displaced legal tender. When instruments were drawn payable in 'current funds' or 'currency' the question whether (a) they were payable in the local depreciated currency, or in legal tender, or in legal tender and bank notes circulating at par therewith, and (b) whether they were negotiable or not, were important and difficult. Different rules were laid down in different jurisdictions. In Illinois it was held that such instruments were payable only in legal tender or funds circulating at par therewith, and not in the depreciated local currency. That so regarded, the instruments were negotiable. In Iowa it was held that instruments so payable were prima facie payable in the depreciated local currency, and were not negotiable (not being payable in money), but became negotiable if it were shown by evidence that the word 'currency' or 'current funds' actually designated legal tender or funds the practical equivalent thereof. In some states such instruments were held to be payable in the local depreciated money, and not in legal tender or its equivalent and so regarded, were by some courts held to be negotiable and by others not. The tendency of the authorities was to regard as negotiable, paper payable in legal tender or in funds passing current at par therewith."

Where an instrument is payable in currency, the word "currency" may mean legal tender only or it may include other media of exchange circulating at par therewith. A court may hold that

[2] Uniform Negotiable Instruments Law, 10 Illinois Law Review, 267.

nothing is money unless it is legal tender, or a court may hold that any medium of exchange is money which, although it is not legal tender, circulates at par with legal tender. Most courts held that in order for circulating media to constitute money they must be legal tender. With respect to this controversy Professor Oliphant concludes that "anything which for a substantial period of time and throughout any important commercial community is by general consent used and treated in common payments as cash in the ordinary course and transaction of business is money." [3] Professor Oliphant aptly observes that any other rule would result in the extraordinary situation that a repeal of our legal tender laws would leave us without negotiable instruments.

Professor Brannan has argued that the section should be amended by providing that instruments payable in currency, current funds and the like should be deemed negotiable and that these added words should be defined in the act to mean legal tender and circulating media circulating at par therewith.[4]

The following cases illustrate various situations that involve the sections above quoted.

ROBERTS v. SMITH et al.

(Supreme Court of Vermont, 1886. 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567.)

VEAZEY, J. Although it has long been settled in this state that a written contract having the usual form of a promissory note, but payable in some specific article, may be treated as a promissory note as to the form of declaring upon it, and the necessity of proof of consideration, and in some other respects, * * * yet such an instrument is not negotiable because not payable in money. * * * The instrument declared upon was not even a promise to pay a given sum in specific articles, but only to pay "one ounce of gold." It stands, for consideration, upon the question of the sufficiency of the declaration, under the demurrer thereto, as though it were a promise to pay one bushel of wheat. This suit is by a purchaser from the payee. The plaintiff cannot stand upon the first count, as the instrument declared upon is not negotiable, and no promise by the defendant to the plaintiff is alleged. * * *

It is but a promise to pay, that is, deliver, a certain article of merchandise definite in amount. Because gold enters into the composition of money we cannot assume that "an ounce of gold" is money, or that it has a fixed and unvarying value. The contract in question lacks, not only the quality of negotiability, but certainty and precision as to the amount to be paid. Upon failure to perform, there would be no definite specified sum due, as in case of a promissory note. The declaration is drawn upon the theory that the instrument was a promissory

[3] The Theory of Money in the Law of Commercial Instruments, 29 Yale Law Journal, 606.

[4] Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law Review, 493.

note except in respect to negotiability. No value is alleged in the thing promised. The pleader claims to be entitled to the value of a commodity, without alleging it has any value. It is plainly impossible to apply to this paper a form of declaration adapted solely to a promissory note. Although it has form of a promissory note, it is not such. * * * It must be treated as a simple contract for the delivery of merchandise. As a declaration upon such a contract it is wanting in proper averments as to consideration, as to value, and as to breach and damages. * * *

Judgment reversed.

MILLIKAN v. SECURITY TRUST CO.

(Supreme Court of Indiana, 1918. 187 Ind. 307, 118 N. E. 568.)

TOWNSEND, J. * * * Appellant's eighth paragraph of answer is, in substance, that appellee at the time of the purchase of said note executed in payment therefor a certificate of deposit, as follows:

"Security Trust Company.

"Certificate of Deposit. No. 2341.

"Indianapolis, Ind., Dec. 4th, 1912.

"American Standard Life Assurance Co. has deposited with this company five thousand dollars payable to the order of same, in current funds on the return of this certificate properly indorsed. June 1st, 1913. With interest at two per cent. per annum for the time specified only. Not subject to check.

"Countersigned: R. A. Young, Secretary.

"Bert McBride, President."

Then this paragraph is, in substance, that the note was dishonored at maturity, that appellee had notice of the dishonor, and that appellee with such notice paid the certificate. If the certificate is not negotiable, the paragraph is bad.

Appellant contends that this certificate is not negotiable because it is payable in "current funds." One of the elements of negotiability is that an instrument be payable in money, and the question is whether "current funds" means money. There is some confusion in the decisions of this court on this point. In the case of Drake v. Markle, 21 Ind. 433, 83 Am. Dec. 358, a certificate of deposit payable "in currency" was held to be payable in money and negotiable. Although no particular stress seems to have been laid upon the point of its being payable in "currency," yet the court sets out the instrument and seems to have had this question in view. In the case of the National Bank, etc., v. Ringel, 51 Ind. 393, this court held that a certificate of deposit payable "in current funds" was not negotiable because it lacked one of the essentials not being payable in money.

Beginning with the issue of United States Treasury notes, declared to have the quality of legal tender, it has been the practice of drawers of bills of exchange and makers of promissory notes to indicate payment in gold or silver or such notes, and from that time the terms "current funds" and "currency" have been used to designate any of these, all being current and declared by statute to be legal tender. The better rule now seems to be that instruments of the kind in question, payable in "current funds" or in "currency," are payable in money. * * *

We therefore hold that this certificate of deposit is payable in money, and is negotiable as an inland bill of exchange. * * *

EASTMAN v. SUNSET PARK LAND CO. et al.

(District Court of Appeal, Second District, California, 1917. 35 Cal. App. 628, 170 Pac. 642.)

CONREY, P. J. The plaintiff, being the owner of a promissory note made by the defendant Sunset Park Land Company in favor of defendant T. G. Rickman, brought this action and obtained judgment, from which the Sunset Park Land Company appeals. It is admitted that the judgment should be sustained if the note was a negotiable instrument. Appellant contends that the note was not a negotiable instrument because by its terms it was made payable "in United States gold coin." * * *

We are of the opinion that a note which is made payable in United States gold coin is a note payable in money only, notwithstanding the fact that the note prescribes a particular kind of money. * * * We think that the note in question was a negotiable instrument, and therefore the judgment is affirmed.

BROWN et al. v. PERERA.

(Supreme Court of New York, Appellate Division, 1918. 176 N. Y. Supp. 215.)

The following is the opinion of LEVENTRITT, referee, in the court below:

The plaintiff composing the firm of Redmond & Co., bankers in the city of New York, bring this action for the alleged conversion by the defendant of foreign moneys bought and received by him from the plaintiffs' defaulting employé and agent.

In the years 1913 and 1914 the plaintiffs were conducting a foreign exchange department as a branch of their business. In that department the moneys of various foreign governments were bought and sold. One Thomas Piptone, the defaulting agent, was the manager of that department. The foreign moneys on hand were in his personal custody, and his authority to sell such moneys was unrestricted. * * * Early in the year 1913 Piptone, who was known to the defendant as the manager of the plaintiffs' foreign exchange department, informed the defendant that he, Piptone, was starting a specie business for the plaintiffs, and was receiving from customers foreign moneys to sell at the best market rates. Thereafter, in the course of that year and in the first half of 1914, Piptone several times a month brought to the defendant's place of business foreign moneys for sale, and usually received cash in payment therefor. * * * The moneys sold on these nine occasions embraced issues of Italy, Germany, Austria-Hungary, France, Switzerland, and Belgium, of the value of upwards of $24,000. It is for the conversion of these moneys that the action was brought. They belonged to the plaintiffs, and Piptone never accounted for any of the proceeds, but appropriated them. He has been convicted of the larceny of moneys sold in one of those transactions. * * *

As to the foreign moneys purchased by the defendant in the nine transactions, some of the essential elements of a conversion are present. From the circumstance that checks for purchase money to the order of Pagano were requested on these nine occasions, it is reasonably clear that in each instance Piptone was acting with the preconceived intent to appropriate the proceeds, and hence was guilty of embez-

zling the foreign moneys. Therefore whatever title the defendant had was obtained from a thief. Furthermore, the defendant has disposed of those moneys and thereby converted them, unless his title was good. The point has been raised that there was no sufficient demand upon the defendant for the restoration of the moneys to support an action for conversion, but as the defendant had placed it beyond his power to comply, the omission to demand is no obstacle to the maintenance of the action. Pease v. Smith, 61 N. Y. 477; Ochs v. Pohly, 87 App. Div. 92, 84 N. Y. Supp. 1. * * * There is no evidence, or even a suggestion, that the defendant's title was affected by knowledge or notice that the moneys he received had been stolen. The plaintiffs' claim must therefore rest upon the proposition that the defendant, having purchased from a thief, obtained no title. That would be so if foreign money is, in legal contemplation, a mere commodity or article of merchandise. The contrary would be true if such money has the qualities of transferability possessed by the circulating medium of the United States. The whole question is whether foreign money, acquired under the circumstances here existing, must be treated as a commodity merely, the title to which did not pass from the owner, or is money, title to which was acquired by the innocent holder, even though he purchased it from one who had no title.

Upon a historical and practical consideration of the subject, it appears that foreign money is not ipso facto a mere commodity. Such moneys have circulated as an actual medium of exchange in this and other countries, both with and without special statutory sanction. The United States Constitution, art. 1, § 8, cl. 5, confers authority on Congress "to coin money, regulate the value thereof, and of foreign coin. * * *" Various European coins had circulated freely as a medium of exchange in the colonies. The framers of the Constitution contemplated that the coins of certain European governments would constitute a necessary part of the current moneys of this country. Accordingly, by chapter 5 of the act of February 9, 1793 (1 Stat. 300), Congress made the gold coins of Great Britain, France, Spain, Portugal, and the silver coins of France and Spain, a legal tender at fixed valuations, and this law, as renewed from time to time, remained in force until repealed by the act of February 21, 1857 (11 Stat. 163, c. 56). Foreign coins are thus moneys of the Constitution, and are accorded more positive recognition by that instrument than the paper issues of this government. Such coins had a general circulation for a long period of our history, sometimes under adverse conditions. In the argument of the Legal Tender Cases, 12 Wall. 475, 20 L. Ed. at page 294, this statement was made: "Your honors will recollect how often in the days of the Spanish piece for 12½ cents, we accepted 12 cents instead and took Spanish quarters with holes drilled through them equally with perfect coin." It is interesting to find that Canada has no gold coinage, and has made the gold coins of the United States and of England legal tender to all amounts. Muhleman's Monetary Systems of the World, p. 147.

No one would deny that, if foreign money is a legal tender, it possesses all the attributes of money. Is it relegated to the status of merchandise merely by reason of the taking away of the legal tender quality? Much of the money of this country does not possess that quality except for certain purposes or in limited amounts, and yet the title to such moneys would be indisputable in the hands of one

who took them in good faith and for value, in any legitimate transaction and to any amount. The American trade dollar for many years prior to 1887, when its coinage was prohibited, was not a legal tender, though it must have possessed the attributes of money in the transactions in which it was intended to be used. Foreign moneys, as well as domestic moneys, which are both legal tender, may, of course, be treated as money by voluntary agreement. Near the border line between two nations, the moneys of both circulate with almost equal freedom. Canadian coins are extensively circulated as a medium of exchange in the northern portion of our border states. In many parts of Canada the paper and silver moneys of the United States, as well as gold, are readily accepted. Certain European moneys, as the franc, are frequently received as a medium of exchange in countries other than that in which they are issued. It would be a startling proposition to hold that in all such cases the foreign money is a mere commodity which may be recovered by the owner from the innocent holder. The evidence shows that in the city of New York some of the department stores receive, at certain rates in payment for goods, European moneys, such as are involved in this case, and give change in American money. The extent to which foreign money may circulate as a medium of exchange varies according to circumstances, and depends upon the needs of commerce, familiarity with the value of the money, and the certainty that it can be disposed of at the same value at which it is received. The circulation of money is nothing more than the aggregate of the transactions in which the individuals have been and are willing to receive that money. The legal attributes of the money can hardly be made to depend upon the number of these transactions. Even money of the country may not circulate. At one period in our history, when the value of gold as compared with silver materially exceeded the established ratio of coinage, gold disappeared from circulation, and "the country retained, instead, only silver and gold coins of those countries whose gold coinage bore a true relation to the existing value of gold and silver." Argument in Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 293.

The plaintiffs, however, contend that in no event is the defendant protected, because he was the purchaser of the foreign money at a price paid in American money, and that in such transactions the foreign money is the subject of purchase and sale, and not the medium with which the purchase and sale is effected. This statement has a certain plausibility, but the transaction actually is the exchange of the foreign money for the domestic at a certain rate. The foreign money is received as a representative of value just as the domestic money is paid as a representative of value. The fact that one kind of money may be sold and purchased in terms of another kind of money is not of controlling significance. * * *

The foregoing general considerations indicate, to my mind, that foreign money in its nature and inherent qualities is not different from domestic money. Whether it is received under sanction of a legal tender statute, or in border transactions, or by certain merchants in accordance with a special practice, or by money changers in exchange for American money at prevailing rates, it is received, not as an article useful or valuable in itself, but merely as a token or representative of value issued by a responsible government.

The legal principles and precedents governing this subject may now

be considered. The foreign moneys here involved were, with an insignificant exception, paper bills. All of the moneys of Austria-Hungary and Belgium received by the defendant, valued at $596.85, were, in form, promises to pay to bearer. The plaintiffs therefore concede, and the authorities clearly establish, that these moneys are within the protection of Negotiable Instruments Law, * * * and so cannot be the basis of recovery in this action. The evidence also shows that an indeterminable portion of the moneys of other governments were negotiable instruments in form. In this state of the proof, these other moneys cannot be treated as subject to the law governing negotiable instruments. They cannot be regarded as promises to pay money, and the question therefore is whether, under principles of law outside of the law of negotiable instruments, they possess the negotiable quality.

The rule that the owner of personal property cannot be divested of title without his consent has been established from the earliest period of the common law. Also of ancient origin and equally familiar is the exception to that rule that good title to money, and bills and notes payable to bearer, is acquired by a bona fide transferee even from a thief. The principle embodied in this exception was established by the old custom of merchants, which "before the end of the thirteenth century was already conceived as a body of rules which stood apart from the common law." Pollock & Maitland's History of English Law (2d Ed.) vol. 1, p. 467. At that stage these rules were applied merely as the general custom of commercial transactions and had to be specifically pleaded, but later they became a part of the common law. * * *

There are two noteworthy features of the law merchant. First, it was not limited to the law of bills and notes, as may sometimes be supposed, but embraced a large body of rules governing commercial dealings. Thus Christian, in his note to 1 Blackstone's Commentaries, 72, quoted in 1 Cranch (U. S. Appendix, note A, p. 373), says that "the law mercatoria, or custom of merchants * * * described only a great division of the law of England," and includes "the laws relating to bills of exchange, insurance and all mercantile contracts." And Sir Matthew Hale, in his History of the Common Law of England (3d Ed.) p. 25, speaks of the lex mercatoria as a branch of the law, "applied under its proper rules to the business of trade and commerce." The second feature is that the rules of the law merchant were international in conception, governing transactions between the merchants and traders of different countries. In Pollock & Maitland's History of English Law (2d Ed.) vol. 1, p. 467, it is stated: "These rules are not conceived to be purely English law; they are, we may say, ius gentium, known to merchants throughout Christendom, and could we now recover them we might find some which had their origin on the coasts of the Mediterranean." And in De La Chaumette v. Bank of England, 2 Barn. & Ad. 385, Lord Tenderden refers to "the custom of merchants, which was part of the common law introduced into this country in consequence of the practice in other countries." The international character of the law merchant is emphasized by the fact that foreign bills of exchange had a secure standing under the rules long before inland bills were recognized. In Bromwich v. Lord (1696) 2 Lutwyche, 1585, Chief Justice Treby said that "bills of exchange at first were extended only to merchant strangers trading with

English merchants, and afterwards to inland bills between merchants trading one with another here in England."

In this system of rules, which sprung into existence and has been perpetuated for the sole purpose of facilitating trade and rendering commercial transactions certain and secure, we may naturally expect to find that the very corner stone of the structure is the rule which guarantees the untrammeled transferability of money. That such is the case is shown by many authorities, both ancient and modern. A few representative cases may be cited: In Crawford v. Royal Bank (1749) reported in Ross on Bills and Promissory Notes, 229, the action was to recover a lost or stolen note for pounds sterling, which was identified in the hands of a bona fide holder for value. The defendant successfully contended "that such is the nature of money and bank notes, which serve the purpose of money, that a bona fide purchaser or possessor is not subjected to a rei vindicatio, because such a claim would be an impediment to commerce." The court said they were unanimous on two points: "That money is not subject to any vitium reale, and that it cannot be vindicated from a bona fide possessor, however clear the proof of the theft may be. Second. That bank books serving the purposes of money must be entitled to the same privileges." In Moss v. Hancock, [1899] 2 Q. B. 3, Judge Channell said: "Now all the considerations which could have induced the Legislature to protect holders of stolen negotiable instruments must apply equally to stolen money taken bona fide. In fact, it is because bills of exchange, etc., are like currency that they are negotiable." In Merchants' Loan & Trust Co. v. Lamson, 90 Ill. App. 18, the court said: "The rule is applied to commercial paper, but the same rule applies with even greater force to currency. Indeed the rule as applied to negotiable paper is derived from and based upon the English rule as originally applied to coin or other forms of currency. The exception to the general rule of the common law that the purchaser of a chattel can acquire no better title than the vendor, was first applied to money, i. e., currency, and then extended to negotiable paper." In Depew v. Robards, 17 Mo. 580, the court said: "At an early period of our commercial law, it was held that money and bills payable to bearer, though stolen, could not be recovered after they had been passed away to a bona fide holder, and this by reason of the course of trade which creates a property in the holder. They pass by delivery only, and are considered as cash, and the possession of a bona fide holder always carries with it the property. This rule is founded on the necessity of sustaining the credit of that which is used as a medium of exchange in commercial transactions." The language of these cases and many others that might be cited conclusively shows that under the law merchant bills and notes were given the quality of negotiability simply because they represented money and answered a similar purpose in commerce. But the free and safe transferability of money was fundamental. Commercial paper shone, as it were, by reflected light, and derived its negotiable qualities from its similarity to the money in which it was payable. Hence it is that bills and notes payable in anything but money are not negotiable. In Bouvier's Institutes (vol. 1, p. 458) the author states the well-established rule that a bill of exchange "must not be for the payment of merchandise, or of other things than such as are considered as money." And in Jamieson v.

Farr, 2 N. C. 182, the court said: "Bonds for specific articles could never answer the purposes of trade, not being the representatives of any certain value as money is. * * * For these reasons the law has never made bonds for specific articles negotiable, but only bills, notes and bonds for money."

From these principles it would necessarily follow that if the money of foreign governments was considered as having the qualities of merchandise and not the qualities of money, a bill or note payable in foreign money would not be negotiable. The rule is well settled, however, that a bill or note payable in specific foreign money is negotiable. Mr. Chitty, in his work on Bills and Notes, at page 160, lays down the rule that a bill of exchange may be payable in "the money of any country." Judge Story, in his work on Promissory Notes, § 17, says: "But, provided the note be for the payment of money only, it is wholly immaterial in the currency of what country it may be payable. It may be payable in the money or currency of England or France or Spain or Holland or Italy, or of any other country." In Daniel on Negotiable Instruments it is said that "it is not necessary that the money should be that current in the place of payment or where the bill is drawn; it may be in the money of any country whatever." * * *

This rule that paper payable in foreign money is negotiable cannot be understood or justified except upon the assumption that the foreign money itself possesses like qualities of negotiability. The law merchant would never have conferred upon the paper promise or direction to pay a higher commercial dignity and security than is possessed by the thing in which the paper is payable. Incidentally, in answer to the plaintiff's contention that foreign moneys must be treated as a commodity when purchased with money of the realm, it is to be observed that bills and notes payable in foreign money are negotiable, even though the subject of purchase and sale is domestic money.

Going a step further, we find that English bank notes, which were treated as money, were held to be negotiable both in that and other countries so as to confer an indefeasible title on the innocent holder. In Miller v. Race, 1 Burrow, 456, in which it was held that an English bank note, though stolen, became the property of an innocent holder, Lord Mansfield said: "The whole fallacy of the argument (to the contrary) lies in comparing bank notes to what they do not resemble and what they should not be compared with, viz. to goods or to securities or documents for debts. Now they are not goods or securities, nor are they so esteemed, but are treated as money or cash in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money in all intents and purposes. * * * The bank note is constantly and universally, both at home and abroad, treated as money, as cash and paid and received as cash, and it is necessary for the purpose of commerce that their currency should be established and secured." De La Chaumette v. Bank of England, 2 Barn. & Ad. 385, was an action of trover involving the title to a bank note which had been stolen and afterwards came into the hands of a money changer of Paris for value and without notice. It was held that the purchaser acquired a good title. The decision was based upon St. 3 and 4 Anne, which made "all notes" negotiable; but that is immaterial, as the statute was probably only declaratory of the law merchant (1 Cranch, U. S., Appendix, note A, p. 418), and in any event became a part of the com-

mon law. Lord Tenderden said: "A note payable to bearer, therefore, is transferable abroad just as an English bill of exchange drawn in England and remitted to a foreign country would be. It may be that great injury has been suffered of late by the facility enjoyed of sending stolen notes abroad; but, on the other hand, the negotiability of English notes in foreign countries is a great convenience, as it saves the necessity of carrying abroad specie."

While in this case the court treated the note as a negotiable instrument, it is evident that the court would unhesitatingly have reached the same conclusion had the note been treated as money. In Parsons on Notes and Bills (vol. 2, p. 355) the author quotes Lord Tenderden as saying on an earlier consideration of the same case: "We are to take care that we do not prevent the circulation of the Bank of England notes in foreign countries. It would be very inconvenient to merchants and travelers if we should do that." Raphiel v. Bank of England, 17 C. B. 161, was another case in which the title of a money broker of Paris to a stolen Bank of England note, acquired innocently and for value, was upheld. From these cases it is perfectly clear that the English judges accepted as fundamental the proposition that one who in good faith received English money abroad acquired an indefeasible title. Nor is authority in this state lacking. In Steinhart v. Boker, 34 Barb. 436, it was held that one to whom stolen Bank of England notes were paid by a thief in discharge of a debt took good title if ignorant of the theft, and was not bound to inquire into the title of the one from whom he received them. Whether the court regarded the notes as money or as promissory notes cannot be material, because under the law merchant, as has been seen, paper is only negotiable because it is supposed to answer the same purpose in commerce as the money in which it is payable.

In view of the international origin of the law merchant and its primary purpose to facilitate and safeguard commercial transactions, it is hardly conceivable that the notion could ever have found acceptance that money becomes a mere personal chattel as soon as it passes beyond the domain of the country issuing it. Merchants, traders, and travelers naturally, in many instances, took the moneys of their countries into foreign lands. There such moneys might be acceptable to those with whom they dealt, or, if not, could be exchanged for domestic currency through the money changer. Glimpses of the extent to which moneys of England were employed in foreign countries may be found in the decided cases. In De La Chaumette v. Bank of England, supra, the following facts were stated: "It was the practice for persons traveling from this country into France to take, for the purpose of paying their expenses, bank notes, and for persons residing or domiciled in France to receive the same in payment. * * * It was also the usual practice in Paris for bankers or other persons to make remittances from Paris to persons residing in England in English money and bank notes, and for the purpose of making such remittances to purchase of the money changers in Paris at the rate of exchange between Paris and London for the time being English money and bank notes." The exchange of moneys was an extensive business in earlier as well as modern times, and was one of the necessities of commerce. In Malynes' Work on the Lex Mercatoria, published in 1622, are found elaborate tables setting forth the values in English money of the moneys of a large number of foreign nations. At the

present time in the city of New York alone dealings in foreign moneys amount to many millions yearly. It will readily be seen to what extent transactions between the citizens of different countries would be hampered if the title to foreign money were subject to the rules governing chattels. The money changer would have to take such money subject to any defect of title, and so would the merchant or tourist who received it from the money changer. There is not in any treatise or decided case on the law merchant, so far as I have been able to discover, a suggestion that any distinction exists in respect to negotiability between domestic and foreign moneys. It is highly significant as reflecting an ancient and uninterrupted custom that in this city, as the evidence shows, dealers in foreign moneys and merchants who accept it in payment for goods receive it from a stranger as readily as from a known customer and without any concern as to the title.

Two decisions, mainly relied on by the plaintiffs, require brief notice. One is Chapman v. Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739. The action was conversion for a gold coin, known and current in California as "Moffatt's Issue." The plaintiff had passed the coin by mistake for a half dollar to a person who passed it on by like mistake to the defendant. The court held that the plaintiff was entitled to recover because the gold piece was not money and was subject to the rules of law governing chattels. Evidently this coin was nothing more than a piece of gold coined by a man named Moffatt. It was used as currency in a certain locality because the people had confidence in the maker and accepted his name as a certificate of the quantity and quality of the metal. It was not issued by any competent governmental authority. The law merchant, with all its solicitude for the security of commercial transactions, has never gone so far as to extend the qualities of negotiability to coins manufactured by individuals. A bill or note payable in "Moffatt's Issue" would obviously not be negotiable. This decision therefore does not in any way militate against the views herein expressed.

The other case is Moss v. Hancock, [1899] 2 Q. B. 3, wherein it was held that a £5 gold piece, coin of the realm, that had been stolen and sold by the thief to a dealer in curiosities, could be recovered by the owner. Apparently the gold piece was rare and of more than its nominal value, and the decision turned upon the question whether the defendant had received the coin as money or currency or as an article valuable in itself. As Judge Darling expressed the question, "I ask myself was this gold piece passed on its character as coin of currency, or was it rather the subject of a sale as an article of virtu?" He came to the conclusion that it was "the subject of a sale as a medal might have been to a dealer in old and curious things." And Judge Channell thought that the coin had been "dealt with as if it were a medal, or ancient coin, or other curiosity." The decision was evidently correct in principle, as applied either to domestic or foreign moneys, but it does not control the present case, where the moneys purchased by the defendant were received by him simply as representative of the values expressed thereon and in their character as moneys of the governments which issued them.

The conclusion that the defendant obtained good title to these moneys is certainly in accordance with the equities of the case. The plaintiffs intrusted these moneys to their manager, gave him authority to

remove them from the premises and sell them wherever the best price could be obtained. They maintained no supervision over him. While the case may not technically be governed by the principle that as between two innocent parties the loss must fall upon the one whose conduct made the loss possible, it certainly comes within the spirit of that rule. Freudenheim v. Gutter, 201 N. Y. 94, 94 N. E. 640; Knox v. Eden Musee Co., 148 N. Y. 453, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700.

Judgment should be rendered for the defendant.

PER CURIAM. Judgment affirmed, with costs.

HEBBLETHWAITE v. FLINT et al.

(Supreme Court of New York, Appellate Division, 1918. 185 App. Div. 249, 173 N. Y. Supp. 81.)

PUTNAM, J. * * * On July 2, 1898, the plaintiff had borrowed of defendants 56 contos of reis Brazilian, "payable at the rate of exchange of 7½ pence per milreis," for which he gave his demand note, made and delivered at Manaos. * * * It is contended that this note was not negotiable, because payable "in foreign currency of fluctuating value in the United States." Our Negotiable Instruments Law * * * declares that the negotiable character of such an instrument is not affected by the fact that it "designates a particular kind of current money in which payment is to be made." Here the note was made in Brazil, payable in its national currency, which was stabilized by a specific rate of exchange into British sterling. It was negotiable by the law merchant. * * *

If this note be held not negotiable, a personal demand on plaintiff would be necessary. * * *

It would seem to follow from the preceding section that, if an instrument contained a promise or order to do an act in addition to the payment of money, the promise as a whole would not be to pay in money, and that therefore the instrument would be nonnegotiable. Nevertheless section 5 provides:

An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.

COOLIDGE & McCLAINE v. SALTMARSH et al.

(Supreme Court of Washington, 1917. 96 Wash. 541, 165 Pac. 508.)

PER CURIAM. The plaintiff Coolidge & McClaine, a corporation, as holder of a promissory note and mortgage executed by Robert S. Saltmarsh and Margaret Saltmarsh, brought an action against them to foreclose the same, making a party defendant also William McCowat, who held a subsequent mortgage covering the same land. The court rendered decree foreclosing the Coolidge & McClaine mortgage. On issues raised between the Saltmarshes and McCowat on the latter's note and mortgage which he held by transfer from the original payee, the court held that the note was a nonnegotiable one and therefore

subject, in the hands of McCowat as assignee, to all the defenses which the makers had against the original payee. The defendant McCowat appeals.

The attorneys for both appellant and respondents agree that the only issue in the case is the negotiability of the note, it having been established that it was procured by fraud on the part of D. Ryrie, the original payee, from whom it had been purchased by appellant. * * *

The Negotiable Instruments Act (Rem. Code, § 3392) declares that an instrument "must contain an unconditional promise or order to pay a sum certain in money" in order to be negotiable. The note in question, in addition to being for a sum named, also contains a promise to pay any taxes assessed upon the note or upon the mortgage securing it. We held, in Bright v. Offield, 81 Wash. 442, 143 Pac. 159, that such a provision in the note renders it nonnegotiable. In that case there was involved a provision in the note for payment of taxes, which constituted an implied rather than a direct promise by the maker to pay them. The court there said: "Since the amount of these taxes, rates, and assessments is uncertain, the amount of recovery would be uncertain. This provision, therefore, renders the note not merely an unconditional promise to pay a sum certain, but also, in necessary effect, a conditional promise to pay an uncertain sum."

The fact, as urged by appellant, that there was no law in force in this state for the taxation of notes and mortgages, would not detract from the effect of the rule. There always remains a possibility during the life of such contracts that they may be subjected to the liability of taxation, and a promise in the note to pay any taxes thereon would leave the amount to be paid indeterminate and open to conjecture upon the contingency of future legislation. * * *

The finding and conclusion of the court as to the nonnegotiable character of the note in controversy is in accord with the case cited, and, as the case is controlling, the judgment will stand affirmed.

HOLLIDAY STATE BANK v. HOFFMAN.

(Supreme Court of Kansas, 1911. 85 Kan. 71, 116 Pac. 239, 35 L. R. A. [N. S.] 390, Ann. Cas. 1912D, 1.)

See ante, p. 662, for a report of the case.

FINLEY v. SMITH, Banking Com'r.

(Court of Appeals of Kentucky, 1915. 165 Ky. 445, 177 S. W. 262, L. R. A. 1915F, 777.)

See ante, p. 664, for a report of the case.

SECTION 7.—THE SUM TO BE PAID MUST BE CERTAIN

The Negotiable Instruments Law provides:

Section 1, subsec. 2. An instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money.

Section 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid: (1) With interest; or (2) By stated installments; or (3) By stated installments with a provision that upon default in payment of any installment, or of interest the whole shall become due; or (4) With exchange whether at a fixed rate or at the current rate; or (5) With costs of collection or an attorney's fee, in case payment was not made at maturity.

McCORNICK v. SWEM et al.

(Supreme Court of Utah, 1909. 36 Utah, 6, 102 Pac. 626, 20 Ann. Cas. 1368.)

Action by W. S. McCornick, doing business as McCornick & Co. against J. M. Swem and another. From a judgment for plaintiff, defendants appeal.

FRICK, J. Respondent, in his complaint, in substance, alleged: That on the 1st day of September, 1904, appellants, at Salt Lake City, Utah, executed and delivered their certain promissory note for the sum of $1,167, payable in four months from said date, to the order of the Northern Light Mining & Milling Company, a corporation, at McCornick & Co.'s Bank, in Salt Lake City, with interest at 10 per cent. per annum. The note also contained the following provision: "In case this note is collected by an attorney, either with or without suit, we hereby agree to pay ——— dollars attorney fee." It was further alleged: "That, immediately upon the execution and delivery of said note, the same was, before maturity, for a valuable consideration, and in good faith, purchased by this plaintiff (respondent) from the payee thereof, which payee duly indorsed and delivered the same, and plaintiff is now and ever since has been the owner and holder of the same." That no part of the principal or interest of said note has been paid except the sum of $791.22. That $100 is a reasonable attorney's fee. * * *

Appellants' counsel further insists that the note in question was nonnegotiable upon its face because, if it provided for an attorney's fee at all, it was for an indefinite and uncertain sum, and hence destroyed the certainty required in negotiable instruments. Before the adoption of the so-called "negotiable instruments law," the authorities upon this question were in hopeless conflict with, perhaps, the greater number of cases in favor of holding promissory notes containing attorney's fee clauses as negotiable. Since the adoption of that law by a large number of states, including Utah, the holdings have become more uniform, and it is now generally held that a provision in a promissory note that the maker thereof will pay a specific amount named, or a certain per cent. of the amount due, or a reasonable amount, as an attorney's fee, does not affect either the certainty or the negotiability of the instrument.

The further contention is made that the provision in the note, in the form in which it was executed, was, in legal effect, an agreement not to pay an attorney's fee; but, if this is not its effect, then in view that the note did not specify any amount, nor in terms provide for a reasonable sum as an attorney's fee, that this was the same as if no provision to pay an attorney's fee had been incorporated into the note. Counsel have not cited any cases either for or against this proposi-

tion. As an original proposition, and in view that in cases like the one at bar an attorney's fee is recoverable only by virtue of some agreement, there seems considerable force to the contention made by counsel. We have devoted considerable time in making a somewhat thorough research of both text-books and reports, but have been unable to find either text-writer or case which sustains counsel's contention. Upon the other hand, we have found cases in which it is held that, where the amount is left blank in an attorney's fee clause, it is tantamount to a promise to pay a reasonable sum as an attorney's fee.

We feel constrained to follow the cases in which it is so held. * * * In case the amount is not expressly agreed upon, it is the duty of the court to limit the fees to a fair and reasonable sum, in view of all the circumstances. It has frequently been held that, even when the amount has been agreed upon, it is nevertheless subject to control by the courts; and therefore, if it appears to the court that the amount agreed upon is unfair, unjust, or unreasonable, the court should permit a recovery only for what is reasonable under all the circumstances the same as where no amount has been agreed upon. It seems to us, however, and quite a number of the courts so hold, that prima facie the amount agreed upon should be assumed as the proper fee to be allowed, and unless it is clearly obvious to the court, or is made to appear, that the amount stipulated for is unjust, oppressive, or unreasonable, in view of all the circumstances of the case, the stipulated amount should be allowed. * * *

The judgment is affirmed.

UNION NAT. BANK v. MAYFIELD et al.

(Supreme Court of Oklahoma, 1917. 169 Pac. 626.)

RUMMONS, C. * * * The sole question involved in this appeal is the negotiability of the promissory note sued upon by plaintiff. The only provision in the note necessary to be considered in determining this question is as follows: "With interest at the rate of 9 per cent. per annum, payable annually from date until due: Provided, however, if the note is paid on or before maturity, interest shall be only 7 per cent."

Plaintiff relies for a reversal of this cause upon the case of Security Trust & Savings Bank v. Gleichmann, 50 Okl. 441, 150 Pac. 908, L. R. A. 1915F, 1203. The opinion in that case was written by Commissioner Devereux, following Savings Bank v. Landis, 37 Okl. 530, 132 Pac. 1101, and overruling Randolph v. Hudson, 12 Okl. 516, 74 Pac. 946, and Bracken v. Fidelity Trust Co., 42 Okl. 118, 141 Pac. 6, L. R. A. 1915B, 1216. In the case cited it is held that "a note dated May 1, 1905, which provides, 'with interest from date if not paid when due,' is a negotiable instrument." In Randolph v. Hudson, supra, it is held that a note reading " '30 days after date I promise to pay to the order of J. H. Thomas $275.00, with interest at the rate of 12 per cent. from date if not paid at maturity,' was not negotiable." In Citizens' Savings Bank v. Landis, supra, it was held that a note reading "December 1, 1907, after date, for value received, we jointly and severally promise to pay McLaughlin Brothers or order $1,200.00 at the Walters National Bank, of Walters, Oklahoma, with interest at 6 per cent. per annum, before maturity, and thereafter at 10 per cent. per annum until

paid, interest payable annually," was a negotiable instrument. In Bracken v. Fidelity Trust Co., supra, it was held that a note, containing the following provisions: "With interest at 6 per cent. per annum before maturity and thereafter with interest at 10 per cent. per annum until paid. Interest payable with note" was nonnegotiable. Since the handing down of the opinion in the case of Security Trust & Savings Bank v. Gleichmann, this court has held in an opinion written by Commissioner Bleakmore, following Farmers' Loan & Trust Co. v. McCoy, 32 Okl. 277, 122 Pac. 125, 40 L. R. A. (N. S.) 177, that a note payable in installments, containing a stipulation that if paid within 15 days from date a discount of 6 per cent. would be allowed was uncertain as to the amount necessary to satisfy it at the time of its execution, and therefore was not negotiable. First National Bank of Iowa City v. Watson, 56 Okl. 495, 155 Pac. 1152.

This case is the only one of the cases cited interpreting a promissory note executed since the adoption of the Uniform Negotiable Instruments Act. It is, however, in direct conflict with the case of Security Trust & Savings Bank v. Gleichmann, supra, and in harmony with the opinion of Randolph v. Hudson, supra. In the body of the opinion it is said: "The sum payable—that is, the amount for which, by the terms of the instrument, the maker became liable, and which he might tender and pay in full satisfaction of his obligation—was, at the date thereof, to a certain extent dependent upon his will; he had the right to pay a greater or less sum than the principal; he could, if he saw fit, within the prescribed period, discharge his debt at 94 per cent. or thereafter pay 100 per cent. on the dollar. Under such condition, the sum payable was, at the time of the execution of the instrument, clearly indefinite and uncertain. Unless the rule of the law of merchant which obtained in this jurisdiction with respect to the certainty required in the sum payable in a negotiable instrument has been changed by the statute, supra, such rule still governs, and the note in question is nonnegotiable. In our opinion, it is obvious that the statutory provisions above quoted do not purport to prescribe a rule in this regard different from that recognized by the courts of this state before their enactment, in a case where a promissory note provided for the discount of a principal sum otherwise payable, if at the option of the maker, payment is made before maturity."

In the instant case the same criticism of the note sued on occurs as in the case last quoted. The sum to be paid upon the instrument was at the option of the maker. If he chose to pay it on or before maturity, the interest upon the principal was to be computed at the rate of 7 per cent. If he neglected to pay until after maturity, the interest was to be computed at 9 per cent. So that it would be impossible for any one to compute with certainty the amount due upon this note at any date in the future. We think the writer of the opinion in the case of Security Trust & Savings Bank v. Gleichmann, supra, fell into error in applying the rule laid down in Savings Bank v. Landis, supra, to the note in controversy in his case. In the case of Savings Bank v. Landis, supra, there was no uncertainty as to the amount due according to the terms of the note. It was provided that the note should bear interest at 6 per cent. before maturity, and thereafter at the rate of 10 per cent. From the face of the note there could be computed with certainty the amount that would be due thereon at any time in the future; so there was no uncertainty as to the sum payable. In the

Security Trust & Savings Bank Case, however, if the note was paid at maturity it bore no interest. A failure to pay at maturity made it bear interest from its date six months prior to maturity. The sum payable, therefore, became indefinite and uncertain, and depended upon the option of the maker.

One of the requisites of negotiability under the Uniform Negotiable Instruments Act is that the instrument must contain an unconditioned promise or order to pay a sum certain in money. We think that the note in the instant case fails to comply with the provision of the act as to the interest to be paid, nor does it fall within any of the exceptions contained in sections 4052, 4055, 4056, Revised Laws 1910, supra [Negotiable Instruments Law, §§ 2, 5, and 6]. We feel convinced that the rule laid down in First National Bank of Iowa City v. Watson, supra, is a correct interpretation of our Negotiable Instruments Act, and we therefore follow the rule announced in that case. The case of Security Trust & Savings Bank v. Gleichmann, supra, so far as the rule announced in the sixth syllabus in that case, and so far as the same overrules the case of Randolph v. Hudson, supra, is overruled.

The judgment of the court below should be affirmed.

SECTION 8.—THE INSTRUMENT MUST BE PAYABLE TO ORDER OR BEARER

Previous sections have shown that an instrument to be negotiable (1) must contain a written promise or order; (2) that the promise or order must be unconditional; (3) that the unconditional promise or order must be payable at a fixed or determinable future time; (4) that the promise or order must be to pay in money; (5) that the sum to be paid must be certain. There is the further requirement that the instrument must be payable to order or to bearer.

Section 1, subsec. 4. An instrument to be negotiable must be payable to order or to bearer. Negotiable instruments are usually drawn payable to a designated person or order, or simply to bearer. As a matter of safety these words should always be used. But the act does not require that these specific words alone must be used, for Section 10 provides: **The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.**

Instruments payable to order or to bearer are alike only in that either of these words satisfy the requirements that the instrument to be negotiable must contain words of negotiability. In other respects different legal effects are produced. In general, it may be said that an instrument payable to order must be indorsed before it may be negotiated, while an instrument payable to bearer is negotiable by delivery without indorsement. These differences will be further discussed in Chapter II.

FORREST v. SAFETY BANKING & TRUST CO.

(United States Circuit Court, 1909. 174 Fed. 345.)

J. B. McPHERSON, District Judge. This suit is brought upon a certificate of deposit issued by the defendant in the following words: "No. 1853. Philadelphia, Janry. 2, 1909. $3,000.00.

"Peter F. Fallon has deposited in the Safety Banking & Trust Company three thousand dollars to the credit of himself payable in current funds on return of this certificate properly indorsed on July 1, 1909. Interest 3½ per cent. per annum.

"H. J. Colver, Cashier. H. L. Rock, Secty.

"This certificate of deposit is not subject to check and is only payable at maturity."

The certificate was properly indorsed in blank by Fallon, and passed into the possession and apparent ownership of J. J. West not long after its date. In March, 1909, West transferred it by delivery to the plaintiff, William S. Forrest, for a valuable consideration * * * in payment of his own debt. Payment having been refused at maturity, Forrest sued in his own name, and the principal question for decision is whether the action is properly brought in that form.

The answer must be in the affirmative if the certificate is a negotiable instrument, and to this point, therefore, the inquiry should be directed. It is undoubtedly true that, if the decisions in Pennsylvania are to govern, this court must hold that the plaintiff cannot sue in his own name. * * *

The question, however, may for the moment be considered as one of general commercial law, and in that region, as is well known, a federal court is not bound by the decisions of a particular state, but may follow its own opinion, or an adverse current of authority elsewhere. * * *

In 5 Cyc., at page 520, the result of the authorities is summarized as follows: "Whether a certificate of deposit is a note or merely a receipt for money has long puzzled the courts. Such certificate, however, if containing proper words to express that intention, is negotiable in the usual manner by indorsement, and although not negotiable in fact, if negotiable in form, it may be assigned. Moreover, where they are negotiable, their transfer is governed by the rules that apply to promissory notes, as is also the liability of the parties thereon." * * * The present certificate is in effect payable to Fallon or his order, for this is necessarily implied by the phrase "properly indorsed."

As it seems to me, these authorities conclusively establish the right of the plaintiff to maintain this suit in his own name, if the question is to be decided as one of general commercial law. The defendant contends, however, that the Negotiable Instruments Act of Pennsylvania, passed in 1901 (P. L. 194), decides the point against such right, and that this court is bound to follow the statute. Certificates of deposit are not referred to in the act by name, and I have been referred to no decision of the Supreme Court of Pennsylvania that construes the statute upon any question now relevant. If, therefore, the act applies to the present controversy, I think that the defendant's position may be disposed of in a few words. * * * Believing, therefore, that the Negotiable Instruments Act, which is intended to bring about the uniform treatment of legal questions in a most important branch of com-

mercial law, should receive a construction that is in harmony with a widely prevailing view (where such a construction is possible), and having been pointed to nothing in the statute that requires me to hold that certificates of deposit are not included within its description of negotiable instruments, I conclude that the instrument sued on is negotiable under the act, and that the action was properly brought in the name of the holder. * * *

The Negotiable Instruments Law contains two additional sections in explanation of the circumstances under which an instrument is to be deemed payable to order or to bearer.

Section 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer, or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or more of several payees; or (6) the holder of an office for the time being.

Section 184. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

The first clause makes it clear that it is immaterial whether the instrument reads "payable to the order of P.," or "pay P. or order." Subsections 1, 2 and 3 assert propositions obviously true. It should be noted, however, where an instrument is drawn payable to the order of the maker or drawer, that it must also be indorsed by the drawer and delivered before any rights can be acquired thereunder. Subsections 4 and 5 provide that there may be more than one payee; in the one case, where the payees have a joint interest, and, in the other, where there is no joint interest—i. e., a case of alternative payees. Before the act some courts held that an instrument payable to payees in the alternative was not negotiable because it was uncertain as to who the payee was. Likewise, subsection 6 changed the law of many states wherein it was held that if an instrument were made payable to such a person as at the time of maturity should hold a certain office the instrument was non-negotiable because the payee was not designated with reasonable certainty. Such an instrument is now negotiable.

The Negotiable Instruments Law provides:

Section 9. The instrument is payable to bearer (1) when it is expressed to be so payable; (2) when it is payable to a person named therein or bearer, or, (3) when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable, (4) when the name of the payee does not purport to be the name of any person, or (5) when the only or last indorsement is an indorsement in blank.

When the instrument reads, "pay bearer," or if, instead of using the word "bearer," some word of similar import is used, the instrument is payable to bearer. This is the simplest case.

The second clause declares that an instrument which is expressed to be payable to "P. or bearer," is payable to bearer. The insertion of the payee's name does not change the status of the instrument. P.'s interest in the instrument arises not from the fact that his name appears therein but because he is the bearer. Before the act, some cases held that because there was a named payee therein, such fact destroyed the effect of the word "bearer" and that the instrument was not payable to bearer. This rule has been changed by the Negotiable Instruments Law.

The third clause opens up a number of situations which involve certain principles of the Law of Negotiable Instruments which we have not taken up. The consideration of this section will be postponed to a later chapter. All that need be borne in mind here is that in this case where the instrument declares that it is payable to a named payee specified therein **or to his order,** the law regards the instrument not as payable to some person or order, but, on the contrary, treats the instrument just as though it read, payable to bearer. The real difficulty arises when we attempt to ascertain the circumstances under which the payee will be deemed to be a fictitious or non-existing payee, and, when we attempt to find out what person must know that fact. The situations where this section is involved will be taken up in chapter V.

Clause 4 provides that an instrument, in legal effect, is payable to bearer, although the words "or order" appear therein, if the name of the payee does not purport to be the name of any person.

It is sometimes convenient to draw instruments, particularly checks, payable to some particular account, such as to "cash," "to draft," "to bills payable" and the like. These words appear in the space provided for the name of the payee. Suppose a check is drawn payable "to cash or bearer." Obviously this instrument is payable to bearer because it is expressly so payable. But suppose the check is payable to "cash or order," how is such an instrument to be construed? Here we have no payee who is capable of indorsing and therefore if the instrument is to be regarded as a negotiable instrument the words "or order" must be given a legal effect different from that which they normally have. Any other construction would make it impossible for an instrument payable "to cash or order" to circulate. For these reasons the law provides that where the payee does not purport to be the name of any person, such an instrument is payable to bearer.

Suppose an instrument is payable to "the person who lives at 126 West Main street," in a specified city, or "to the Chamber of Commerce"—which, let us assume, is an unincorporated association—are these two instruments payable to bearer because the payee does not purport to be the name of any person? This language, while it does not specify the name of a particular person, does sufficiently describe the payees so that they may be identified within the meaning of the last clause of section 8, subsection 6, which provides that, **where the instrument is payable to order**

the payee must be named or otherwise indicated with reasonable certainty. Any instrument which indicates the payee with reasonable certainty cannot be regarded as payable to a payee which does not purport to be the name of any person. It is only where the language used in the space provided for the name of the payee cannot be construed as indicating a particular payee that section 9, subsection 4, discussed, applies.

CLEARY v. DE BECK PLATE GLASS CO.

(Supreme Court of New York, Appellate Term, 1907. 54 Misc. Rep. 537, 104 N. Y. Supp. 831.)

Action by Frances A. Cleary against the De Beck Plate Glass Company. From a judgment for plaintiff, defendant appeals.

GILDERSLEEVE, P. J. Plaintiff sued to recover on a check payable to the order of "Cash," signed * * * by A. M. De Beck, as president, of the defendant company. Upon the trial the plaintiff's attorney produced the check. It was admitted as evidence without objection. * * * It was also shown that the check had been presented to the bank upon which it was drawn on several occasions, and payment demanded and refused. The answer of defendant was a general denial. No evidence other than the production of the check was given by the plaintiff as to its ownership. This constituted prima facie evidence of the plaintiff's ownership. * * * How or in what manner the plaintiff became possessed of the check does not appear. * * * Payment of the check by the defendant under the circumstances disclosed by the testimony here is ample protection to it.

Judgment affirmed.

SECTION 9.—PROVISIONS NOT AFFECTING NEGOTIABILITY

The Negotiable Instruments Law contains a few provisions which expressly permit the incorporation of certain kinds of clauses in the instrument without destroying its negotiability. The act does expressly provide that omissions of certain clauses shall not affect negotiability. The clauses which may be inserted without affecting negotiability relate to the rights of the holder with respect to the collection of the debt. These rights are alike in that they are acquired by contract, the evidence of which appears on the instrument. They are unlike in that two of them confer upon the holder rights with respect to the manner of obtaining payment of the debt which, in the absence of said contract would not have been conferred upon him by the law. The remaining two special rights conferred upon the holder arise from an express waiver by the obligor on the instrument of rights which, under the law, he has already possessed.

Section 5, subsection 1. The negotiable character of an instru-

ment otherwise negotiable is not affected by a provision which authorizes the sale of collateral securities in case the instrument be not paid at maturity.

VALLEY NAT. BANK OF CHAMBERSBURG v. CROWELL.

(Supreme Court of Pennsylvania, 1892. 148 Pa. 284, 23 Atl. 1068, 33 Am. St. Rep. 824.)

PER CURIAM. The only question in this case was whether the note in controversy was negotiable. It is in the usual form of negotiable paper, but it is contended that its negotiability is destroyed by reason of the following provision contained therein: "Having deposited herewith a like amount of Crowell Company mortgage bonds as collateral security, which we authorize the holder of this note, upon the non-performance of this promise at maturity, to sell either at broker's board, or at a public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply the proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary charges, holding us, as makers and indorsers, responsible for any deficiency."

We find nothing in this to destroy the negotiability of the note. The mere giving of collateral security with a promissory note does not destroy its negotiability. In the case at hand the amount of the note is not uncertain, nor is there any question about the time of payment. And the payment is not made dependent upon any condition whatever. The agreement, that if the collateral proves insufficient for the payment of the note, and all necessary expenses and charges, the makers will be responsible for any deficiency, neither increases nor decreases the responsibility of the makers. It merely requires them to do what the law would compel them to do without such an agreement.

Section 5, subsection 4. The negotiable character of an instrument otherwise negotiable is not affected by a provision which gives the holder an election to require something to be done in lieu of payment of money.

PRATT v. HIGGINSON et al.

(Supreme Judicial Court of Massachusetts, 1918. 230 Mass. 256, 119 N. E. 661, 1 A. L. R. 714.)

BRALEY, J. The plaintiff, the owner of a 4 per cent. coupon bond of the United States of the par value of $1,000 payable to bearer, and of a 4 per cent. convertible gold bond of the American Telegraph & Telephone Company of the par value of $1,000 payable to the Old Colony Trust Company, trustee, or to bearer, deposited the bonds in a safe deposit box from which they were purloined by one Bassett, who passed them over to one Small for the purpose of having them sold. The bonds were delivered by Small to the defendants, a firm of bankers and brokers, by whom they were sold in the ordinary course of business, and after deducting the customary commission, and the stamp tax, remitted the balance to Small, who after taking out his

compensation paid the remainder to Bassett. The plaintiff upon discovery notified the defendants of the theft, and then brought this action to recover the value of the bonds. * * *

The question for decision therefore is whether the defendants who received and sold the bonds and accounted for the proceeds to the apparent owner, without notice of any infirmity in the title, or of any circumstances which should have put them upon inquiry, can be held responsible in damages by the true owner for conversion. The defendants undoubtedly exercised dominion over the bonds by converting them into money. If the property had consisted of chattels or non-negotiable documents of which certificates of stock are an example, the plaintiff's title would not have been divested by a sale even to a purchaser for value and in good faith. * * * But to this rule there is a well-recognized exception where the property consists of negotiable securities. * * * The provision shown by the word "convertible," that the holder at maturity will receive the face of the bond in money, or at his option an equivalent in stock of the corporation does not destroy negotiability. It is a negotiable instrument within the meaning of R. L. c. 73, § 22, subsec. 4, and section 18 [Negotiable Instruments Law, § 5, subsec. 4, and section 1], and possesses the essential attributes of commercial paper, for the conversion of which the defendants on the record cannot be charged. * * *

We are accordingly of opinion that judgment should be entered for the defendants. * * *

Section 5, subsection 3. The negotiable character of an instrument otherwise negotiable is not affected by a provision which waives the benefit of any law intended for the advantage or protection of the obligor.

This section preserves the negotiability of an instrument, even though it contains a clause in which the maker waives the rights which he may have under certain laws. There are many rights which are the subject of waiver. For example, statutes usually provide that a certain amount of property shall be exempt from sale on execution. One exemption law for the benefit of the individual himself as distinguished from his family, may be waived. Special defenses of a surety are also the subject of waiver. The right to due presentment and to receive notice of dishonor may be waived. There are any number of rights which conceivably may be the subject of waiver in negotiable instruments. This provision does not provide that all such waivers will be legal. It is deemed to be against public policy to permit a person to be bound by his agreement waiving certain kinds of rights which the law gives him. The waiver, whether enforceable or not, will not destroy negotiability.

Section 5, subsection 2. The negotiable character of an instrument otherwise negotiable is not affected by a provision which authorizes a confession of judgment if the instrument be not paid at maturity.

A word in explanation of the judgment note may be added. A judgment has the effect of determining finally that the defendant owes the plaintiff the sum of money specified in the judgment. The judgment also operates as a lien on the debtor's land, and as a lien on personal property as soon as the execution is placed in the hands of the sheriff for service.

The law requires that a person cannot be proceeded against unless he is notified by summons. Usually the summons must be personally served upon the defendant. If he cannot be found, the action will be ineffective. A creditor, therefore, although legally entitled, will not always be able to obtain a judgment. Even in a case where the debtor may be found and served with notice of the pending action, considerable time may elapse before the judgment is obtained. Usually the law provides that the defendant shall have from three to ten, twenty or thirty days before he is required to answer the plaintiff's declaration. After this comes the trial, and if the business of the court is heavy it may not be possible to have the case heard for weeks, months, and occasionally a trial may not be had for one or two years. The plaintiff, therefore, is required to wait for this long period before he obtains his judgment. Anything may happen in the meantime. The defendant may lose all of his property by speculation, concealment, or otherwise, so that when the judgment is obtained it will be worth nothing.

The foregoing was inserted for the purpose of emphasizing the importance of the confession of judgment clause in promissory notes. The effect of the clause is a waiver of the debtor's right to be personally served with summons and of the right to a trial. To illustrate: If A. holds a note signed by M. as maker, which contains a confession of judgment clause, instead of instituting a suit against M. in the ordinary way and waiting for a trial, A. will simply hand the note to some attorney who will as it were, admit in writing, on behalf of the maker, that the debt is due—notice that the clause may expressly empower any attorney to do this—and another attorney, in behalf of the holder, will take the note before some judge, even though such judge may not then be holding court, and the judge, thereupon, will enter judgment on the note. The entire process will require less than half an hour, whereas without such clause a judgment could not be obtained for weeks or months. Immediately following the entry of the judgment, property owned by the maker may be levied upon and sold to satisfy the judgment, or his wages or bank account or other debts may be garnished. It is still possible for the judgment creditor to have the judgment vacated upon his filing an affidavit showing a defense. The trial will then proceed as in the ordinary case. But in the meantime the judgment will still constitute a lien on the defendant's property.

The provision of the Negotiable Instruments Law merely provides that if such a clause be inserted in the note that such clause

does not render the instrument non-negotiable. That is, the privilege conferred upon the holder of converting a negotiable instrument into a judgment does not destroy negotiability.

This provision of the Negotiable Instruments Law does not declare that a confession of judgment clause shall be legal. A court is still left free to hold that because of the hardships upon the defendant such a clause is to be deemed against public policy and therefore unenforceable, and some states do so hold.

If the clause on an instrument bearing a fixed maturity authorizes confession of judgment at any time after date, it has been held that the instrument is non-negotiable because uncertain in the time of payment. The sections of the Negotiable Instruments Law do not absolutely require such holding; for, in effect, the instrument is one with a fixed maturity subject to acceleration at the option of the holder and could be held negotiable under Section 4(2) providing that "an instrument is payable at a determinate future time which is expressed to be payable on or before a fixed or determinable future time specified therein."

Section 6 (3). The validity and negotiable character of an instrument is not affected by the fact that it does not specify the place where it is drawn or the place where it is payable, or (4) bears a seal.

SECTION 10.—DESIGNATION OF PARTIES TO NEGOTIABLE INSTRUMENTS

There are three possible parties to a note: The maker; the payee; and the indorsers.

N. I. L., Section 184. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

On a bill of exchange there are four possible parties: The drawer; the drawee; the payee; and the indorsers.

N. I. L., Section 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

N. I. L., Section 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

N. I. L., Section 87. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

The drawee becomes an acceptor after acceptance. There may

be an acceptor who is not the drawee. Such an acceptor is called an "acceptor for honor". The practice of accepting for honor is rarely resorted to. The following sections of the act prescribe the circumstances under which a person will be deemed to be a party to a negotiable instrument. The nature and extent of the rights and liability of the various parties is the subject matter of succeeding chapters. We are interested here only in formal requirements. When will a person be regarded as a maker, drawer, payee, drawee, acceptor, or indorser of an instrument?

(a) OBLIGORS GENERALLY

Section 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Section 17, subsection 7. Where an instrument containing the words, "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Section 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

Section 20. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

Section 21. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

DANIEL v. BUTTNER et al.

(Supreme Court of Washington, 1905. 38 Wash. 556, 80 Pac. 811.)

HADLEY, J. This suit was brought to recover of the defendants, Buttner and Glidden, for an alleged personal liability upon a written instrument of which the following is a copy: "German American Investment Co. Inc. No. 409. $600.00. Seattle, Wash., Feb. 8, 1902. Received from Herman Daniel $600.00 (Six Hundred Dollars) which we promise to pay six (6) months after date with interest at the rate of eight (8) per cent. per annum. Wm. H. Buttner, President. H. M. Glidden, Secy." * * *

We have somewhat extensively discussed the question of liability arising out of the fraud, inasmuch as the transcript, statement of facts, and briefs are largely devoted to that subject. But, aside from that, we think the judgment of the court was right upon another ground which is urged by respondent. It will be observed by refer-

ence to the note that, while the signatures are each followed by words indicating a representative character, yet no principal is disclosed. The words "German American Investment Co., Inc.," at the top constitute no material part of the instrument. The original is before us, and it shows that the above words were merely lithographed upon a blank form of receipt which was used as a paper upon which to write the note. Appellant's name is followed by the following, "Secy." Assuming that the letters designate him in the representative character of secretary, yet they disclose no principal. What purports to be the seal of the German American Investment Company is impressed upon the paper, but by no reference is it made a part of the note itself. There are no apt words used in the note showing that the corporation is obligated. Therefore, although appellant's signature is followed by an abbreviated word indicating a representative capacity, yet, no obligated principal being discosed, he cannot escape personal liability under section 20 of our Negotiable Instruments Law. * * * The signatures to this instrument come squarely within the terms of the above section, and the signers are personally liable.

For all the foregoing reasons we think the judgment [for plaintiff] of the lower court was right, and it is affirmed.

JUMP v. SPARLING.

(Supreme Judicial Court of Massachusetts, 1914. 218 Mass. 324, 105 N. E. 878.)

Action by Edwin R. Jump, trustee in bankruptcy, of David F. Burns, against John H. Sparling. From an order of the appellate division of the municipal court of the City of Boston dismissing a report by the trial justice, plaintiff appeals.

RUGG, C. J. This is an action upon a promissory note of the tenor following:

"$596.20. Boston, Nov. 19th, 1908.

"On demand after date we promise to pay to the order of David F. Burns five hundred and ninety-six 20-100 dollars. Payable at State Street Trust Co., Boston, Mass.

"Value received with interest.

"J. H. Sparling, Treas. Stratton Engine Co.

"David F. Burns, Pres. Stratton Engine Co."

The plaintiff is the trustee in bankruptcy of the payee. Oral evidence was received to the effect that both Burns and the defendant signed the note in their respective capacities as officers of the Stratton Engine Company. * * *

Under the law previous to the enactment of the Negotiable Instruments Act, the defendant corporation would not have been held on this note. It would have been not the note of the corporation, but simply the individual note of the two individuals who signed. * * * A change in the law in this respect has been wrought by that act. [Court quotes section 20.]

These words plainly imply that if the person signing a promissory note adds to his signature words describing himself an agent or as occupying some representative position which at the same time discloses the name of the principal, he shall be exempted from personal

liability, while if he omits the name of the principal, although adding words of agency, he will be held liable personally and the words of agency will be treated simply as descriptio personæ. In this respect the common-law rule of this commonwealth whereby agents bind themselves by a form of signing a note such as the one at bar, even though acting with authority, * * * is abrogated. The agent now relieves himself from liability by a form of signature whereby he is described as agent of a disclosed principal. * * * Where a trustee executes a note in his trust capacity he is liable personally. Of course, if one signs as agent when he is not, he is liable as principal.

Although the law on this point in other jurisdictions before the passage of the negotiable instruments act may have differed from that of this commonwealth, the result here reached appears to be in harmony with the rule now generally prevailing under that act. * * *

The plaintiff as trustee in bankruptcy has no greater rights in this respect than the bankrupt himself had. * * *

Order dismissing report affirmed.

(b) PAYEE

Section 8, subsection 6. Where the instrument is payable to order the payee must be named or otherwise indicated with reasonable certainty.

Section 42. "Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

(c) DRAWEE

Section 1, subsection 5. Where the instrument is addressed to a drawee he must be named or otherwise indicated therein with reasonable certainty.

Section 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

Section 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such a person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

The practice of inserting the name of a referee in case of need is uncommon in this country.

Section 130. Where in a bill drawer and drawee are the same person, or where the drawer is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

(d) ACCEPTOR

The person upon whom a bill has been drawn, until acceptance, is called the drawee; after acceptance it is proper to refer to such party as the acceptor. We are interested here in noting the circumstances under which one's status will change from that of a drawee to that of an acceptor. The term "acceptance" is used to describe the act by which the drawee becomes bound to the holder to pay the amount called for by the bill. The acceptance is an operative fact which produces certain legal effects upon the relations of the acceptor and the drawer, of the acceptor and the holder, and of the holder and the drawer and indorsers. We are not here interested in the nature and scope of the various legal effects of an acceptance. We are concerned only with the question: what evidentiary facts are sufficient to constitute an acceptance. It should be apparent, that, while these matters relate to the form of the instrument the rules to be taken up do not prescribe requisites for negotiability. The instrument, when it leaves the hands of the party executing it either is or is not then negotiable. Nothing that may happen subsequently will change its status. The acceptance may occur prior or subsequent to the execution and delivery of the instrument. The group of facts constituting the acceptance operates merely to affect the legal relations of the various parties to the bill but does not determine or affect negotiability.

The following sections of the Negotiable Instruments Law are involved:

Section 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Section 191. "Acceptance" means an acceptance completed by delivery or notification.

Section 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused may treat the bill as dishonored.

Section 134. Where an acceptance is written on paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Section 135. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

Section 138. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is

dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Section 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

Section 136. The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

Section 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

Section 139. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Section 140. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

Section 141. An acceptance is qualified, which is

(1) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of the condition therein stated;

(2) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

(3) Local, that is to say, an acceptance to pay only at a particular place;

(4) Qualified as to time;

(5) The acceptance of some one or more of the drawees, but not of all.

Section 161. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for one party, there may be a further acceptance by a different person for the honor of another party.

Section 162. An acceptance for honor supra protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

Section 163. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Section 178. Where a bill is drawn in a set each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

COLCORD v. BANCO DE TAMAULIPAS.

(Supreme Court, Appellate Division, 1918. 181 App. Div. 295, 168 N. Y. Supp. 710.)

Action by Alan H. Colcord against the Banco de Tamaulipas. From an order overruling demurrers to the complaint, defendant appeals.

DOWLING, J. The facts upon which the two causes of action herein are based are set forth in the complaint as follows: The First State Bank & Trust Company (assignor of the claim in question to plaintiff) is a banking corporation organized under the laws of the state of Texas, and having its principal place of business at Laredo, Tex. It is hereinafter referred to as the State Bank. Defendant is a banking corporation organized under the laws of the Republic of Mexico, and having its principal place of business at Tampico in the state of Tamaulipas, Republic of Mexico. On February 28, 1914, C. Barreda, as municipal president of the city of Nuevo Laredo, a municipality in the Republic of Mexico, made a certain draft or bill of exchange in writing. This (as well as all the other writings hereinafter referred to) was in the Spanish language, and translated into English read:

"$5,000.00 (Mexican dollars).

"G. Laredo, Tamaulipas, Feb. 28, 1914.

"At three days' sight pay by this bill of exchange, in this city, to the order of the First State Bank of Laredo, Texas, the sum of five thousand Mexican dollars. Value which you will charge with or without notice to account of C. Barreda, Municipal President.

"To the Bank of Tamaulipas, Tampico, Tampas.

"[Indorsement:] [Seal.] Municipal Government Constitutional of Laredo, Tamaulipas.

"[Written:] G. Laredo Tampas, Feb. 28, 1914. C. Barreda.

"[50 cent Mexican stamp affixed.]"

Said draft was presented to the State Bank for purchase, which thereupon sent the following telegram to defendant:

"Laredo, Texas, March 3, 1914.

"Bank of Tamaulipas, Tampico, Tamps., Mex.:

"Please telegraph us immediately if you will pay a draft signed C. Barreda, Municipal President Nuevo Laredo, for five thousand Mexican dollars. First State Bank & Trust Co."

To this defendant replied as follows:

"Tampico, Mexico, March 5, 1915.

"First State Bank & Trust Co., Laredo, Texas:

"Draft C. Barreda, Municipal President Nuevo Laredo, for five thousand Mexican dollars is good. Banco de Tamaulipas."

On the same day defendant wrote the State Bank as follows:

"Tampico, Tam., Mex., March 5, 1915.

"First State Bank & Trust Co., Laredo, Texas—Dear Sirs: On this date and through the same method we have answered your telegram

relative to Dr. C. Barreda's draft for five thousand Mexican dollars, which we confirm as per inclosed transcript.

"Yours truly, Banco de Tamaulipas.
"P. Assemat, Mgr. J. J. Dias, Cashier."

The transcript inclosed was as follows:

"Transcript of the telegram which the Banco de Tamaulipas addresses to First State Bank & Trust Co., Laredo, Texas, on March 5, 1914. 'Draft C. Barreda, Mayor of New Laredo, for five thousand dollars is good.'"

The State Bank, relying upon the faith of the correspondence quoted, bought the draft in question, paying 5,000 Mexican dollars therefor, and after indorsing it, so as to make it payable to any bank, banker, or trust company, transmitted the draft, so indorsed, to defendant, and duly presented it and demanded payment. Thereafter defendant telegraphed to the State Bank:

"Tampico, March 19, 1914.

"We return remittance 9336 because it is not correct. We are writing. Banco de Tamaulipas."

The letter which followed was in these terms:

"Tampico, Tam., Mex., March 19, 1914.

"First State Bank & Trust Co., Laredo, Texas—Dear Sirs: We confirm our telegram of even date as per inclosed copy. Accordingly we return your remittance No. 9336 for its lacking of two signatures, to wit: Faustino Garza's as finance commissioner and the signature of Dr. Adolfo Salinas Puga as health commissioner of Nuevo Laredo. It also lacks the official seal of the municipal corporation. Once the above requisites having been fulfilled, we will have no objection to honoring the remittance herewith returned. We have charged you with $5.54 for telegram expenses. We are yours respectfully,

"Banco de Tamaulipas,
"P. Assemat, Manager. J. J. Diaz, Cashier."

Inclosed therewith was a copy of said telegram of March 19, 1914. The State Bank procured the signing of the draft by the two officials referred to in the latter, and also the affixing of the seal of the municipal corporation thereto, and in this condition it was returned to defendant and again duly presented for payment. The defendant retained the draft in its possession from March 24, 1914, to December 8, 1914, ignoring repeated demands to pay the same between March 29, 1914, and October 31, 1914, on which latter date it refused payment, and still refuses to pay the same. It is alleged that when said draft was accepted, and when it was presented for payment, the drawer thereof had deposited with the defendant funds sufficient to pay the same, and which had been so deposited for that purpose.

The first cause of action is based on the theory that defendant's telegram of March 5th constituted an acceptance of the draft in question and that defendant was therefore liable to pay the same. I do not believe that defendant's telegram of March 5th can be interpreted to be an acceptance of the draft in question, nor as a promise to accept the same. The State Bank telegraphed defendant an explicit question as to whether defendant would pay a certain described draft. Defendant did not reply to this question directly, nor does it appear that it was under any duty or obligation so to do. The State Bank did not say in its telegram that it was about to buy the draft upon the faith of

defendant's reply. Defendant replied only that the draft was good, which reasonably meant only that C. Barreda, as municipal president of Nuevo Laredo, then had on deposit with defendant at least the sum of five thousand Mexican dollars, but gave the State Bank no right to assume that defendant would hold the funds to meet the draft, or would itself accept or pay the draft. On the contrary, the very form of the reply, not answering directly the question as to whether defendant would pay the draft, was sufficient to put the State Bank on its guard, and cause it to either require an explicit answer from defendant as to whether it would accept and pay the draft, or to proceed further at its own risk. The defendant had no control over the State Bank's transactions with Barreda, and it was the business of the State Bank to protect itself in its dealings with him, and to make certain that the draft would be accepted by defendant before it parted with its money on the faith of the draft.

An acceptance is a contract, and there are no words used by defendant in the telegram which can be interpreted to mean that it agreed to accept the draft. In First National Bank of Atchison v. Commercial Bank, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281, an acceptance was sought to be based upon the following telegrams passing between the parties:

"Adrian, Mich., October 15, 1903.

"First National Bank, Atchison, Kan.:

"Is J. F. Donald's check on you $350 good? Commercial Savings Bank."

"Atchison, Kan., October 15, 1903.

"Commercial Savings Bank, Adrian, Mich.:

"J. F. Donald's check is good for sum named.

"First National Bank."

In that case Donald was a depositor in the Kansas bank and drew a check upon it for $350 to a payee who indorsed and delivered it to a third party, who in turn indorsed and delivered it to the Michigan bank. Donald stopped payment on the check before it was presented for payment, and the Michigan bank sued the Kansas bank for the face of the check and interest, claiming it had been accepted in writing, and that it had been purchased for value on the faith of such acceptance. The court held that the drawee of a check could not be held liable upon a claimed contract of acceptance, external to the bill, unless the language used clearly and unequivocally imported an absolute promise, and that the response that a check was "good for sum named" was not such a promise. * * *

So, also, in Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203, it was held that, while an affirmative answer by the bank to a general inquiry whether checks of a person named for a specified sum are good is information that such person has on deposit, subject to check, money to that amount, it does not constitute an acceptance or certification of, or otherwise create an obligation on the bank to pay, checks which the inquirer may then hold. The telegraphed query in that case was, "Are M. A. Walton's checks for $2,000 good?" to which the bank answered, "Yes, sir." In the course of its opinion the court said: "It is manifest there was no acceptance or certification of the checks in question in this case. The telegraphic correspondence between the bank and Kahn's agent amounted to no more than an assurance that

valid checks to the amount stated, drawn by Walton, or that might be drawn by him, were then good. No particular checks were mentioned in the inquiry, nor any intimation given that the inquirer had received, or was about to receive, such checks; nor had the bank any means of identifying the checks to which the inquiry related. Its telegram, therefore, did not commit the bank to the payment of any particular check. At most, it was information that Walton had, at its date, money on deposit to the amount stated, subject to check." * * *

In Myers v. Union National Bank, 27 Ill. App. 254, the query telegraphed to the defendant bank was, "Will drafts for $3,800 made by J. R. Snyder on you be paid, if presented Monday?" to which the reply was sent, "Drafts named are good now." The funds of the drawer having been paid out to meet other checks, it was sought to hold the defendant for the drafts in question as upon a virtual acceptance for certification. The defendant was held not to be liable, as it had not accepted the drafts. The court said: "An acceptance is a contract, and does not differ from other contracts in the essential requirement of a meeting of minds. A bank is not bound to accept by telegram the checks or drafts of its depositors, although in possession of funds to pay. Its duty in such cases is to accept a draft, or pay a check, only on presentment. One relying on a telegram as an acceptance should see to it that the language used will, at least, fairly bear the meaning." * * *

These cases support the general rule as laid down in Daniel on Negotiable Instruments (6th Ed.) vol. 1, p. 600: "There is no doubt that, in the absence of statutory interdiction, an acceptance may be upon a separate paper, as in a letter, for instance, as well as upon the bill itself. The drawee cannot be held liable upon a contract of acceptance external to the bill, unless the language used clearly and unequivocally imports an absolute promise to pay. Thus a written promise to accept an existing bill, or 'that it shall meet with due honor,' or that the drawee 'will accept or certainly pay it,' or any other equivalent language, has been held to amount to acceptance. But if the language be equivocal—if it be merely stated, 'Your bill shall have attention'—it is not sufficient."

The Negotiable Instruments Law of New York * * * provides that: "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value."

It follows as the result of the reasoning of the foregoing cases that the State Bank had no right to rely on defendant's telegram that the draft was good in purchasing it, but should have insisted on a direct answer to a question whether defendant would accept or pay the draft. Not having done so, and defendant not having said in its telegram that it would either accept or pay the draft, the latter is not liable. The case of Garrettson v. Bank (C. C.) 39 Fed. 163, 7 L. R. A. 428, is not controlling here, for in that case the question was, "Will you pay James Tate's check on you twenty-two thousand dollars? Answer," and the reply was, "James Tate is good. Send on your paper." In its opinion the court laid stress on the last words, "Send on your paper," as clearly implying that it was to be sent on for payment and not

merely for acceptance. No such words were used in the case at bar. The demurrer to the first cause of action should have been sustained.

The second cause of action * * * proceeds upon the theory that the telegram of March 5th was not an acceptance, but an agreement to accept, for the breach of which defendant is equally liable. For the reasons heretofore assigned, I do not believe the telegram in question was an agreement to accept, any more than it was an acceptance. In so far as plaintiff pleads upon the alleged telegram as an agreement to accept, I believe the complaint is demurrable. Plaintiff does not set forth any acts done by his assignor, liability assumed by it, or moneys paid out by it, after the receipt of the defendant's letter of March 19th, nor does he seek to predicate any liability thereupon. Had the State Bank paid out its moneys only after the receipt of that letter, a very different question would have been presented. * * * For all these reasons, the demurrer to the second cause of action should also have been sustained. * * *

The order appealed from will be reversed. * * * and the demurrers to the first and second causes of action sustained. * * *

PAGE, J. (dissenting). The sufficiency of the allegations of the first cause of action depends upon whether the exchange of telegrams of March 3d and 5th constitutes an acceptance of the draft, so that the defendant became primarily liable thereon. In my opinion it does. If the draft had been presented to the defendant, and some one duly authorized had written "Good" upon the face thereof and signed the name of the defendant, there could be no doubt but that this would be equivalent to an acceptance of a negotiable bill of exchange in favor of the holder for the amount specified therein. * * * The acceptance, to be binding in favor of a holder who has parted with value upon the faith thereof, does not have to be upon the instrument itself. The Negotiable Instruments Law provides: "Sec. 134. Acceptance by Separate Instrument. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value."

A telegram satisfies the requirements of the statute; it is a writing, and the method of its transmission, whether by mail or telegraph, is immaterial. * * * The telegram was understood to be an acceptance, and, relying thereon, plaintiff's assignor discounted it. Fairly construed, I do not believe that the telegram of the defendant merely meant that C. Barreda, as municipal president of Nuevo Laredo then had on deposit with defendant at least the sum of five thousand Mexican dollars. The inquiry of plaintiff's assignor was: "Please telegraph us immediately if you will pay a draft signed C. Barreda, Municipal President Nuevo Laredo, for five thousand Mexican dollars."

This was not an inquiry as to the validity of the draft or as to the sufficiency of the account of the depositor. It was an explicit request for an acceptance of a specified draft for a definite amount. The answer returned was such that, had it been placed on the draft, it would have constituted an acceptance. In my opinion it should be so construed. * * *

The opinion in the Circuit Court of Appeals in North Atchison Bank v. Garrettson, 51 Fed. 168, 2 C. C. A. 145, did not lay stress on the words "Send on your paper." That court said: "The question put to the bank, and to which an answer was requested, was not

whether Tate was good, but whether the bank would pay his check for a given sum." It cannot be supposed that the bank intended to return an ambiguous answer, for the purpose of misleading the party asking the question, and therefore, if the answer had been limited to the words, "Tate is good," there would have been ground for holding that the bank thereby intended an affirmative answer to the categorical question put to it; but all doubt is put at rest by the remaining words of the answer, "Send on your paper." * * *

Where, in the case at bar, the defendant replied that, "Draft C. Barreda, Municipal President Nuevo Laredo for five thousand Mexican dollars is good," the plaintiff's assignor was justified in believing that the defendant meant that if the plaintiff's assignor sent in the draft it would pay it, and where on the faith of that promise the plaintiff's assignor purchased the draft, the defendant became liable for the payment of the draft.

The second cause of action sufficiently states a promise of acceptance, not alone from the facts above mentioned, but also from the later occurrence. When the draft was presented to the defendant bank, it returned it, explaining that there were two signatures and the official seal of the municipality lacking. The letter further said: "Once the above requisites having been fulfilled, we will have no objection to honoring the remittance herewith returned."

This letter is evidence that the defendant considered itself bound by the telegram of March 5th. The plaintiff's assignor secured the two signatures and the municipal seal and returned the same. It is urged that there is no consideration for this promise, as the plaintiff's assignor had already paid the money for the draft. In my opinion the performance of the condition imposed was a sufficient consideration for the agreement to accept.

The fact that a draft is discounted before acceptance does not render the acceptance without consideration. "It is the settled law of this state that the right of the holder of the draft against the acceptor is not affected by the mere fact that he discounted the draft before acceptance." Iselin v. Chemical Bank, 16 Misc. Rep. 437, 438, 40 N. Y. Supp. 388, 389. * * *

In my opinion, the order overruling the demurrers to both causes of action should be affirmed.

ST. LOUIS & SOUTHWESTERN RY. CO. v. JAMES.

(Supreme Court of Arkansas, 1906. 78 Ark. 490, 95 S. W. 804, 8 Ann. Cas. 611.)

Action by J. B. James against the St. Louis & Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed in part, and reversed in part.

RIDDICK, J. This is an action by J. B. James against the St. Louis & Southwestern Railway Company to recover damages on account of the failure of the company to repair a building used as a restaurant or railway eating house, and which he had leased from the defendant, and also for failure to pay board for certain of its employés. * * * The company also agreed with him that it would pay all board orders given by its employés when, to quote the language of the contract, "it appears that deduction can be made out of the wages due them."

On the trial before a jury the jury returned a verdict in favor of the plaintiff for $35 on board orders, and for $147 for other damages.

As to the $147 for damages for the failure of the company to repair building, we think the evidence is sufficient to support the verdict. * * *

As to the orders given by employés of the company on it in payment for meals or board due by them to the plaintiff, the testimony shows that it was the custom of the company, when the company was due the employés an amount equal to or greater than the orders, to charge the order to the employé and account to the plaintiff for the amount of the order. If nothing was due the employé, the orders were returned to the plaintiff unless the employé was still in the service of the company, in which event the orders were sometimes retained with the view of collecting them from future wages of the employé. It does not appear that any objection to such retention of the orders was made by James, and as it was done in his interest he probably did not object to it. But, in instructing the jury on this point, the court told them that the company was liable for the amount of such orders if it kept them, "unaccounted for, an unreasonable length of time without notifying the plaintiff of any reason why they could not be paid." Now counsel for plaintiff contends that these orders, being drawn for a specified sum, were bills of exchange within the meaning of our statute, * * * and that a failure to return the same made the company liable under the following section, to wit: "Every person upon whom a bill of exchange is drawn, and to whom the same may be delivered for acceptance, who shall destroy such bill, or refuse within twenty-four hours after such delivery, or within such times as the holder may allow, to return the bill, accepted or nonaccepted, to the holder, shall be deemed to have accepted the same." * * *

It will be noticed that to make the company liable under this section it must be shown that the orders were destroyed, or that there was a refusal to return the same. A mere neglect or failure to return does not constitute an acceptance under this statute. Statutes similar to this are found in many of the states, and it has been held by courts in several of those states that the refusal mentioned in the statute "refers to something of a tortious character, implying an unauthorized conversion of the bill by the drawee." * * * Matteson v. Moulton, 79 N. Y. 627. * * * As it is not shown that any demand for the return of these orders had ever been made on the company, or that it had ever refused to return the orders, we do not think this statute has any application in this case Leaving out the statute, it cannot be said that a failure to return a bill of exchange constitutes an acceptance in this state, for our statute expressly requires that an acceptance, to bind the acceptor, shall be in writing. * * * In the absence of any demand or request for a return, it is clear that a mere failure to return does not in this state bind the drawee as acceptor. * * *

The evidence showed that it was the custom of the company to return the orders which it did not intend to pay, and the failure of the company to return an order was no doubt a circumstance tending more or less to show that the employé by whom it was drawn had money in the hands of the company with which to pay it, and that the company intended to pay it. But this was not conclusive, and the company had the right to show that the failure to return was due to other reasons. The failure to return may have been due to oversight, and the plain-

tiff may have suffered no injury from such failure. We are therefore of the opinion that the court erred in instructing the jury over the objection of defendant that as a matter of law the company was liable if it kept the orders an unreasonable time without notifying plaintiff of its reasons for not paying them.

The result is that in our opinion the judgment should be affirmed as to the $147 allowed for repairs, but reversed as to $35 allowed for board, and remanded for a new trial on that cause of action.

(e) INDORSER

Section 17, subsection 6. Where a signature is so placed upon an instrument that it is not clear in what capacity the person making the same intended to sign he is deemed to be an indorser.

Section 31. An indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

Section 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

MANGOLD & GLANDT BANK v. UTTERBACK.

(Supreme Court of Oklahoma, 1916. 54 Okl. 655, 160 Pac. 713, L. R. A. 1917B, 364.)

MATHEWS, C. In October, 1910, the defendant purchased from the Denver-Laramie Realty Company certain shares of stock in said company and executed his note to said company in payment for same. On August 14, 1911, the note was renewed, and afterwards transferred to the plaintiff in error. A copy of the note with indorsements is as follows:

"$1,000.00. Denver, Colorado, August 14, 1911.

"December 14, 1911, after date, I promise to pay to the order of Denver-Laramie Realty Company one thousand & no/100 Dollars, for value received. Payable at First State Bank of Binger, Okl., with interest at seven per cent., from maturity.

"[Signed] W. T. Utterback."

Indorsed on back:

"Payment Guaranteed. Protest waived.

"The Denver-Laramie Realty Co.,
"By A. J. Spengel, Treasurer.
"Northwestern Land & Iron Co.,
"By A. J. Spengel, Treasurer."

On October 10, 1912, suit was instituted on said note. * * * The defendant answered by general denial, admitted the execution of the note, and alleged that the note was given for certain shares of stock in the Denver-Laramie Realty Company, but claimed that he was induced to sign the same through certain false and fraudulent representations upon the part of said company. Trial was had to a jury,

verdict was returned for defendant, and plaintiff prosecutes this appeal. * * *

The defendant advances the following argument against the foregoing contention of plaintiff: "While the note is negotiable in form, the indorsement is in no sense a commercial indorsement. It is a guaranty of payment pure and simple; that is, the words, 'Payment guaranteed. Protest waived,' followed by the signatures of the two companies, mean that the companies guarantee the payment of the note and waive the protest thereof. The indorsement, amounting to a guaranty of payment, gives the plaintiff in error no standing as a bona fide holder of the note, but it holds the same subject to all defenses which would be available as against the original payee."

If plaintiff's contention is correct that the said indorsement upon the note was a commercial indorsement, there being no allegations in the answer that defendant had notice of the alleged infirmity of the note, then plaintiff was entitled to judgment upon the pleadings.

In arriving at a decision on this point we are confronted with a chaotic conflict of opinions thereon, and, as far as our investigation has led us, we find that the courts of but few, if any, of the states have been consistent in declaring on this proposition, and our own court is in conflict thereon. * * * An instructive note to the case of Hendrix v. Bauhard, Ann. Cas. 1913D, 688, after giving a list of the states, including both Oklahoma and Kansas, which hold that a signed guaranty on the back of a note makes the guarantor liable as an indorser, states that the great weight of authority supports that view. In the case last cited there was written on the back of the note, "For value received we hereby warrant the makers of this note financially good on execution," which was followed by the signatures of the payees, and it was there held, if the note was negotiated before maturity to a bona fide purchaser for value, he would be protected from any defense the maker might have against the payees.

The leading case holding to this view is a North Dakota case, Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293, 36 L. R. A. 232, 57 Am. St. Rep. 556, and there the subject is also treated with an extended note which declares that the numerical weight of authorities support the decision in Dunham v. Peterson. The indorsement on the note in the Dunham Case was as follows: "For value received, I hereby guarantee the within note, waiving notice of protest and demand." Beneath this guaranty the payee signed his name. The court held therein that, when the payee of a negotiable promissory note transfers it by indorsing thereon a guaranty of payment, the purchaser is an indorsee within the rule protecting an innocent purchaser of such paper for value before maturity against defenses good between the original parties. * * *

The case of Pattillo v. Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616, is an exhaustive and well-considered one on the point under discussion, and, after reviewing the authorities thereon at great length, concludes that a guaranty written on the back of a negotiable promissory note followed by the signature of the payee ordinarily amounts to a commercial indorsement. * * * We are not unmindful of the fact that the case of Ireland v. Floyd, 42 Okl. 609, 142 Pac. 401, L. R. A. 1915C, 661, is supported by a respectable line of authorities. * * * But we think the better reasoning and greater weight of authority is with the case of McNary et al. v. Farmers' Nat. Bank, 33

Okl. 1, 124 Pac. 286, 41 L. R. A. (N. S.) 1009, Ann. Cas. 1914B, 248. But, even if the case of Ireland v. Floyd, supra, was not opposed by the case of McNary v. Farmers' Nat. Bank, supra, and by the weight of authority from other states, we are inclined to the view that it is in conflict with the Negotiable Instruments Law of this state, adopted in 1909.

Section 17 * * * so far as applicable, is as follows: "Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply: * * * Sixth. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser." * * *

Section 63: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

It will be observed from section 63 that the tendency of the law, when the status of a party who places his name upon the back of a negotiable instrument is under consideration, is to resolve all doubtful cases towards holding the same to be a commercial indorsement in due course. This rule is founded upon commercial necessity. The unshackeled circulation of negotiable notes is a matter of great importance. The different forms of commercial instruments take the place of money. To require each assignee, before accepting them, to inquire into and investigate every circumstance bearing upon the original execution and to take cognizance of all the equities between the original parties, would utterly destroy their commercial value and seriously impede business transactions.

A simple indorsement by the payee of his name upon a note serves the double purpose both of transferring the title to the holder and of charging the payee with the obligation to pay it in event the maker upon presentation declines to honor it. But before the liability can be fixed against the indorser there must be; First, a demand made upon the maker of the note for payment; and, second, in case the same is not paid, notice must be given the indorser. The rule seems to be that a general guaranty is in law a general indorsement of the instrument, with a waiver of the condition precedent of a notice of nonpayment by the drawers. * * *

There is no contention but that in the case at bar the defendant is at least a guarantor. If he be a guarantor only, then he is not entitled to the legal rights of an indorser to be served with notice of nonpayment. Yet we find written upon the back of the instrument in controversy the very significant words "Protest waived." Why waive a right that the party did not have? It must be presumed that the parties did not intend to do a useless and unnecessary act when these words were written upon the back of the instrument, and the reasonable construction is that by the entire indorsement he became an indorser with the enlarged liability of being legally held to payment without notice of the dishonor of the note. Further, no one can fairly say that the intention of defendant not to be bound is clearly indicated from the words written upon the back of the instrument in controversy; in fact, the indication points the other way.

It will be admitted that, where the payee in a note makes a written assignment of the same on the back of the note, followed by his sig-

nature, he can with much better logic argue that such an act should be construed as an assignment only, and not a commercial indorsement, than can one who makes a guaranty in a similar way, yet in the recent case of Farnsworth v. Burdick, 94 Kan. 749, 147 Pac. 863, under the same Negotiable Instruments Law as our own, the Kansas court held: "Under the Negotiable Instruments Law * * * a writing in these words, 'I hereby assign this note over to E. H. Farnsworth, * * *' signed by the payee, on the back of a negotiable promissory note, is an indorsement of the note."

Therefore holding, as we do, that the defendant was an indorser of the note in controversy, * * * and the plaintiff having alleged that the note was indorsed to it before maturity, for a valuable consideration, in due course of business, and a copy of said note having been attached to its petition showing the indorsement, and the indorsement having not been denied under oath, it follows that plaintiff was entitled to judgment on the pleadings. * * *

CLARK v. THOMPSON et al.

(Supreme Court of Alabama, 1915. 194 Ala. 504, 69 South. 925.)

SOMERVILLE, J. Complainant files her bill for the cancellation of a certain mortgage executed by herself and her husband on her realty to secure their joint negotiable note. * * * The bill of complaint was dismissed on the theory that the respondent was a purchaser for value in due course of the note and mortgage, without notice of the infirmity charged.

Respondent bought the note and mortgage from the payee, W. A. Thompson; the note being payable to Thompson, or order. In order to free the note of the defense available to complainant against the payee, it was necessary for respondent to acquire it in due course by indorsement, as prescribed by the Negotiable Instruments Law. * * * "The indorsement must be written on the instrument itself or upon a paper attached thereto." * * * This is but a statutory affirmation of the rule of the old law merchant, which allowed indorsements to be made upon an "allonge"; that is, upon a slip of paper tacked or pasted on to the instrument so as to become a part of it. * * * But the use of the allonge was allowable only when the back of the instrument itself was so covered with previous indorsements that convenience or necessity required additional space for further indorsements. * * * Section [31 of the Act] sanctions the use of the allonge, but certainly it was not intended to establish the loose and undesirable practice of making regular indorsements of commercial paper by a writing on the back of any other paper or document to which it might be temporarily attached, as by pinning, and, more especially, when there is ample space for indorsement on the back of the instrument itself.

In a case like this, arising under the law merchant, the Supreme Court of Nebraska has reached a like conclusion. Said the court: "Webster defines the word 'allonge' to mean 'a paper attached to a bill of exchange for receiving indorsements too numerous to be written on the bill itself.' In the case at bar the mortgage and note were not attached or fastened together; and, had they been, as there was plenty of room remaining blank on the back of the note for indorse-

ment thereon, it would be a forced and inadmissible construction to treat the mortgage as an allonge of the note." Doll v. Hollenback, 19 Neb. 639, 643, 28 N. W. 286, 288.

An exhaustive discussion of the subject, with citation of many authorities, will be found in the case of Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080, 79 Am. St. Rep. 515, cited in 1 Words and Phrases, First Series, 343. It was there held that a written transfer of a note, made on a separate paper to which it was pinned, there being room on the back of the note itself for the transfer, was an assignment merely, and not a commercial indorsement.

In the instant case, whether the note was pinned to the mortgage or not, we are constrained to treat its transfer, in the manner shown, as a common-law assignment merely, and to hold that respondent was not a holder in due course. It must be noted, however, that the evidence does not show that the note was pinned to the mortgage when they were transferred to respondent, but only when they were delivered to the payee nearly a year before; and we could not presume that such a superficial fastening, evidently for temporary convenience only, still existed at the date of the transfer.

It results that the decree of the chancery court must be reversed, and a decree will be here rendered granting to complainant the special relief prayed for in the bill of complaint.

SECTION 11.—DATE OF THE INSTRUMENT

Section 11. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

Section 12. The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Section 17, subsection 3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

Section 6, subsection 1. The validity and negotiable character of an instrument are not affected by the fact that it is not dated.

Section 13. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a holder in due course; but as to him, the date so inserted is to be regarded as the true date.

SECTION 12.—INTERPRETATION OF AMBIGUOUS INSTRUMENTS

Section 17. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

(1) Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

(4) Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

(2) Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

(5) Where the instrument is so ambiguous that there is doubt whether it is a bill or note the holder may treat it as either at his election.

SECTION 13.—CONSIDERATION

A negotiable instrument evidences a particular kind of contract. All contracts, not governed by the common-law rules applicable to sealed instruments, must be supported by consideration. A negotiable instrument is no exception to the rule. Only those operative facts which constitute consideration in the law of simple contracts will constitute consideration for a negotiable contract. There are some features of the rule requiring consideration for negotiable instruments which are different from the corresponding rule in simple contracts. As a general rule, in a suit upon a simple contract the party alleging its existence must affirmatively prove that the agreement was supported by consideration. In a suit upon a negotiable contract, the party relying upon it as a ground of action does not sustain the burden of proving consideration. With respect to this feature the Negotiable Instruments Law provides:

Section 24. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Section 28. Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

SHAFFER v. BOND.

(Court of Appeals of Maryland, 1917. 129 Md. 648, 99 Atl. 978.)

BOYD, C. J. George M. Bond, the appellee, sued E. Whyland Shaffer, the appellant, on the common counts and a special one on a promissory note purporting to be dated January 2, 1915, payable to the order of the appellee on demand for $4,250, with interest, at the Citizens' National Bank of Laurel, Md. The defendant pleaded the general issue, pleas of never promised as alleged and never indebted as alleged, and, issue having been joined, a trial was had, resulting in a verdict in favor of the plaintiff for $4,578.30, being the amount of the note with interest. From a judgment entered on that verdict this appeal was taken. * * *

The defendant's first prayer as offered was as follows: "The defendant prays the court to instruct the jury that, if the jury find from the evidence in the case that there was no consideration moving from the plaintiff to the defendant for the note, which is the cause of the action in this case, then their verdict must be for the defendant."

The court modified that by adding to it, "but the burden of the proof is on the defendant to show want of consideration," and granted that prayer as modified, to which modification an exception was taken. The defendant's fifth prayer, which was rejected, asked the court "to instruct the jury that, under the pleadings and evidence in this case, the burden of the proof is upon the plaintiff to show that he gave value for the note the cause of action herein sued on."

Those rulings present the important question in the case, namely, upon which side was the burden in reference to the alleged want of consideration, under the circumstances. The Negotiable Instruments Act was passed in this state in 1898, being chapter 119 of the acts of assembly of that year, and now included in article 13 of the Annotated Code. Section 43 of that article provides that: "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." And section 47 is: "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise." * * *

The appellant cited McCosker v. Banks, 84 Md. 292, 35 Atl. 935, to show that, where there is fraud or illegality in the inception of the note, the burden of proof is upon the holder to show that he is a bona fide holder for value. * * * After stating the law of this state as to the legal presumption that the plaintiffs became holders for value before maturity, etc., the court said: "But if the defendant shows by such proof as may be properly left to the jury to consider, that the instrument was procured by fraud, or was fraudulent in its inception, or that the consideration was illegal, or that it had been lost or stolen before it came to the possession of the holder, the burden of proof is changed, and it is then incumbent upon the plaintiff to show that he acquired the note bona fide for value, in the usual course of business, before maturity," etc. * * *

The reason for the rule, as quoted above, does not apply to an original party to a suit; the onus put on the plaintiff in such case is only

to show that he is a bona fide holder for value, etc., not that there was no fraud, that the consideration was illegal in the inception of the note, etc. It is only when fraud is shown on the part of the payee or some one other than himself that the indorsee is called upon to prove that he was not aware of it in that class of case, and then by reason of the presumption which is raised as stated above. * * *

In 8 C. J. § 1299, p. 994, it is said: "It is a general rule, supported by a multitude of decisions, that the burden of proof is on defendant to establish a defense of want, failure, or illegality of considerations. These decisions, while for the most part apparently without qualification on their face, are subject to explanation, at least according to the rules laid down in many jurisdictions, by adding that what is meant is that defendant must produce some evidence to overcome the presumption of consideration arising from the production of the instrument, in order to shift to plaintiff the necessity for proving facts relating to the consideration. In other words, the rule, at least in most of the states, is that, although a bill or a note imports in itself a consideration, yet when the evidence has been introduced to rebut the presumption of consideration, the burden shifts to plaintiff to show by a preponderance of the evidence that there was a consideration; and this is so even where the instrument on its face recites a consideration as by the use of the words 'value received,' but it has been held that the rule does not apply to a defense of a failure of consideration." * * *

It must be admitted that 8 C. J. 994, 3 R. C. L. 928, and 4 Am. & Eng. Ency. of Law, 200, cited above, seem to adopt the rule contended for by the appellant, but it will be observed that 8 C. J. begins by saying that: "It is the general rule, supported by a multitude of decisions, that the burden is on defendant to establish a defense of want, failure, or illegality of consideration." And there are cited in the notes what may very properly be called "a multitude of decisions." The author concludes that, "at least according to the rules laid down in many jurisdictions," it is only meant to say that the defendant is called upon to produce some evidence to overcome the presumption of consideration arising from the production of the instrument, and that when that is done the burden shifts to the plaintiff. While that is undoubtedly correct as to a number of courts, it is by no means so with all of those cited in the notes. * * *

In 3 R. C. L. 928, it is said: "Nevertheless in a number of jurisdictions it is asserted to be the rule that the defense of a want of consideration for a bill or note is an affirmative defense, and that, as a bill or note imports on its face a valuable consideration, the burden of establishing that there was no consideration falls upon the party pleading that defense, or at any rate when the paper, in accordance with commercial usage, specifies a consideration."

It is also true that in a number of the states where there are courts of the highest standing the rule contended for by the appellant has been adopted. * * * McKenzie v. Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748, and Preas v. Vollintine, 53 Wash. 137, 101 Pac. 706, are very emphatic in favor of the appellee's contention, and criticize some of the cases holding the opposite view. The cases in the note in 18 Ann. Cas. 204, cited as sustaining the appellee's position, are from the reports of Alabama, Arkansas, California, District of Columbia, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Mis-

souri, New York, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, and Washington. * * *

Apparently the majority of courts in this country have adopted the view contended for by the appellee, but it would prolong this opinion (already longer than we intended) to an unreasonable extent if we attempt to call attention to all of the cases cited which, adopting the view of the one side or the other, can be distinguished or shown not to be applicable to the precise questions before us. Some of those we have cited may be subject to that criticism.

So far as the defense of failure of consideration is concerned, * * * it is an affirmative defense, and must be proven by the defendant and sustained by him throughout, if he relies on it. * * *

If, then, the defendant in a suit on a negotiable promissory note, which is admitted to bear his signature, attempts to escape payment of it by alleging fraud, or what is equivalent to fraud without the use of the term, in order to show want of consideration for the note, he ought not to complain if he has the burden of establishing it by a preponderance of proof, such burden continuing to the end of the case. * * *

We are of the opinion that the better rule is to hold that the burden is generally on the maker to show a want of consideration to a promissory note in a suit between him and the payee. There may be circumstances which justify an exception to such a general rule. Sometimes the facts may be so peculiarly within the control of the plaintiff as to place the burden on him, or there may be some other reason for making an exception, but it seems to us that it is the wiser rule to adopt, in order to make negotiable instruments effective and of the value they are supposed to be. When the maker signs a negotiable instrument, it is presumed to be for value, and, without meaning that that is necessary, this one states on its face it is for "value received." In business transactions notes are often taken in order to settle all questions about the amount of liability, etc., and to put them in such shape that they will speak for themselves, in case of the death of debtor or creditor, and yet, if the burden is put upon the payee to sustain the consideration, simply because the maker denies it, they are in fact of little more use between the parties than an open account would be. The creditor may destroy his checks or other evidence, if he has any, tending to prove consideration for a note which has been in existence for some time, or has been renewed from time to time, and if he has done so, then the fact that a negotiable promissory note imports consideration and the prima facie presumption that there was value are of little benefit, if the debtor can by offering some evidence that there was no consideration cast the burden on the plaintiff. It is, of course, wise not to make a note or a bill of exchange conclusive of a valid consideration, but the burden should at least be on the one setting up a want of consideration, and that burden should not be shifted, but should rest on him to the end of the case. * * *

Judgment affirmed. * * *

In applying the doctrine of consideration to negotiable instruments, there are some special situations which may be noted briefly. As between maker and payee of a negotiable note no

difficulty is presented. The payee may recover on the instrument unless the maker affirmatively proves the absence of consideration. Suppose the payee makes a gift of the instrument to A., may A. recover? Certainly not, as against the payee indorser because the payee can show no consideration between them. But may A., the donee, recover from the maker? If this were a case of an attempted assignment by way of gift of a chose in action not evidenced by a specialty, the answer probably would be no, because such a right—not being capable of actual or constructive delivery, gifts by will excepted—is not the subject of a gift inter vivos. But where we are dealing with a special contract, such as a negotiable instrument, the written evidence of the contract assimilates some of the attributes of tangible property, to the extent that some of the principles of the law of tangible property become applicable. Therefore, a negotiable instrument which evidences a contract between two persons which is supported by consideration becomes capable of actual delivery and, therefore, the subject of a valid gift. This result is stated in the following language of the act:

Section 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time.

Section 25. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

Section 27. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

It will be noticed that section 26 employs the word "value" instead of "consideration" and that sections 25 and 27 define "value" to be (1) any operative facts which constitute consideration; (2) any operative facts showing a transfer for a pre-existing debt or which give rise to a lien on the instrument transferred, whether such facts constitute consideration or not. The legal effect of sections 25 and 27, in all respects is not clear. The difficulty arises from the fact that these sections must be applied to two general situations which are different: (1) We have the situation where the holder, whether payee or some subsequent indorsee, is attempting to recover from some prior party irrespective of his being a holder in due course. (2) We have the situation where a holder is attempting to recover from a prior party who had a defense good as against the party with whom he dealt, and the holder is seeking to recover free from this defense. That is, the holder is asserting his right to recover as a holder in due course. We are not here concerned with the circumstances under which a holder of a negotiable instrument will be a holder in due course and as to the nature of his rights against prior parties, except to

note this fact: A holder, to be a holder in due course, must not only be a taker before maturity in good faith and without knowledge of defenses, but he must have given **value**. When the word "value" is used in this latter sense, it is not synonymous with the word "consideration." The rule requiring **consideration** as a condition precedent to the enforceability of mutual promises, is wholly distinct from the independent rule requiring the giving of **value** as a condition precedent to the right to hold prior parties to a negotiable instrument free from defenses which such parties had as against holders not in due course.

The rules requiring consideration in contracts and the rule requiring the giving of value in order to constitute one a holder in due course have been kept distinct unless section 25 has made them identical. It may be said that any group of facts which constitute consideration will also constitute the giving of value, but under common law rules one may give value without parting with consideration. If section 25 has made these two rules identical then if A. signs a note of M. subsequent to its execution and delivery to P., he will be bound to P., even though there was no consideration between P. and A. at the time he signed. This would make inapplicable the rule that past consideration is not sufficient to support a promise. It is possible, but not likely, that the courts will so interpret section 25. We have seen, therefore, that a holder may recover from his immediate transferor only when there is consideration between them. If the holder did not part with consideration, he may still recover from any prior party who, for a consideration, was bound to any prior party.

The application of the doctrine of consideration as between the parties to a bill of exchange presents some special situations which may be noted briefly. Suppose M. draws his check on the D. bank, payable to P. or order, and delivers the same to P., by way of gift, what relations are created? If the bank dishonors the instrument, P. cannot recover from M., because there is no consideration between them. Even where D. has by contract with M. bound itself to honor M.'s checks, and wrongfully dishonors the instrument, P. still is unable to recover from M. If the drawee bank D. does pay the check, D. may charge M.'s account. The act of payment by the drawee, D., was simply in performance of its contract duty to M. The same result would follow if, instead of paying the amount of the check to P., the drawee, D., certified the check; that is, promised to pay it upon demand of the holder. There need be no consideration for this promise between D. and P., because D.'s duty does not arise from the apparently gratuitous act of promising to pay P., but arises from a contract between D. and M. If there were no contract between M. and D., and D. certified the check, P., being a donee, D. could successfully set up absence of consideration as a defense, for here there is no consideration between any of the parties to the instrument. In other words, the

law requires that there be consideration between at least two of the parties but it is not necessary that there be consideration between all parties.

One very common transaction which concerns negotiable instruments involves the assumption by one party of the duty to discharge it to the holder, where such party is but lending his credit to the principal debtor thereon. Such a person is called, generally, a surety. A surety on a negotiable instrument is usually called an accommodation party. All accommodation parties are sureties but not all sureties are accommodation parties. Obviously, there may be sureties on contracts other than on negotiable instruments. The principles which were adverted to in chapter XI of Contracts, dealing with the rights and liabilities of sureties generally, are likewise applicable to accommodation parties. The status of an accommodation party is not determined by the position of his name on the instrument. He may be a maker, drawer, acceptor, or an indorser. His status is determined by his relation to some other party to the instrument—the principal debtor. Similarly, the principal debtor may occupy any position on the instrument. The section of the Negotiable Instruments Law following, in the main, asserts a proposition which is self-evident from the cases in chapter II of Contracts dealing with the matter of consideration.

Section 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

There is one special situation involving the liability of accommodation parties which has given rise to a conflict of authority which has not been definitely settled by the above section. If the instrument is issued by the accommodated party, for the first time after maturity, may the party who then gives value hold the accommodation party; i. e., the surety? It has been held that the accommodation party is liable in this case.[5] This holding is contrary to the weight of authority before the act, and it has been argued that this decision is not justified by the statute, but that, if it is, the act should be amended, so as to conform the weight of authority before the act.[6]

SECTION 14.—DELIVERY

An instrument may be in form negotiable, it may be executed upon consideration, and it may even be in the hands of the payee, but these facts may occur under circumstances where it will fail

[5] Marling v. Jones, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996 (1909).
[6] Brannan, Some Necessary Amendments of the Negotiable Instruments Law, 26 Harvard Law Review, 494.

to be an enforceable contract because of the absence of one further requisite—i. e., delivery. It is to be noted that the written evidence of a negotiable contract is, in a fairly real sense, regarded as the thing of value in itself, much the same as a gold or silver certificate or national bank note is regarded as a thing of value. It is, in part, for this reason that the law requires, as a condition precedent to the enforceability of the contract, that there be a delivery of the instrument. To illustrate: If M. purchases goods from P., and executes a note payable to P.'s order, but does not deliver it, and thereupon P. by force or other unauthorized means obtains physical possession of the note, the defense of no delivery could be successfully interpreted, although M. might be held liable on the simple contract of sale which gave rise to the instrument. This rule and its corollaries are expressed in the following sections of the Negotiable Instruments Law:

Section 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. * * * And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Section 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

That portion of section 16 which deals with the right of the holder in due course to hold a party on a negotiable instrument from whom there had been no valid delivery, was omitted here for this question is taken up in chapter IV. Likewise with respect to section 15, the rights of the holder in due course of a negotiable instrument which originally was incomplete and was not delivered, is taken up in chapter IV.

Section 191, clause 6, defines delivery as follows: **"Delivery" means transfer of possession, actual or constructive, from one person to another.** The requirement of delivery always involves an intention to vest in the party to whom the instrument is made payable, the rights of a holder, and usually involves some physical act which outwardly manifests this intention. The problem is therefore, to determine what circumstances are sufficient to establish the existence of the requisite intent and act.

PAULSON et al. v. BOYD et al.

(Supreme Court of Wisconsin, 1908. 137 Wis. 241, 118 N. W. 841.)

This is an action upon a promissory note by the receivers of the Security Savings Bank, Incorporated, against the maker of the note and the former owner of the note as indorser. L. T. Boyd is the maker of the note, and J. S. Ellis is the payee and indorser. It appears from the evidence of Boyd and Ellis that the note was given to Ellis by Boyd as a part of a transaction concerning the sale of some mining stock. Boyd was to give his note to Ellis for $2,500, the purchase price of the stock. The note, dated October 17, 1902, was for six months, and was to be renewed twice for the same length of time. The testimony of Boyd as to the terms of the parol agreement is admitted by Ellis to be correct; and the agreement, in effect, is embodied in Boyd's evidence, set out in the record as follows: "Shortly prior to the date of the first note, he persuaded me as a good friend of his to go into this deal with him and take some of his mining stock. I told him then that I had no money, and that I was in debt and couldn't afford to take the chance. He said he wouldn't urge me to do this if he didn't know all about it. I stated that I didn't have any money to buy it with, and he said, 'That doesn't make any difference' and he said, 'I will carry it with the bank, I will carry it 18 months if you will pay the interest.' Then I said: 'Suppose at the end of 18 months, I can't pay it?' He said: 'Then I will take it off your hands; but I am sure that you will have realized enough on it to pay it, and make a good profit.' I said, 'I don't see any reason why you should do that for me'; and he said, 'I know you have been up against it pretty hard, and I would like to see you make some money,' and I said, 'That is very friendly of you, and I will accept the offer,' and in that case I took the stock conditionally, and signed the note which he was to renew twice, and at the expiration of the 18 months, if I didn't want the stock, he would take it off my hands." There was no actual delivery of the certificates of stock by Ellis to Boyd. At the time of this agreement Ellis conducted a private banking business under the name "Security Savings Bank."

Pursuant to the provisions of chapter 234, p. 351, Laws 1903, the Security Savings Bank was incorporated for the purpose of succeeding to the business and assets of the private bank of the same name previously conducted and managed by J. S. Ellis. The new bank was incorporated August 21, 1903; the incorporators and stockholders being Ellis and his relatives. At the stockholders' meeting the record shows the following: "On motion it was ordered that the board of directors be and are directed to assume the liabilities of the private bank heretofore known as the Security Savings Bank of Ashland, Wisconsin, in consideration of the transfer of the assets of said bank to their corporation." At the directors' meeting J. S. Ellis was elected president, E. H. Ellis, his brother, vice president, and Ellis Kennedy, a nephew and former employé of the president, was elected cashier. Under the agreement between Boyd and Ellis, three notes were given by Boyd to Ellis and deposited by Ellis at the bank. All were payable to the order of Ellis. Two of them were made before the incorporation of the bank, and one, the note in suit, thereafter. In each instance Boyd and Ellis conducted these transactions. The note in suit was received by Ellis as president and turned over to the cashier with instructions. The mining stock was always in the possession of Ellis and the

transfer of the stock on the books of the corporation was not made until after the execution of the last note. The certificate of stock then made out was sent to Ellis and held by him. Boyd offered to transfer any interest in the shares of mining stock to which the agreement between him and Ellis referred, and renewed this offer at the trial.

SIEBECKER, J. At the trial the defendant Boyd relied upon an agreement between him and Ellis, the payee in the note given by the defendant. The transaction between the defendant and Ellis for the purchase of mining stock is admitted by Ellis to have constituted the agreement for which the notes were given. The primary question is: What was the parol agreement between these parties? The evidence of it is not voluminous or contradictory, and is, in effect, that Ellis undertook to assist Boyd in securing the advantages of an interest in a mine, if it should prove a profitable enterprise at the expiration of 18 months. To accomplish this, Boyd contracted for the purchase of some mining stock from Ellis at an agreed price of $2,500 upon the following arrangement: Since Boyd had no available means to make such a purchase, Ellis made him an offer for such purchase, under which Boyd was to give him a note for the amount, which Ellis was to carry and renew for 18 months. If the stock had not then realized enough to pay the purchase price, and Boyd did not then want the stock, then Ellis was to take it off his hands, and cancel the note. The stock realized nothing, and Boyd insists that, under the parol agreement with Ellis at and before the delivery to Ellis of the first note, the notes never went into effect as completed contracts. He contends that he was to have the right at the expiration of 18 months to elect whether he wanted the stock.

We are of the opinion that the facts sustain this claim and show such an agreement between the parties. An examination of the evidence, in view of the relations of the parties and the considerations which induced him to make and deliver the note, leads us to the conclusion that it was not intended and agreed by them that the note should be a present binding agreement, but that it was delivered to Ellis upon the condition that, if Boyd paid interest on the sum for 18 months, Ellis was to renew the notes, as agreed, and, if at the expiration of that time Boyd did not want the stock, the agreement to purchase was to be terminated at Boyd's election, and the note canceled. * * * Such oral agreements are not contradictory of the written instrument. This rule was declared and fully discussed in the recent case in this court of Hodge v. Smith, 130 Wis. 326, 110 N. W. 192, where it was held: "It is familiar law, notwithstanding some conflict in the authorities, that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation in præsenti of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper, as between the parties, will have no validity as a binding contract till the condition shall have been satisfied; and that proof of such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous parol agreement; that such evidence only goes to show that the instrument never had vitality as a contract"—citing cases. It is there also held that this principle is recognized in the negotiable instrument law, section 16. * * *

Can defendant assert this defense to the note in the hands of the

new bank? This must be answered in the affirmative in view of the circumstances of the transfer of the assets from the private to the new bank.

TIMLIN, J. (dissenting). * * * The majority of the court seem to have overlooked the force and significance of this undisputed evidence regarding the delivery of the note in suit. * * * The agreement to pay interest and the payment of interest, the agreement to renew, and the renewals pursuant to that agreement are consistent only with absolute delivery. The agreement that the payee should carry the note at the bank even where the payee owned the carrying bank means that the note was considered by the parties to have been delivered. All of these are inconsistent with nondelivery or with conditional delivery. Again, in the light of the additional testimony above quoted interpreted in harmony with the pleading, the whole testimony of Boyd is plainly to the effect that it was orally agreed that he should give his note for $2,500 for certain shares of mining stock to be held by the seller as collateral security to that note, that the note was to run six months and to be twice renewed, Boyd to pay interest thereon and to have the right to avail himself of any rise in the price of the stock in the meantime, but if he did not during or at the end of the 18 months avail himself of this right to take the shares, Ellis was to take or keep the stock and cancel or discharge the note. There is here no evidence of nondelivery or of conditional delivery, but rather evidence showing delivery coupled with an oral agreement that the note should be discharged or paid in a certain manner differing from that specified in the instrument itself. * * * I have no doubt the oral contract between Boyd and Ellis collateral to this note was founded upon a valuable consideration and enforceable by Boyd against Ellis. It was a sale of the shares to Boyd with an agreement to repurchase at the end of the 18 months at the same price at the option of Boyd. * * *

CHAPTER II

RIGHT OF THE HOLDER TO COMPLETE, TO SUE UPON, AND TO NEGOTIATE THE INSTRUMENT

Section
1. Introduction.
2. Completion of the Instrument.
3. Right to Sue Prior Parties.
4. What Constitutes a Negotiation.
5. Negotiation by Special Indorsement.
6. Negotiation by Blank Indorsement.
7. Negotiation by Restrictive Indorsement.
8. Negotiation by Qualified Indorsement.
9. Negotiation by Conditional Indorsement.
10. Transfer of Unindorsed Paper Payable to the Order of the Transferor.
11. Surrender to the Drawee.
12. Other Formal Requisites and Aspects of Negotiation.

SECTION 1.—INTRODUCTION

The particular rights of the holder of a negotiable instrument with which we are concerned in this chapter are those rights which are common to holders in due course and to holders not in due course. The special rights of the holder in due course constitute the subject-matter of succeeding chapters. The Negotiable Instruments Law contains provisions relating to three special rights which are taken up in this chapter: (1) The privilege of the holder to fill in blanks; (2) the right of the holder to demand payment of prior parties; (3) the power of the holder to transfer the instrument.

The circumstances which make one a holder are thus prescribed in the act:

Section 191, clause 7. "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

Section 191, clause 4. "Bearer" means the person in possession of a bill or note which is payable to bearer.

SECTION 2.—COMPLETION OF THE INSTRUMENT

Section 13. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly.

Section 14. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for

any amount. In order, however, that any such instrument when completed may be enforced against any person who becomes a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time.

The clauses in sections 13 and 14 dealing with the rights of the holder in due course of instruments originally issued in blank and subsequently filled up in excess of authority have here been omitted, as these provisions concern the subject-matter of chapters IV and V. It is to be noted that the privilege of the holder to fill in blanks, such as to the amount, interest rate, place of payment, attorney fees, the name of the payee, etc., is conditional upon his having completed the instrument (1) strictly in accordance with the authority given, and (2) within a reasonable time. If either of these two elements is wanting, the act will then operate as a material alteration, which avoids the instrument in the hands of all holders other than holders in due course. The particular difficulty will be to determine when authority has been given to fill up blanks. Such authority may be shown by oral testimony of the granting of express authority, whether by words or conduct; but whether the authority may legitimately be inferred exclusively from the fact that the instrument was issued in blank is not clear.

Certainly the bare issuance of an instrument containing blanks as to certain features which commonly are filled up would not in itself be sufficient in all cases to confer authority to fill them up. For example, a blank as to the rate of interest could not be filled up merely because there appeared on the instrument such a blank. Containing no express provision with respect to the interest rate, the instrument should be interpreted as stipulating for the legal rate. The act of inserting another rate would be a material alteration. There may be a special problem as regards the right to fill in the name of the payee in order paper, arising from the fact that section 8 (6) provides that "where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty." If this provision should be interpreted as meaning that the paper must be so designated at the time of issuance, then the holder would have no right to fill in the name of the payee, even if given express authority to do so. Even if this interpretation were adopted, a court of equity would probably reform the instrument in accordance with the express authority given.

SECTION 3.—RIGHT TO SUE PRIOR PARTIES

Section 51. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

The first clause of this section makes it clear that the rule of the common law that an assignee of a chose in action must sue in

the name of his assignor is not applicable to holders of negotiable instruments. A special indorsee may sue in his own name, and also a holder under a blank indorsement or a holder of an instrument on its face payable to bearer. The definition, in section 191, clause 4, of a bearer as being the person in possession of a bill or note which is payable to bearer, if interpreted in its widest sense, would permit a thief or finder of bearer paper to recover upon it. This section would probably not be so interpreted. Even if it be contended that a thief has legal title, it could still be held that all remedies for the enforcement of his legal title have been destroyed by his wrongful act. The status of an illegal contract furnishes an analogy. In such cases there is a contract between the parties, but, being illegal, no remedies are available for its enforcement. The case of a finder is more difficult. He is not a wrongdoer; still his attempt to enforce the instrument may be taken as evidence to convert the proceeds to his own use, sufficient to defeat his action on the instrument, except where such action by the finder is necessary to protect the interests of the unknown owner, as perhaps might be the case where the statute of limitations was about to run on the instrument. Certainly the finder would not be permitted to sue against the active opposition of the true owner, who had intervened to protect his rights. To have the right to sue, it is not necessary that the plaintiff be the beneficial owner. If he has been given power to sue by the owner, that fact is sufficient. Payment to a thief or finder of bearer paper by an obligor, who had no knowledge that the party demanding payment was a thief or finder, would, however, discharge the obligation.

LANCASTER v. BALTZELL.

(Supreme Court of Maryland, 1836. 7 Gill & J. 468, 28 Am. Dec. 233.)

BUCHANAN, C. J. A bill or note, payable to order, can only be transferred by indorsement; and as an action against the acceptor or drawer can only be sustained by one who has legal title, which cannot be derived through the medium of forgery, it is incumbent on the plaintiff in such an action to show his interest in the bill or note, which must be done by proving that it was indorsed by the person to whom, or to whose order, it was made payable.

This is an action by the second indorsee against the maker of a promissory note, payable to the payee or order, which was resisted at the trial on the ground that the first indorsement, purporting to be by the payee, was a forgery, of which proof was offered by the defendant. On the part of the plaintiffs, it was proved that the defendant, on being called on by their counsel, after the indorsement to them, to pay the note, examined it, and said it was right, and he would settle it with them. Upon which the court instructed the jury that, if they believed the defendant, when the note was presented to him by the counsel of the plaintiffs, had examined the indorsements, and said it was right, the plaintiffs were entitled to recover, although they might believe the indorsement of the payee's name had been forged, and notwithstanding that acknowledgment had been made, after the trans-

fer of the note by these indorsements to them, on an exception to which instruction the case is brought up.

Apart from the alleged conversation between the defendant and the counsel of the plaintiffs, it is very clear that the plaintiffs are not entitled to recover, if the first indorsement in the name of the payee of the note was forged, as the title was not and could not thereby be transferred, but continued in the payee, who, on obtaining possession of the note, might sue upon it, and recover against the maker, notwithstanding he should have paid it to him, into whose hands it came, through the medium of the forgery; for, besides that, in such case the payee has not parted with his title, the payee of a note, whose name is forged, knows nothing of it, and the maker, before he pays it to the holder as indorsee, should look carefully to the indorsements, and, if one is to suffer, the loss should fall on him who is most in fault, or most negligent.

The only question, then, in this case is whether, if, after the indorsements had been made, the defendant, on the note being presented to him, by the counsel of the plaintiffs, examined the indorsements and said it was right, that makes any difference? And we think it does not. By saying so, he gave no credit to the note, and did not thereby induce the plaintiffs to take it. That had been done before, and not on the faith of what he said. The plaintiffs might before they took the note, have inquired whether the first indorsement was by the payee or not, and, not having done so, they must abide by the consequence, and cannot throw the loss upon the defendant, who had done nothing to mislead them or induce them to take the note, and who, if made to pay the amount in this action, may be made to pay it over again by the payee, whose right remains unimpaired.

It is not like the case of a drawee of a bill, who, if on being asked if the acceptance is in his handwriting, says that it is and that it will be duly paid, cannot afterwards set up as a defense the forgery of his name; because by saying so he had accredited the bill and induced another to take it, which being his own fault, the loss ought to fall on him, and not on another, who has been induced to take the bill on the faith of his assurance.

Judgment reversed.

GREENE v. McAULEY.

(Supreme Court of Kansas, 1905. 70 Kan. 601, 79 Pac. 133, 68 L. R. A. 308.)

Action by F. F. Greene against A. T. McAuley. Judgment for defendant, and plaintiff brings error.

MASON, J. F. F. Greene sued A. T. McAuley upon two notes, for $130 each, executed by McAuley to H. E. Stearns, and assigned in writing by Stearns to the plaintiff. Defendant admitted the execution and assignment of the notes, but in his answer alleged that they belonged to Mrs. Laura Sims Thomas, and that plaintiff did not own them, and had no right to maintain an action upon them. The case was submitted to a jury upon the issue of the ownership of the notes, and a verdict was given for the defendant. A judgment followed, from which the plaintiff prosecutes error. The principal, and indeed the only substantial, question involved is whether the evidence given in behalf of the defendant had any tendency to establish a defense.

The plaintiff, while denying that any person except himself had any interest whatever in the notes, contends that the case is controlled by the principle that an action upon a note may be maintained by one who holds the legal title, although without beneficial interest, and that, as he had possession of the notes, and they were assigned to him by the payee, he was entitled to enforce their payment, whatever claim any third person might have had against him with reference to them. The defendant claims that the principle invoked does not apply to the facts of the case. * * *

The question presented, therefore, is this: Assuming that Mrs. Thomas' statements are true, and that Greene, after promising that he would get the notes from Stearns and give them to her, procured Stearns to assign them to himself, and then wrongfully kept them, having obtained them from Stearns in lieu of the payment of rent which was owing for the use of land belonging to Mrs. Thomas, but which had been made payable to Greene in order to secure him against a liability from which he had now been released, do these facts constitute a defense in an action brought against the maker of the notes by Greene, not only without the consent, but against the objection, of Mrs. Thomas?

In jurisdictions where, as in Kansas, * * * the holder of the naked legal title to a promissory note may sue upon it, even although he may be under obligation to account to some third person for the entire proceeds, it is often said that in such an action the defendant cannot challenge the plaintiff's right to maintain it, except by a showing of bad faith in the transaction. Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036, and cases cited; City Bank of New Haven v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332. But in the decisions there is a somewhat singular lack of explanation or illustration as to just what might be considered bad faith, in this connection. Doubtless the phrase is sometimes used with reference to a merely colorable transfer of title by the real owner to a stranger, had for the purpose of embarrassing the maker of the note in his defense. * * * In 2 Daniel on Negotiable Instruments, 1191, it is said: "If it were shown that the plaintiff, upon suing upon a note payable to bearer or indorsed in blank, has no interest in it, and, in addition, that he is suing against the will of the party beneficially interested, he could not recover, as his conduct would be in bad faith." In support of this statement the author cites Towne v. Wason, 128 Mass. 517, the syllabus to which reads: "It is a good defense to a promissory note that the plaintiff, although in the possession of the note, has no interest in it, and is prosecuting the action, not for the benefit of the person beneficially interested, but against his objection." But in that case the defense made was that the plaintiff had wrongfully, and without the consent of the owner, obtained possession of the note sued on, which was indorsed in blank; that he had no title to it, and never had had any; and that he was not authorized to sue in behalf of the owner—in effect, that he had stolen the note. And the ground of the decision was that under the facts stated the plaintiff had no authority to receive payment of the note, and a payment to him would not have released the maker. And this suggests what we conceive to be the true rule, of general, if not universal, application—that, so far as affects the question of the right of the plaintiff to maintain the action, the only inquiry open to the defendant is whether the plaintiff has such title to the

note that a payment made to him would be a complete protection to defendant from any further liability. * * *

Applying the test suggested to the present case, the question is: Would McAuley have been completely protected in making payment of the notes to Greene? True, according to the contentions of defendant, when Greene settled with Mrs. Thomas, he agreed to procure the notes from Stearns and turn them over to her, and nothing was said as to his taking an assignment to himself rather than to Mrs. Thomas. Yet the case is not the same, for instance, as if an agent, commissioned to buy negotiable paper for his principal, had wrongfully taken title in his own name. For here it required no authority from Mrs. Thomas, to be given at the time of the settlement, for Greene to collect the rent from Stearns, or for Stearns to pay Greene. Stearns, having originally contracted to pay Greene, and not having contracted to pay any one else, might have paid him in cash or by any other method satisfactory to Greene. In fact, he settled his debt by assigning the McAuley notes to Greene—the person to whom, so far as he knew or had occasion to inquire, he was indebted. The fact that the notes here sued upon were given by McAuley to Stearns for the rent of Mrs. Thomas' land is merely incidental, and has no bearing upon the decision of the controversy. They might be regarded as having been given for any other consideration without affecting the rights of the parties. Greene obtained them in exchange for, or in satisfaction of, a claim of which Mrs. Thomas was the beneficial owner, having been enabled to do so by her voluntarily allowing such claim to be made payable to him. She never acquired possession of, or legal title to, these notes. The effect of the transaction, from her standpoint, was merely to charge Greene as trustee for her benefit with respect to them. The situation presented is closely analogous to that which would have arisen if Mrs. Thomas had assigned and delivered notes originally payable to herself to Greene as collateral security, and he had retained them, after the full satisfaction of the principal obligation, to secure which they had been transferred to him. * * *

The peculiar feature of the present case is that the equitable owner objects to the holder of the notes exercising further control over them, and his possession as to her is wrongful. Of course, the holder of a note unlawfully acquired has no authority to receive payment, or to sue upon it, even although it should bear a genuine indorsement to himself. This might happen, for example, if one holding a note made payable to himself were to sell and deliver it without further assignment, and were then to regain its possession by theft. In such a case he would have neither legal ownership nor rightful possession. A payment made to him would afford no protection, and a showing of the facts would constitute a good defense to an action brought by him. But where one has rightfully obtained possession of a note, and the legal title is actually vested in him, although he may be under an obligation to transfer it to another, so long as these conditions exist, and no effective measures are taken by the equitable owner to enforce his rights, the payee is justified in dealing with the holder, and a payment made to him is a bar to any further demand. This would apply where the pledgee of paper deposited with him as collateral security retains it after the satisfaction of the debt secured, and it applies here. McAuley would have been completely protected by a payment to Greene, who therefore had capacity to maintain the action.

Just how, in such cases, the interests of other claimants than the holder of the paper involved may be safeguarded, is not a matter for present determination. It has been held that, where an action is brought by the holder of the legal title to a note, any one beneficially interested in the proceeds may intervene for his own protection. * * * But we are not required to decide whether Mrs. Thomas might have intervened in the present case. There was no necessity for settling in this proceeding any dispute between her and the plaintiff, for their rights with respect to each other remain unaffected by its result. * * *.

The plaintiff was equally entitled to recover the full amount due upon the notes, whether he owned them absolutely, or was required to account for their proceeds as a trustee. * * *

The judgment will be reversed, and the cause remanded, with directions to enter judgment for the plaintiff as prayed for in his petition.

SECTION 4.—WHAT CONSTITUTES A NEGOTIATION

We are interested here in noting the various methods of negotiating an instrument. Looking at the subject of negotiation from the standpoint of the holder, the question is as to the power which the holder possesses in this regard. He may part with his entire interest or he may part with but a portion of his interest. The holder may part with his complete interest in more than one way, and thereby produce different legal effects as regards the rights of subsequent parties. We shall, therefore, be required to look at the transactions both from the standpoint of the party negotiating and the party to whom it is negotiated.

Section 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Section 191, clause 6. "Delivery" means transfer of possession, actual or constructive, from one person to another.

Section 191, clause 10. "Issue" means the first delivery of the instrument complete in form, to a person who takes it as a holder.

Section 191, clause 8. "Indorsement" means an indorsement completed by delivery.

Section 33. An indorsement may be either special or in blank; and it may be either restrictive or qualified, or conditional.

FARNSWORTH v. BURDICK et al.

(Supreme Court of Kansas, 1915. 94 Kan. 749, 147 Pac. 863.)

MARSHALL, J. This is an action to recover on a promissory note. Judgment was rendered in favor of the plaintiff. The defendants appeal.

The defendants, Wm. S. Burdick and A. M. Ewing, in consideration for a tract of land in Mercer county, Mo., gave a stock of goods in

Iola, Kan., a negotiable promissory note for the sum of $500, signed by all the defendants, and assumed an incumbrance on the land for the sum of $890. The trade was made with, and the note given to, J. A. Wheeler, who negotiated the note to the plaintiff by writing on the back thereof, "I here by assine this note over to E. H. Farnsworth this the Nov. 1st, 1910," signed it, and delivered it to the plaintiff. The plaintiff became the holder of the note before it was due, without any notice that it had been previously dishonored. He took it in good faith, and for value. At the time it was negotiated to him, he had no notice of any infirmity in the note or defect in the title of J. A. Wheeler. The note is complete and regular on its face. The defense is failure of consideration for the note. Is this defense good?

Prior to the passage of the Negotiable Instruments Law, * * * this court, in Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129, said: "A writing upon the back of a promissory note, transferred before maturity, in these words: '* * * I, James C. Rogers, do hereby assign the within note to Charles B. Hatch, of Osage county, Kansas. Said assignment is made without recourse on me, either in law or equity. J. C. Rogers. Signed in the presence of H. F. Raymond, clerk county court, Washington county, Arkansas'—is not an indorsement in a commercial sense, and will not cut off the defenses of the maker."

This principle was followed in * * * Briggs v. Latham, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546. At the time these decisions were rendered, the weight of authority in this country was that such a writing on the back of a note was an indorsement, which cut off the equities and defenses of the maker, available against the payee.

The Negotiable Instruments Law reduces to a certainty many things that prior to that date were in confusion. This law contains several definitions. One is that " 'delivery' means transfer of possession, actual or constructive, from one person to another." Another is, " 'holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Still another is, " 'indorsement' means an indorsement completed by delivery." * * *

Section 30 reads in part: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof."

The note sued on was negotiated within the meaning of this section. It was transferred from Wheeler to Farnsworth, and he became the holder thereof. * * *

The indorsement in this case is special, in that it specifies the person to whom the note is made payable. It is absolute and unrestrictive. It is not a qualified indorsement, unless the use of the word "assign" makes it a qualified indorsement. It is not a conditional indorsement. * * *

Section 63 reads: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

When Wheeler placed his name on this note, he did not do it as maker, drawer, or acceptor, and is therefore deemed to be an indorser, unless the word "assign," used by him, indicates "his intention to be bound in some other capacity." The authorities seem to be in utter and hopeless confusion concerning the effect of the transfer of a negotiable instrument by words like those used here. This confusion

existed prior to the passage of the uniform Negotiable Instruments Law, and still exists. The weight of authority was, and is, that this is a commercial indorsement. We are of the opinion that the "assignment" of this note is an indorsement thereof, under the Negotiable Instruments Law; that Farnsworth is a holder in due course; and that the makers of the note cannot set up the defenses against the note that could have been set up against it in the hands of Wheeler. This disposes of the case, and compels an affirmance of the judgment.

SECTION 5.—NEGOTIATION BY SPECIAL INDORSEMENT

Negotiable Instruments Law, Section 34. A special indorsement specifies the person to whom or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument.

To illustrate: If M. executes and delivers his note payable to P. or order, and P. indorses: "Pay A. [Signed] P."—and delivers to A., the indorsement is special. The indorsement, "Pay A." has the same effect as though it read, "Pay A. or order." As expressly provided in section 34, the indorsement of A. is necessary to the further negotiation of the bill. The instrument cannot be negotiated by mere delivery. If A.'s indorsement is placed on the instrument without his authority and the instrument transferred to an innocent party, such person would acquire no interest in the instrument against the special indorsee or any party prior to him. One cannot gain title to an instrument through a forged indorsement as expressly provided in section 23 as follows:

Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

FIRST NAT. BANK OF SHENANDOAH, IOWA, v. KELGORD.

(Supreme Court of Nebraska, 1912. 91 Neb. 178, 135 N. W. 548.)

LETTON, J. This is an action upon a promissory note made by the defendant payable to the order of "Wonder Stock Powder Company." The petitioner alleges that one James J. Doty is the owner and proprietor of "Wonder Stock Powder Company," and that the plaintiff before maturity and in the usual course of business purchased the note for a valuable consideration. * * * The cause was tried to a jury which returned a verdict for the defendant.

The note in question is made payable to "Wonder Stock Powder Company." It is indorsed in blank, "James J. Doty, Prop." This indorsement is clearly insufficient under section 30 of the negotiable instruments act * * * to constitute the plaintiff a holder in due course of business. The only evidence as to the relation of Doty to

the concern is that of Albert A. Reed, who purchased the note for the plaintiff. He testifies that he purchased it with 59 others from Mr. Doty, and that Doty is sole proprietor of the "Wonder Stock Powder Company." It is not shown whether the Wonder Stock Powder Company is a corporation of which Doty owns all the stock, or whether it is a trade-name used by Doty in his individual business. * * *

The purchase and delivery of the note transferred the title to plaintiff, but there being, so far as the evidence shows, no indorsement by the payee, the transfer could not vest plaintiff with the privileges of a holder in due course, and the note was subject to the same defenses as might be set up against the original payee.

Judgment affirmed.

SECTION 6.—NEGOTIATION BY BLANK INDORSEMENT

N. I. L., Section 34. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

The blank indorsement consists simply in the signature of the holder accompanied by delivery. Thereafter the instrument may be negotiated by delivery without indorsement. It is quite common for the holder, who transfers an instrument which is in such form that it may be negotiated by delivery, to indorse the same. When this is done, it is not for the purpose of enabling the transferor to obtain title to the instrument, but is done for purposes quite different. The indorsement imposes upon the indorser a liability to pay the instrument to the holder in the event that the party primarily liable thereon fails to pay at maturity. If the holder did not indorse, his liability as a transferor by delivery would extend no further than a warranty that the instrument was genuine, that he had title to it, that all prior parties had capacity to contract, and that he had no knowledge of any fact which would impair the validity of the instrument or render it valueless, and such liability would extend no further than his immediate indorsee. The effect of the indorsement would be to impose upon the indorser a liability to pay if the instrument were not paid at maturity, provided there was a due presentment and due notice of dishonor given. The liability of indorsers is discussed in detail in a later chapter. The point is merely adverted to here to show that, while an indorsement is not necessary for the transfer of title to a negotiable instrument, which is either payable to bearer on its face or became payable to bearer through a blank indorsement, oftentimes an indorsement will be necessary in order to induce the transferee to take the paper.

It should be realized that, if a person has in his possession an instrument in form transferable by delivery, there is always some risk that he may lose title thereto through loss or theft of the instrument. The innocent purchaser from a thief or finder of bearer paper obtains title. This is not so where the innocent purchaser

took the instrument under the forged indorsement of a special indorsee of paper on its face payable to order. In order to guard against the loss of title through the loss or theft of the instrument while in form negotiable by delivery, and for other purposes, the law allows the holder to convert the blank indorsement into a special indorsement by writing his name above the blank indorsement following the words "Pay to." This is accomplished by section 35:

The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

We have one special problem relating to special and blank indorsements which is of considerable importance. Suppose an instrument bears both a special indorsement and a blank indorsement, which indorsement controls? If an instrument is made payable to bearer on its face, and some holder negotiates by special indorsement, does the special indorsement control? We have already noted that the effect of a blank indorsement is to convert the paper into bearer paper. Suppose a blank indorsement is followed by a special indorsement; does the special indorsement have the effect of reconverting the instrument to order paper, so that the indorsement of the special indorsee is necessary to the further negotiation of the instrument? In short, we have two questions: (1) Does a special indorsement control a prior indorsement in blank? (2) Does a special indorsement control the method of negotiation of an instrument which on its face is payable to bearer?

Unfortunately the Negotiable Instruments Law is not clear on these questions. Before the act a subsequent special indorsement did not control paper which was bearer paper on its face, nor did it control a prior blank indorsement. If it were once bearer paper, it was always thereafter bearer paper. Under the act, the law probably is that an instrument which is payable to bearer on its face cannot be controlled by a subsequent special indorsement, but that an instrument which on its face is payable to the order of a named payee, and became payable to bearer through a blank indorsement, is controlled by a subsequent special indorsement. The sections of the act involved are as follows:

Section 9 (5). The instrument is payable to bearer when the only or last indorsement is an indorsement in blank.

This section, standing alone, would clearly change the common-law rule, and the last indorsement in all cases would control. If the instrument were payable to bearer on its face, a special indorsement would prevent further negotiation by delivery merely. Also if the instrument became payable to bearer for the first time by a blank indorsement, a subsequent special indorsement would control, and the instrument could be further negotiated only by the indorsement of the special indorsee.

But there are two other sections of the act involved which affect the result:

Section 48. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

If this section means that the transferee by delivery only, from a special indorsee, may strike out the special indorsement and rely upon any prior blank indorsement, then the subsequent special indorsement will not control. This interpretation is not reasonable, however, because the only kind of indorsement which may be stricken out is that kind of indorsement **which is not necessary to the holder's title.** The very question we are trying to solve is: What indorsements are necessary to one's title? Section 48, therefore, does not aid us in answering the questions raised above.

Section 40 has a more direct bearing on these problems. This section provides:

Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

We are interested here only in the first clause. This states that an instrument if payable to bearer is indorsed specially, it may nevertheless **be further negotiated by delivery.** This states a rule just the opposite from that laid down in section 9 (5). Under section 9 (5) the last indorsement controls. If this is a special indorsement, it would control a prior blank indorsement. Under section 40 the subsequent special indorsement does not control a prior blank indorsement, nor does it control the manner of negotiating an instrument payable to bearer on its face.

If one section is not to be regarded as completely neutralizing the effect of the other, the most reasonable way out of the difficulty is to divide all negotiable instruments into two classes: (1) Those which on their face are payable to the order of a named payee; and (2) those which on their face are payable, either to bearer, or to a named payee or bearer. Then let section 9 (5) apply only to instruments in the first class, and regard section 40 as applicable only to instruments in the second class. The courts have not yet passed upon this question, but, if this be the correct solution, our conclusions are: (1) That an instrument payable to bearer on its face will always be payable to bearer. A subsequent special indorsement will not control. (2) That an instrument payable on its face to the order of a named payee, if subsequently it becomes payable to bearer by virtue of a blank indorsement, a subsequent special indorsement will control the prior indorsement in blank, and the instrument may be further negotiated only by the indorsement of the special indorsee.

DAVIS v. FIRST NAT. BANK OF BLAKELY.

(Supreme Court of Alabama, 1915. 192 Ala. 8, 68 South. 261.)

ANDERSON, C. J. The note sued upon was executed by B. F. W. Davis and was made payable to himself or order and was indorsed by said Davis in blank before it fell into the hands of the plaintiff. Therefore, as the last, and in fact only, indorsement was in blank, the note was, when acquired by the plaintiff, payable to bearer. * * * This being the case, it was negotiated to the plaintiff and its predecessor by a delivery thereof. * * * The trial court did not err in holding that plaintiff was the legal holder of the note and could maintain a suit upon same, although not indorsed by the party from whom it purchased same.

The judgment of the circuit court is affirmed.

SECTION 7.—NEGOTIATION BY RESTRICTIVE INDORSEMENT

N. I. L., Section 36. An indorsement is restrictive, which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Section 37. A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

An owner of a negotiable instrument may sometimes desire to part with its possession and to vest in the transferee certain special rights, but reserving to himself the real beneficial ownership. If a special or blank indorsement were employed in such case, the indorser incurs the risk that the instrument may get into the hands of a purchaser who has no knowledge of the special purpose for which the transfer was made. Since the holder under a blank indorsement, or the special indorsee under a special indorsement, has it within his power to negotiate to a third party free from the restrictions imposed by the owner, the only method by which a negotiation for a special purpose may safely be made is to provide expressly on the instrument the special purposes for which the transfer is made. Such an indorsement is a restrictive indorsement. There are no particular words which must be used in order to manifest the intention to part with but a limited right, but any words will be sufficient if they unequivocally indicate that a special interest only was transferred. The most distinctive feature of the most common form of a restrictive indorsement is that it con-

sists in language which manifests the intention of the owner to retain the beneficial interest in the instrument, and to transfer to the restrictive indorsee the power to collect and to sue upon the instrument. Such an indorsee becomes thereby a trustee of a chose in action, and an agent for the owner. His rights and liabilities are then determined by the law of trusts and agency. The question with which the following case is concerned is: What words accompanying the signature of the holder will operate as a restrictive indorsement?

NATIONAL BANK OF COMMERCE v. BOSSEMEYER et al.

(Supreme Court of Nebraska, 1917. 101 Neb. 96, 162 N. W. 503, L. R. A. 1917E, 374.)

Action by the National Bank of Commerce against Ernest Bossemeyer and Frank Bossemeyer, doing business under the firm name and style of Bossemeyer Bros. Judgment for defendants, and plaintiff appeals.

LETTON, J. On January 3, 1911, defendants, who are grain dealers at Superior, Neb., drew a sight draft upon a firm in New Mexico for $729, and attached a bill of lading for a car of grain consigned to the order of the drawer. They deposited the draft in the First National Bank of Superior (hereinafter termed "the Superior bank"), which gave them credit for the amount upon their checking account. This was done in accordance with a custom whereby defendants deposited such drafts with bills of lading attached and were given credit, with the understanding that if the draft was not paid it should be protested, and its amount, with protest fees, should be charged back; that if interest was charged to the bank by the correspondent the interest should be charged to the account of drawer. Before the draft was deposited, by mutual agreement the custom was changed and such dishonored drafts were not charged back, but defendants, upon being notified of their return, would give a check to the bank to cover the amount of the draft and protest fees. This was the custom in Superior between banks and grain dealers generally.

The Superior bank sent the draft and bill of lading to plaintiff, its correspondent bank in Lincoln, which credited it with the amount and forwarded the draft and bill of lading to New Mexico through its regular correspondents. The draft bore upon its face the following: "Protest and return immediately, with all papers attached, if not paid upon presentation." The indorsement by the Superior bank is as follows: "Pay any bank or banker. All previous indorsements guaranteed." Before the draft reached New Mexico the Superior bank had suspended payments and been taken in charge by the Comptroller of the Currency. Defendants notified the drawee not to pay the draft, caused the car to be delivered, and collected the amount due from him. The draft was protested and returned to plaintiff. The action was brought against the drawers by plaintiff as a holder for value, as defined in section 5344, Rev. St. 1913. Five similar transactions are alleged as causes of action in the petition.

Several defenses are set up: (1) That the drafts were deposited with the Superior bank for collection only, to the knowledge of plaintiff, and were received by plaintiff from that bank for collection. (2)

That since the Superior bank charged interest until the collection was made, and charged the drafts back if not paid, it was not an owner or holder in due course, and the same relation as to the drafts being deposited for collection existed between the Superior bank and plaintiff. (3) That at the time the drafts were received the Superior bank was insolvent, which was known to plaintiff and to the officers of the Superior bank, but unknown to defendants, and that when these conditions became known defendants rescinded the transaction. The action was tried to the court without a jury, which found generally for the defendants and rendered judgment of dismissal. Plaintiff appeals. * * *

The question for determination is whether the draft was received by the plaintiff for collection, the title and ownership remaining in the Superior bank, or, did plaintiff become a holder in due course by the indorsement and receipt of the draft and the crediting of the Superior bank with the amount thereof? Defendant contends that the indorsement is restrictive, and shows that the title did not pass; that since the custom was that interest should be charged between the date of the receipt of the paper and the receipt of the money in payment thereof, and because if not paid it was the custom to charge the amount and protest fees back to the account of the Superior bank, the draft was taken for collection only.

Is the indorsement restrictive? Whatever may have been held before the enactment of the Negotiable Instruments Act, it is clear that this question must be determined by the provisions of that statute. * * *

There is nothing on the face of this indorsement which prohibits the further negotiation of the instrument or constitutes the indorsee the agent of the indorser, or vests title in the indorsee in trust for the use of some other person, and hence, by the most elementary principles of statutory construction, the plain meaning of the language must be observed, and it must be held that the indorsement was not restrictive.

In Bank of Indian Territory v. First Nat. Bank, 109 Mo. App. 665, 83 S. W. 537, a case which was decided before the Negotiable Instruments Act went into effect in that state, it was held, without any discussion of the reasons, that an indorsement such as this was a restrictive indorsement. In three cases decided in that state after the act was in force (National Bank of Rolla v. First Nat. Bank, 141 Mo. App. 719, 125 S. W. 513; National Bank of Commerce v. Mechanics' American Nat. Bank, 148 Mo. App. 1, 127 S. W. 429; Citizens' Trust Co. v. Ward, 195 Mo. App. 223, 190 S. W. 364) the same ruling was made; but in none of these cases was the language of the statute considered, and the holding is placed upon the authority of the first case, which, as we have seen, was decided before the act took effect. These cases are not authority upon the proposition as to whether such an indorsement is restrictive under the provisions of the act. Furthermore, any bank receiving a draft with such an indorsement has the right to again indorse it in blank or payable to any particular bank or person. This, of course, it would have no power to do if the indorsement was restrictive. If, however, the words "for credit," "for account," "for collection and return," had been added, the character of the indorsement would have been changed entirely, and it would have been restrictive, showing upon its face that the indorsee bank took it only as a collecting agent, and not as a holder for value. * * *

In First Nat. Bank of Belmont v. First Nat. Bank of Barnesville, 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. Rep. 748, it is pointed out that the practice of indorsing checks "for collection," "for account" had become almost universal, but when it was decided by the Supreme Courts of New York and Missouri that the drawee bank could not recover back money paid upon a forged draft in the one case from a collecting bank, or in the other from the bank owning the draft, "it startled the banks located in large cities, and awakened them to the dangers attending the payment of such drafts or bills, and the result was that in the year 1896, the clearing house in the city of New York adopted a rule to the effect that its members should not send through the exchanges any paper having any qualified or restrictive indorsements. such as 'for collection,' or 'for account of,' unless all indorsements were guaranteed by the bank sending such paper. This action was soon followed by the clearing houses in other cities, and in some of them all indorsements are required to be either in blank, or 'pay to ——— or order.' By this action of the clearing houses, indorsements 'for collection' or 'for account of' have fallen into disuse, and the banking business of the country is now done, almost universally, upon unrestricted indorsements." We conclude then that the indorsement by the Superior bank was general, and not restrictive.

Does the fact that, if protested, the Lincoln bank was entitled to charge back the amount of the draft and protest fees constitute it merely an agent for collection and not a holder in due course? While there is some conflict in the authorities, the better view is that the deposit of a check or draft in a bank with a general indorsement and the giving of credit for its amount by the bank to the depositor, in the absense of other evidence as to the intention of the parties, passes the title to the bank, and makes it a holder for value, entitled to recourse on prior indorsers upon the protest of the paper. In other words, when such a state of facts is proved there is a prima facie case made that the title has passed, and the fact that it, the receiving bank, may charge back a protested draft does not affect the relation. In Higgins v. Hayden, 53 Neb. 61, 73 N. W. 280, before the enactment of the Negotiable Instruments Act, it was held that a bill of exchange drawn to the order of a bank by its customer, the amount of which was placed to his credit, and on which he drew, and the bank paid checks, became the property of the bank, such conduct being inconsistent with the theory of a bailment for collection. * * *

That credit to the drawer was entered by the Superior bank in a passbook in which was printed, "This bank in receiving out of town checks and other collection acts only as your agent and does not assume any responsibility beyond due diligence on its part," cannot affect the right of the plaintiff to recover in this case. The fact that the drawers put the paper in circulation, and that the Superior bank was thus able to negotiate it as its owner and holder, received full credit for it, the plaintiff bank having no knowledge of any infirmity, makes it a holder for value as defined in section 5233, Rev. St. 1913.

The Minnesota case (In re State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454) is not in conflict with these views, since in that case the controversy was between the original parties, and not between a holder for value without notice and the drawer, and such was the relation between the parties in the other cases cited in which

a printed notice was on the passbook. * * * The fact that a custom between banks and grain dealers is that when any draft bearing a general indorsement was unpaid it was protested and either charged back or paid by the drawer is an argument in favor of the plaintiff's position and not in favor of the defendant because such a custom clearly recognizes the liability of the drawer to pay a dishonored draft to the indorsee who has failed to collect the same. Even though by the custom between the drawer and the Superior bank, the drafts were taken only for collection, there is absolutely no proof in the record that the plaintiff had any knowledge whatever of this state of affairs. It received the draft with the general indorsement and credited the Superior bank with the amount in its deposit account which was drawn upon from day to day.

Under section 5379, Rev. St. 1913: "The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder." The benefit of this liability in case of dishonor was transferred to plaintiff by the general indorsement. When the Superior bank closed its doors, its assets became the property of the receiver for the purpose of liquidating its affairs. The rights of its receiver against the plaintiff or plaintiff's right to apply the fund in its hands to the payment of the debt of the Superior bank are not involved in this case, since the receiver is not a party to the suit and the case must be determined without regard to this fund. That the bank was in fact insolvent at the time of the deposit, under the circumstances of this case, does not seem to be material: First, because plaintiff bank took the draft in good faith for value without notice or knowledge of any infirmity in the title; and, second, because the drawers between the time of the deposit of the first drafts and the closing of the bank drew out over $4,000 more than the credit given and within a few hundred dollars of the total amount deposited within this period, leaving the account of the drawers substantially as it was before the drafts were deposited.

Under the provisions of the Negotiable Instruments Act and the evidence in the case the defendants are liable as drawers for the full amount of the drafts and protest fees.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment for the amount due.
* * *

SECTION 8.—NEGOTIATION BY QUALIFIED INDORSEMENT

N. I. L., Section 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

The indorsement here referred to is commonly called the indorsement "without recourse." In form it consists in adding the words "without recourse," or words of similar import, either to a blank or special indorsement. The effect of the indorsement "without recourse" is to limit the liability of the indorser. The extent to which the liability is so limited is a subject in which we are not here interested. This matter will be taken up in the chapter dealing with the liability of indorsers.

At this point we are interested in the indorsement "without recourse," only in so far as it is necessary to note, first, that it may be added to a blank or to a special indorsement and that the addition does not affect the manner of negotiating the instrument. for the last sentence of this section states that such an indorsement does not impair the negotiable character of the instrument. If the words were added to a blank indorsement the instrument is still negotiated by delivery. If added to a special indorsement the instrument is negotiated only by the indorsement of the special indorsee. The transferee under either indorsement gets the title just the same as though the words "without recourse" has been omitted, nor do these words prevent such an indorser from being a holder in due course.

SECTION 9.—NEGOTIATION BY CONDITIONAL INDORSEMENT

N. I. L., Section 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorser or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

In form the conditional indorsement is a special indorsement with an added term, illustrated as follows: Pay A., upon condition that (here stating the condition upon which payment is to be made to A.). From a practical standpoint this indorsement is of little importance. It is seldom used. It is to be noted that the condition does not affect the rights of a party who is bound to pay the instrument for he is allowed to disregard the condition and to pay the holder whether the condition has happened or not. The indorsement affects only the rights of the party to whom payment was made. If the condition has not happened, the party receiving payment will hold the money virtually in trust for the conditional indorser.

SECTION 10.—TRANSFER OF UNINDORSED PAPER PAYABLE TO THE ORDER OF THE TRANSFEROR

N. I. L., Section 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

It has heretofore been stated that where the instrument is not in form payable to bearer, it cannot be negotiated except by the indorsement of the holder. While this is strictly true the rule does not prevent a disposition of the instrument in some way other than by negotiation. The instrument may still be transferred without the indorsement of the special indorsee. There is no one word that describes the status of such a transferee. He cannot rightly be called an indorsee, but he may be referred to as a transferee of unindorsed paper payable to the order of the transferor. In many respects such a transferee is in just as good a position as an indorsee occupies, but in some important situations his position is not so strong. Section 49 gives to the transferee of the unindorsed paper the same rights as the transferor had, but no greater rights. The indorsee, if a purchaser for value in good faith before maturity, will be able to enforce the instrument free from most of the defenses which the maker had against the party with whom he dealt. Moreover, the transferee of unindorsed paper will have greater difficulty in proving his right to the instrument than the indorsee would have because there is nothing on the instrument which indicates that the party in possession is the owner. This section will be referred to again in the chapter dealing with the holder in due course. In the case following, is the court correct in saying that the transferee could acquire only an "equitable title," in the light of the language of section 49 which declares that "the transfer vests in the transferee such title as the transferor had therein"?

CAPITOL HILL STATE BANK v. RAWLINS NAT. BANK OF RAWLINS.

(Supreme Court of Wyoming, 1916. 24 Wyo. 423, 160 Pac. 117, 11 A. L. R. 937.)

POTTER, C. J. * * * However, it is well settled that a negotiable instrument payable to order may be transferred by the payee or holder without indorsement, though in such case the transferee takes only the title and right of the one so transferring it, and does not become the holder in due course, but has only the equitable instead of the legal title. * * * And this principle is recognized by the Ne-

gotiable Instruments Law. * * * Therefore, if the plaintiff had shown a transfer of the certificate to it by the payee, although without indorsement, it would have been entitled to recover, in the absence of evidence showing a good defense as against the payee, or that would otherwise interfere with such recovery. But mere possession is insufficient to show such a transfer. * * *

We are aware that there is a direct conflict in the decisions on the question of the sufficiency of mere possession to show equitable ownership, so as to authorize a recovery against the maker by one other than the payee or special indorsee. The view is maintained in a few jurisdictions that possession is alone sufficient for that purpose, unless the presumption of ownership therefrom is rebutted by proof. It is so held in North Carolina, while conceding that the mere introduction of a note in evidence does not prove the payee's indorsement. * * *

But the clear weight of authority and the better reasoning, in our opinion, sustains the rule that mere possession of such an instrument unindorsed is not sufficient or prima facie evidence of even the equitable title. * * *. Such possession does not prove or tend to prove the transfer of a note payable to order and not shown to have been indorsed by the payee. The fact necessary to the equitable title, in such case, is a transfer by the payee or the person to whose order the instrument has been made payable. Such proof is generally at least within the power of the person seeking to recover upon the instrument, if it has been so transferred, while the other party might be wholly without knowledge or information concerning the matter. The presumption of delivery from possession is proper and reasonable where the instrument is payable to bearer; but we see no good reason for giving effect to such presumption where the instrument is payable to order and not indorsed, so as to overcome the usual and primary presumption, in such case, that the instrument remains the property of the person to whose order it is made payable.

Holding, therefore, that the proof was insufficient to entitle the plaintiff to recover, the judgment will be affirmed.

SECTION 11.—SURRENDER TO THE DRAWEE

It should be apparent that the act of the holder of a check or other bill of exchange, in surrendering the same to the drawee and receiving payment, is a transaction essentially and materially different from that of selling the instrument, and yet there is some confusion on this matter. An instrument, when transferred to a purchaser, is still alive. An instrument surrendered to a drawee for payment is thereafter, for most purposes, a dead bill. The surrender of an instrument to the drawee is not a sale. It is quite important to note this fact, for the rights and duties of the two parties concerned are very different in these two cases. In the first place, since the surrender of a bill to the drawee is not a sale, the transfer is in no sense a **negotiation of the instrument.** Therefore no indorsement is necessary to entitle the holder to receive payment. A holder, even a special indorsee, is entitled to demand payment from the drawee and to refuse to indorse. If the

drawee refuses to pay unless the holder indorses, the drawee thereby breaks his contract with the drawer, and the instrument is dishonored. If the instrument is a check, and the drawee bank refuses to pay unless the special indorsee indorses, the extent of the damages which the drawer—not the holder—may recover from the drawee may be considerable. It is a common practice for the holder, upon presenting the instrument to the drawee, to sign his name on the back of the instrument. If the holder does sign his name upon delivery of the instrument to the drawee, such act is not an indorsement. It is a mere receipt for money.

Another important effect, arising from the fact that a transfer to the drawee is not a negotiation, is that such transferor assumes no liability as an indorser to the drawee. Occasionally we find statements to the effect that the transferor to the drawee thereby assumes a liability as an indorser to the drawee, but these statements are not correct. No doubt, a transferor to the drawee could enter into a special contract, under which he might warrant to the drawee that certain things are true, for example, that the instrument was not forged; but the point made here is that no such liability rests on the transferor to the drawee, arising from the fact that at the time he received payment he signed a receipt for the money on the back of the instrument then surrendered to the drawee.

It is, of course, possible for a drawee to purchase the bill. Such a case could arise, where the drawee took a time bill of exchange before maturity. This transaction might be either a purchase or a payment of the bill. If the evidence showed an intent to purchase, the above discussion would not be applicable to the situation.

NATIONAL BANK OF COMMERCE OF LINCOLN v. FARMERS' & MERCHANTS' BANK OF LINCOLN.

(Supreme Court of Nebraska, 1910. 87 Neb. 841, 128 N. W. 522.)

FAWCETT, J. * * * What is meant by "negotiating" an instrument? * * * Counsel answer that question by quoting section 30 of article 3 of the Negotiable Instruments Law, * * * as follows: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." * * * "The power to 'negotiate' a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorsee or holder. 'Negotiation' means the act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person." If A. gives B. a check on C. Bank, and B. presents the check at the counter of C., no negotiation is necessary or had. He simply demands and receives payment; but if B. goes to D. store and buys a bill of goods, and tenders the indorsed check in payment, he negotiates the check. The difference is clear and well defined. The presentation by defendant of the check in controversy for payment was not a "negotiation" of the check within the meaning of the statute quoted.

Nor do we think that the payment by a bank of a check drawn upon it constitutes such bank a "holder" within the meaning of the statute. * * * When a check is presented to the bank upon which it is drawn, and is paid by such bank, such payment discharges the instrument, * * * and the bank is not thereafter, within the meaning of the statute, a "holder" of such check. * * *

ANONYMOUS.

(Ohio Common Pleas, 1882. 26 Albany Law J. 61.)

The suit was by the holder against the drawer of a check. The check was payable to order, duly indorsed in blank, and transferred to the plaintiff. On presentation the bank, drawee, demanded that the holder should also indorse it. This he refused to do, and thereupon had the check protested, and brought this suit. Judge Jones holds that the bank had no right to make such requirements, although it was proved that such was the local custom, and holds that the check was properly dishonored.

JONES, J. A bank is ordinarily presumed to know the signatures of its own customers and depositors; but it will not be seriously doubted that when a check is drawn on a bank, which is a stranger to the payee and his signature, the bank is entitled to a reasonable time in which to ascertain the genuineness of the indorsement, before paying a check payable to his order, and indeed some of the authorities seem to justify a bank or banker in calling upon the holder of such a bill or check, when it is reasonable to do so, to furnish proof that the indorsement is the genuine one of the payee; but in this case neither of these things was required or asked. There was no demand by the bank for proof of the signature, nor for a reasonable delay to satisfy itself of the genuineness of the indorsement; but there was simply an absolute refusal to pay, unless the person who presented the check would indorse it. That this refusal to pay without such indorsement is not justified by commercial law is, we think, perfectly clear; it is an attempt to limit the negotiability of such paper, and to fix terms and conditions for its payment not warranted by the law or by the drawer of the check, and to which neither he nor the holder is obliged to submit. The implicit contract of a bank with its customers is to pay their checks according to the law merchant.

SECTION 12.—OTHER FORMAL REQUISITES AND ASPECTS OF NEGOTIATION

N. I. L., Section 31. The indorsement must be written on the instrument or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

N. I. L., Section 32. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally does not operate as a negotiation of the instrument. But

where the instrument has been paid in part, it may be indorsed as to the residue.

N. I. L., Section 41. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

N. I. L., Section 42. Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

N. I. L., Section 43. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

N. I. L., Section 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

N. I. L., Section 45. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

N. I. L., Section 46. Except where the contrary appears every indorsement is presumed prima facie to have been made at place where the instrument is dated.

N. I. L., Section 47. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

N. I. L., Section 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

N. I. L., Section 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

CHAPTER III

WHO ARE HOLDERS IN DUE COURSE

Section
1. Introduction.
2. Must be a Purchaser for Value.
3. Must be a Purchaser Before Maturity.
4. Must be a Purchaser in Good Faith.
5. Payee may be a Holder in Due Course.
6. Transferee from a Holder in Due Course is a Holder in Due Course.
7. Rights of the Reacquirer.
8. Rights of a Transferee from a Holder in Due Course of Unindorsed Paper Payable to the Order of the Transferor.

SECTION 1.—INTRODUCTION

A party in physical possession of a negotiable instrument may occupy one of two positions: (1) He may have no title to the instrument; (2) he may have possession and title to the instrument. In the first case the party in possession is not a holder. His possession may be rightful or wrongful. There are various subordinate positions which may be held by a person who has no title to the instrument but does have physical possession. So, also, in case (2), the holder of the title to the instrument may occupy one of several positions. The holder may have the title in trust for a former owner or for a third party. He may have the title accompanied by the same rights, no more, and no less, than his predecessor in title had, or he may have the title under circumstances where his rights against prior parties are superior to those possessed by former owners of the instrument. The term "holder in due course" is used to describe a holder of the title who does have rights against prior parties which may be greatly superior to those of former owners who are not holders in due course. The present chapter is devoted to the consideration of the circumstances under which a holder is to be deemed a holder in due course. The chapters following will show to what extent the rights of the holder in due course are superior to the rights of holders not in due course.

SECTION 2.—MUST BE A PURCHASER FOR VALUE

Section 52 (3). A holder in due course is a holder that took it for value.

Section 25. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

Section 191, clause 12. "Value" means valuable consideration.

Section 24. Every negotiable instrument is deemed prima facie

to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Section 27. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Section 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

The problem of the interpretation of these sections is substantially the same as that presented in any transaction involving the application of the rules relating to the common-law requirement of consideration in simple contracts. There are a few special situations to be noticed.

Before the Negotiable Instruments Law, there was a conflict of authority as to whether a transferee of negotiable paper in payment of a pre-existing debt was a purchaser for value. There was the same conflict in the case where the transferee took, not in payment of a pre-existing debt, but by way of collateral security for the pre-existing debt. Section 25 adopts what was the weight of authority on this question, but, it is to be noticed, the section makes no mention of the case where the transferee took by way of collateral security. In Illinois the section was so worded that a transferee, who took the instrument either in satisfaction or as security for an antecedent or pre-existing debt, was a transferee for value. But all courts, except those of New York, which had occasion to interpret section 25, have held that a transferee by way of collateral security is a holder for value. Recently the New York Court of Appeals said in a very strong dictum that these earlier interpretations were incorrect. Following is an extract from this decision:

KELSO & CO. v. ELLIS et al.

(Court of Appeals of New York, 1918. 224 N. Y. 528, 121 N. E. 364.)

POUND, J. * * * Unquestionably, upon the evidence, plaintiff was a holder for value. Prior to the passage of the Negotiable Instruments Law, and from the time of the decision of Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342, it was the law of this state that, in order to constitute one a holder for value as indorsee of negotiable paper, it was necessary that he should part with some present consideration and that mere credit given on an antecedent debt was not such a consideration; but the Negotiable Instruments Law * * * provides that "an antecedent or pre-existing debt constitutes value" and thus brings the law of this state into harmony with that of the United States Supreme Court. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, held that the transfer of negotiable paper by indorsement to a creditor before maturity, merely as security for an antecedent debt or in payment thereof, is a transfer for value. The conflicting doctrines of the two leading cases were for many years the subject of earnest discussion in the courts, and the lack of a uniform rule on the subject caused no

little confusion. The New York rule was so well established that the inertia of Coddington v. Bay carried it along for some distance before the external force of the Negotiable Instruments Law acted upon it. Sutherland v. Mead, 80 App. Div. 103, 107, 80 N. Y. Supp. 504; Roseman v. Mahony, 86 App. Div. 377, 378, 83 N. Y. Supp. 749; Crawford's Annotated Neg. Inst. Law, p. 63. Even in this court a dictum in Bank of America v. Waydell, 187 N. Y. 115, 120, 79 N. E. 857, reveals the habit of bench and bar to look to cases rather than statutes for principles of commercial law until attention is sharply directed to the extent that the movement for uniformity of laws through legislation has been successful in New York and many other states. But it is perfectly clear that for the sake of uniformity New York has abrogated the rule which had been in force since the year 1822. Melton v. Pensacola Bank & Trust Co., 190 Fed. 126, 132, 111 C. C. A. 166. Coddington v. Bay and section [25] of the Negotiable Instruments Law are irreconcilable in the mind of any candid student of the decisions in this and other jurisdictions.

LASSAS v. McCARTY.

(Supreme Court of Oregon, 1906. 47 Or. 474, 84 Pac. 76.)

This is a suit by George Lassas against Lettie McCarty to foreclose a mortgage. The complaint states that the defendant, on November 21, 1900, gave to one G. L. Webb her promissory note for the sum of $1,500, payable in one year, with interest thereon at the rate of 8 per cent. per annum, and to secure the payment thereof she at the same time executed to him a mortgage of certain real property in Baker county, which mortgage was duly recorded. Various assignments of the note and mortgage are set out, and it is alleged that on July 2, 1901, the plaintiff for a valuable consideration became the owner and holder thereof, and that no part of the debt so secured has ever been paid.

MOORE, J. * * * This brings us to a consideration of the question whether or not plaintiff secured the title to the note and mortgage under such circumstances as to render him an innocent purchaser thereof for a valuable consideration and without notice of the imposition practiced upon the defendant. An examination of plaintiff's testimony shows that he purchased the note before maturity, paying therefor $1,000, which was two-thirds of its face value, without knowledge of any fact that would tend to render the negotiable instrument invalid. It is argued by defendant's counsel that the sum paid for the note imparts notice of its infirmity, and hence plaintiff was not an innocent purchaser thereof. * * * Whatever the rule may be in other jurisdictions, it is settled in this state by statute, enacted prior to the giving of the note and mortgage, that the holder of a negotiable instrument in due course may enforce payment for the full amount thereof against all parties liable thereon. * * *

CITIZENS' STATE BANK v. COWLES.

(Court of Appeals of New York, 1905. 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765.)

WERNER, J. The action is upon a check dated June 1, 1900, drawn by the defendant upon the First National Bank of Port Chester, N. Y., to the order of W. W. Miller & Sons, for $600. The check was given in payment for a team of horses purchased by the defendant from the Millers under a written guaranty of soundness and condition, the alleged breach of which is now sought to be interposed as a defense.

The horses were delivered shortly after midnight on the 2d day of June, and later in the morning it was discovered that one of them was ill from pneumonia, as a result of which it died within about nine days. On Monday, the 4th of June, which was the first business day after the giving of the check, the defendant's son notified the bank to stop payment on the check, and then communicated by telephone with one of the payees, advising him of the sickness of one of the horses, and of the fact that payment of the check had been stopped.

The payees indorsed the check to one George M. Hoffman, the president of the plaintiff bank, and mailed it to him at Little River, Kan., but whether it was so mailed before or after the notification as to the illness of the horse does not appear. Hoffman received the check on the 8th day of June, indorsed it, and within two or three hours deposited it with the plaintiff, which credited the amount thereof to Hoffman's account, indorsed the check to the National Bank of Kansas City, Mo., and sent it to that bank for collection. What was done with the check after that does not appear, except as it may be inferred from the fact that it was received by the First National Bank of Port Chester (on which bank it was drawn) on the 14th of June, where it was protested, and marked "Payment stopped."

One of the issues tendered by the defendant's answer was that the plaintiff was not an innocent holder of the check for value. Upon the trial the plaintiff made out its case by introducing the check in evidence, and relying upon the presumptions in support of negotiable paper. * * * The defendant then introduced evidence bearing upon the breach of warranty or failure of consideration in the sale of the horses.

It is obvious that if the evidence would support the inference that the plaintiff did not buy the check, but simply gave Hoffman credit for the amount upon its books, then plaintiff is not a holder of the check in due course, within the "law merchant," as that term is now defined in the negotiable instruments law, so as to render its title superior to the defenses which the drawer of the check may have against the payees. Under the negotiable instruments law four elements must concur to constitute such a title: (1) The instrument must be complete and regular on its face; (2) the holder must receive it before it is overdue, and without notice that it has been previously dishonored, if that is the fact; (3) it must have been taken in good faith and for value; (4) it must have been taken without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Neg. Instruments Law, § 91 (Laws 1897, p. 732, c. 612). If the plaintiff had not actually parted with value before it received notice of the dishonor of this check, it is apparent that at least one of these elements

is lacking in the plaintiff's title. The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course. * * *

The view of the evidence most favorable to the defendant would, we think, have justified a jury in finding that the amount of the check had simply been credited to Hoffman's account, and that no money was paid to him by the plaintiff upon the check before the latter had notice of its dishonor.

The judgments of the courts below should be reversed, and a new trial granted, with costs to abide the event.

MERCHANTS' NAT. BANK OF ST. PAUL v. SANTA MARIA SUGAR CO.

(Supreme Court of New York, Appellate Division, 1914. 162 App. Div. 248, 147 N. Y. Supp. 498.)

Action by the Merchants' National Bank of St. Paul against the Santa Maria Sugar Company. From a judgment dismissing the complaint, plaintiff appeals.

CLARKE, J. The action was to recover $2,340 on the following paper executed by defendant and delivered to the Americon Hoist & Derrick Company of St. Paul:

"I shall pay to the order of the American Hoist & Derrick Company on the 30th day of August, 1911, in the city of New York, the sum of two thousand three hundred and forty ($2,340) dollars currency, for amount of the second installment agreed on of a crane of their manufacture purchased on this date, according to specifications of their representative, Mr. H. S. Johannsen.

"Dated, Ingenio, Santa Maria, August 30, 1910.

"[Signed] Santa Maria Sugar Company, Bernard Pons.

"For $2,340.00 Cy. together with interest at 6% per annum to August 30, 1911."

The complaint alleged that thereafter and before its maturity, to wit, on or about March 29, 1911, said American Hoist & Derrick Company indorsed and delivered said note to the plaintiff for value. * * * In its decision the court made findings of fact as follows:

That before maturity, and on or about the 29th of March, 1911, the American Hoist & Derrick Company discounted said note with the above-named plaintiff.

That the plaintiff credited the American Hoist & Derrick Company, which maintained a regular drawing account with the plaintiff, with $2,427.36, the value of said note.

That immediately after the discounting of said note the balance on hand to the credit of the American Hoist & Derrick Company was $22,661.13, and that between the date of the discounting of said note, which was March 29, 1911, and the time when the plaintiff was notified by the defendant of the latter's objection to the note, which was some time shortly after April 26, 1911, the American Hoist & Derrick Company deposited the sum of $129,547.60 with the plaintiff and withdrew from the plaintiff day by day such sums as to make the total of $110,999.58.

That during said period the smallest balance on hand at the bank to the credit of the American Hoist & Derrick Company was $6,294.04 on April 18, 1911. * * *

That at maturity said note was duly presented for payment to the defendant and payment thereof demanded, but no part thereof was paid.

That the plaintiff at the time it discounted said note had no knowledge or suspicion of any defect or infirmity in the note and had no such knowledge or suspicion until its receipt of defendant's letter dated Santa Maria, April 26, 1911.

And as conclusions of law: That the said instrument is a negotiable promissory note. That the plaintiff herein is not a bona fide holder for value without notice. * * *

The main question involved upon this appeal does not seem to have been directly passed upon in this state. * * *

The Trial Term found that until one month after plaintiff had discounted the instrument it had no knowledge or suspicion of any infirmity therein or equities existing. The question therefore is whether by discounting the note and by the subsequent transactions on the account it can be considered that value passed therefor. Of course, the mere discounting of the note and placing the amount of said discount to the credit of the holder would not then have constituted a transfer for value, because the bank would, under those circumstances, have parted with nothing, there would have been a mere bookkeeping entry. * * * But if the sum had subsequently been checked out, then value would have passed.

The respondent claims that the bank always had on account a sum in excess of the amount of this note. The lowest balance on any day during the period was upwards of $6,000. But the appellant claims that the rule of law is, "The first money in is the first money out," that the first items on the debit side are charged against the first items on the credit side. It paid out continually, and the only reason that it had a balance at the end of the period was by reason of a continual flow of deposits; but those subsequent deposits went to meet subsequent drawings. This credit was exhausted long before the period expired.

In Fox v. Bank of Kansas City, 30 Kan. 441, 1 Pac. 789, * * * Mr. Justice Brewer said: "The general rule as to the application of payments, there being no special facts to interfere, is that the first payments go to the oldest debts; so all the money drawn out by the Emporia Bank, in the absence of some special facts, was a payment by the plaintiff of the oldest deposits and discounts; and when, at the close of February 21st, the balance due February 15th had been fully checked out, the plaintiff had paid for every deposit and discount made by the Emporia Bank prior to February 15th. * * *"

I am of the opinion that, as there is no controlling authority in this state to the contrary, we should agree with the well-reasoned opinion of Mr. Justice Brewer, supra, followed as it has been in five other states, and apply the rule recognized in National Park Bank v. Seaboard Bank, 114 N. Y. 28–35, 20 N. E. 632, 11 Am. St. Rep. 612, that the first debits are to be charged against the first credits. It follows therefore, upon the facts as found, that the bank was a bona fide holder for value. The second and third conclusions of law should

be reversed and a finding made in lieu thereof that the plaintiff is a bona fide holder of the note for value without notice, and, in accordance with the stipulation, judgment should be entered for the plaintiff upon the note with costs.

The judgment appealed from should therefore be reversed, and judgment for the plaintiff entered as indicated, with costs to the appellant. * * *

The effect of section 24 is merely to relieve the holder from proving, in the first instance, that he is a purchaser. The party sued must prove that the holder was not a purchaser—i. e., that he did not give value: otherwise, it will be presumed that the holder gave value.

The effect of section 27 is to prevent a pledgee or any other holder who has a lien on the instrument from acquiring an interest in the instrument greater than the amount of the debt secured. If P. owes A. $100, and P. transfers to A. a negotiable note executed by M. for $150, to secure the payment of the $100 debt, A. is given only a $100 interest in the instrument. This does not mean that in all cases A. will be prevented from recovering $150 in the event that A. sues M. For example, if the circumstances were such that P. could have recovered $150 from M., then A., although he holds this $150 note as collateral security for $100, may recover $150 from M. But, under section 27, it is clear that $100 only of this sum will belong to A. The balance of $50 will be held by A. in trust for P., which amount P. could recover from A. If, however, M. had some defense as against P., such as want or failure of consideration, or of fraud, or payment before maturity, then A., in suing M., could not recover more than $100, the amount of the debt, assuming that A., in all other respects was a holder in due course. Obviously, if A. had taken the note in payment of P.'s debt to A., instead of as collateral security for the debt, A. could then recover the full amount of the instrument, $150.

Section 26 permits a donee of the instrument to recover if any prior party parted with value. This section was discussed in Chapter I.

SECTION 3.—MUST BE A PURCHASER BEFORE MATURITY

The theory underlying the rule that a holder, in order to be a holder in due course, must have purchased the instrument before maturity, is substantially the same as that which underlies the rule that the holder in due course must be one who takes in good faith. The theory is that, if an instrument is not taken up at maturity, the inference is that the person primarily liable for its payment, who failed to take it out of circulation at maturity, did so because he had a good defense. The presumption is that every one will

take up his commercial paper on the day of maturity. The commercial world deals in paper upon this assumption. Of course, many negotiable instruments which represent bona fide debts are not always taken up on the day they fall due. Nevertheless the rule that a holder, in order to be a holder in due course, must have bought the instrument, once part of the broader rule that he must take in good faith, is now crystallized into an independent rule, having little to do with good faith. If an indorsee bought one day after maturity, he could not be a holder in due course.

The rule being well established and now codified, the only difficulty arises in its application to varied states of fact. We have three situations, which must be dealt with separately: (1) Where the instrument bore a fixed date of maturity. (2) Where the instrument was payable on demand. (3) Where the instrument had a fixed date of maturity, but subject to acceleration into an earlier maturity upon the happening of some specified act or event.

The sections of the Negotiable Instruments Law that bear on these questions are as follows:

Section 52 (2). A holder in due course is a holder who has taken the instrument before it was overdue.

Section 13. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the time, date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a holder in due course; but as to him the date so inserted is to be regarded as the true date.

Section 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls on Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday where that entire day is not a holiday.

Section 53. Where an instrument payable on demand is negotiated an unreasonable length of time after issue the holder is not deemed a holder in due course.

Section 193. In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments and the facts of the particular case.

Section 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.

Section 52 (2). A holder in due course is a holder who has taken the instrument before it was overdue and without notice that it had been previously dishonored, if such was the fact.

Section 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

As regards the situation where the instrument has a fixed date of maturity, the purchaser will be able to ascertain from the face of the paper whether the date of maturity has arrived. Of course, he will run the risk that the date has been altered. If the date has been erased and a later date inserted, the purchaser's rights will be determined by the date which the instrument originally bore. An alteration of the date is a material alteration. A person buying the instrument after the actual date of maturity, but before the arrival of the altered date, will not be a holder in due course. He is a taker after maturity.

Most of the difficulty in the application of the rule that a holder in due course must be one who bought before maturity arises in connection with demand paper and paper which has a fixed date of maturity, but subject to earlier payment upon the happening of a specified act or event. As regards demand paper, we note that one who purchases it before the lapse of a reasonable time from date of issue will be regarded as a purchaser before maturity. What is a reasonable time? Section 193 provides that three things must be taken into consideration: (1) The nature of the instrument; (2) the usage of trade; and (3) the facts of the particular case.

Since the nature of the instrument must be taken into consideration, we should expect to find that what constituted a reasonable time would differ, according as the instrument was a demand note, a demand bill of exchange, or a check. Generally speaking, the time within which one might safely buy a check would be shorter than in either of the other two cases. A demand note would have a longer life, and probably a demand bill of exchange would have a longer life than a demand note; at least it would seem that a foreign bill of exchange could freely circulate longer than a demand note. A certificate of deposit would have a still longer life.

Demand instruments are due at the moment of issue. The statute of limitations as a general rule begins to run from date. Still the law does not regard such an instrument as due as soon as issued, within the meaning of the rule that a holder in due course must be one who takes before maturity. If it did, demand instruments would not readily circulate. But as a matter of fact they are intended to circulate for a while, and the question is: How long? The inherent difficulty in being able to ascertain within any degree of certainty what a reasonable time is has led a few states to define by statute what shall constitute a reasonable time. Generally the matter is left open.

The statutory direction to look at usages of trade in determining what shall constitute a reasonable time is most important. Banks sometimes establish a custom to hold demand notes for a specified period of time. This period is not always the same. The period will vary with the community and with general credit conditions. Sometimes demand paper is held by banks on the general understanding that demand will not be made for six months. Sometimes the period is three months. In certain kinds of transactions the period is much shorter. The point is, however, that if a custom has developed in a community to such an extent as to be fairly well known, the period of time which demand paper is thus held will fix the time within which it is safe for one to buy demand paper.

The facts of the particular case must also be taken into consideration, and such facts might even control presumptions arising from the character of the paper and from observing business usage. Stipulations in regard to interest would be important. Notations of partial payments and of interest payments on the instrument would be important in this connection. The field of inquiry is obviously quite broad. The following cases illustrate the application of the rule.

ESTES v. LOVERING SHOE CO.

(Supreme Court of Minnesota, 1894. 59 Minn. 504, 61 N. W. 674, 50 Am. St. Rep. 424.)

COLLINS, J. * * * It is argued by counsel for appellant that these checks were stale and overdue when transferred to the plaintiff, and are therefore subject to any equitable defense which might have been available so long as they remained in the hands of the payee; but the decided weight of authority is opposed to this claim. It is to be borne in mind that no question as to the discharge of an indorser by delay in presentation, or by the failure of the bank on which the checks were drawn in the meantime, arises here; but the attack is made by the maker solely upon the consideration. As before stated, the checks were drawn and dated October 26th, at St. Paul, and were cashed about five days later (six days, at most) in Denver, Colo., and there were no circumstances, except the period of time which had passed, and the fact that the payee was attempting to cash the checks at a point some distance from the city in which they were drawn, to put plaintiff on his guard. In these days of large business enterprises and extraordinary facilities for traveling there was nothing suspicious in the fact that the checks were presented at a city distant from that in which they were drawn and made payable; and, as to the time, the rule is well settled that a holder who in good faith and for value, takes a check several days after it is drawn, receives it without being subject to defenses of which he had no notice before or at the time his title accrues. * * *

MOREY v. WAKEFIELD et al.

(Supreme Court of Vermont, 1868. 41 Vt. 24, 98 Am. Dec. 562.)

PIERPOINT, C. J. This action is brought by the plaintiff as the indorsee of a promissory note, given by the defendant to J. D. & H. Smith or bearer, payable on demand with interest, dated the 13th day of July, 1865, and sold and indorsed to the plaintiff by the payees in the fore part of May, 1866. It is conceded that this note was given for intoxicating liquor bought by the maker, of the payees, to be sold in violation of law, and under such circumstances that, as between the original parties to it, it could not be enforced.

The plaintiff claims to recover on the ground that he is an innocent holder for value, ignorant of the consideration for which it was given, and that he took it in the due course of business, while it was current and before it was due.

The first question that naturally suggests itself is whether the plaintiff did in fact take this note while current and before it was due. If he did not, the other questions which have been discussed, become immaterial, as no question is made by the plaintiff but that, if he took the note when past due, he took it subject to all defenses that would have been available if the suit had been by the original payees.

The note was payable on demand with interest, and was taken by the plaintiff of the payees about ten months after it was executed. Was the note then past due?

We do not now consider this an open question in this state; certainly not, so far as defenses by the maker are concerned. This precise question arose in Camp v. Scott, 14 Vt. 387. In that case the court held that a note payable on demand with interest, and negotiated two months after its date, was negotiated when it was past due, and held the maker liable as the trustee of the original payee, although, as the law then stood in this state, no maker of a negotiable note could be made liable as trustee of the payee, until the note had become due in his hands unnegotiated. We think this case must be controlled by that. * * *

Judgment of the county court reversed, and judgment for the defendant for his cost.

WEBER v. HIRSCH et al.

(Supreme Court of New York, Appellate Term, 1917. 163 N. Y. Supp. 1066.)

Action by I. Newton Weber against Oscar A. Hirsch and Al. Schwartz. Judgment for plaintiff in part, and he appeals.

MULLAN, J. Plaintiff, having sued on defendant's demand note, indorsed to him by the payee for value and without notice of any equities, appeals from a judgment in his favor for the amount of the note less the amount of a debt due to defendant by the payee. The learned trial justice allowed the offset upon the theory that plaintiff was not a holder in due course, because of an unreasonable delay in negotiation.

Whether a delay is unreasonable or not depends upon the particular facts in each case. Here the facts are not in dispute. Plaintiff was a brother-in-law of the payee, and knew that the defendant and the payee were in business together. The note was indorsed to plaintiff three months and six days after it was made. We see here no cir-

cumstance justifying a suspicion in the mind of the holder, or indicating that the delay in negotiation was "for an unreasonable length of time after the issue of the note," within the meaning of section 4 of the Negotiable Instruments Law.

Judgment modified, by increasing the amount thereof to $380.07, with interest from November 30, 1915, and appropriate costs in the court below, and, as so modified, affirmed.

The third case, above mentioned, where the instrument has a fixed date of maturity, but is subject to acceleration into an earlier maturity is one in which there is some conflict of authority as regards its negotiability, a situation which will be most unfortunate, if the conflict becomes widespread, because the use of this kind of instrument is becoming very common. The problem is simply this: A note will contain a fixed date of maturity, and will also contain a clause authorizing the holder to confess judgment at any time after date, or to declare the note due upon default of interest payments or of installments of principal, or to declare the note due upon the depreciation of collateral put up by the maker to secure payment of the note, or upon the maker's failure to deposit additional collateral. We have already discussed at some length the question as to whether such an instrument is negotiable, and we have found that there is considerable conflict among the authorities—some holding that the time of payment is uncertain; others holding that it is certain. Assuming that the instrument is held to be negotiable—and this must be the situation before our question arises—is a purchaser of such an instrument after the event has happened but before the fixed date arrives, a purchaser before maturity? If the stipulation is treated as giving an option only to the holder to declare the note due, and he has not yet done so, there is no difficulty in holding that a purchaser is a purchaser before maturity. But if the holder has demanded payment, and payment has been refused, and the holder has then negotiated the instrument to the present holder, is the latter a purchaser before maturity? Again, suppose the stipulation be treated, not as giving to the holder an option to declare the note due, but as actually maturing the instrument upon the happening of the event. Here it is more difficult to hold that a purchaser after this date, but before the date arrives, is a purchaser before maturity. Of course, the holder may not know that the event has happened, but it would be possible to require him to ascertain at his peril whether it had happened or not.

GILLETTE et al. v. HODGE et al.

(United States Circuit Court of Appeals, Eighth Circuit, 1909. 170 Fed. 313, 95 C. C. A. 205.)

AMIDON, District Judge. This was an action brought by Hodge Bros., the defendants in error, against the plaintiffs in error, on three promissory notes, dated April 13, 1903, payable to Robert Burgess &

Son, or order, respectively, July 1, 1904, 1905, and 1906, with interest payable annually. The notes contained a provision that default in the payment of interest should cause the whole note to become immediately due. The plaintiffs are private bankers, who discounted the notes at the rate of 10 per cent. on June 2, 1904, passing the proceeds to the credit of the payees, who afterwards drew the same in full. The answer interposes two defenses: First, that the notes were given as the purchase price of a stallion, and that the horse failed to comply with the warranties made by the vendors; second, that the notes were handed to the payees by the defendants upon an express agreement that they should not be treated as delivered until the signature of four other persons named in the answer should be obtained, and that, unless such signatures should be obtained, the notes should be of no effect. To make these defenses available, the defendants first sought to show that the notes were dishonored at the time they were acquired by the plaintiffs. Their main reliance for establishing this fact is the provision in the notes that they should become immediately due if there was default in the payment of interest. The first year's interest was due April 13, 1904. This installment of interest was, therefore, past due on June 2d, when plaintiffs acquired the notes; and it is urged that this fact, when combined with the clause of the note just referred to, caused the notes to mature April 13th, and that they were, therefore, dishonored at the time of the indorsement. The difficulty with this contention is that the provision of the notes upon which it is based is not self-executory. It simply gave to the holder an option to declare the notes due for default in the payment of interest. There is some conflict in judicial decisions as to the effect of such a provision (Hodge Bros. v. Wallace, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938); but it was expressly ruled by the Supreme Court of the United States in the case of Chicago Railroad Equipment Co. v. Merchants' National Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, that a similar provision did not of itself cause the notes to mature upon default in the payment of interest. * * *

On quite elementary principles, the judgment in this case was right, and should be affirmed.

CITIZENS' NAT. BANK OF GLENWOOD SPRINGS v. FIRST NAT. BANK OF PORTLAND, OREGON.

(Supreme Court of Colorado, 1919. 66 Colo. 426, 182 Pac. 12, 5 A. L. R. 587.)

DENISON, J. * * * No transaction between the acceptor and holder of a negotiable instrument can advance its maturity as against a subsequent holder in due course, even though it was negotiated after such transaction. If it could, the safety of negotiable paper would be destroyed, and the law merchant nullified. When a certified check is presented for payment, the debtor bank, if it has a defense against the holder, can protect itself by marking the face of the paper, so as to destroy its negotiability. * * *

It is believed that, in any and all cases where the fixed date of maturity has not yet arrived, a purchaser before the fixed date should be regarded as a purchaser before maturity. This seems to have been provided for in one case in the Negotiable Instru-

ments Law, and by analogy should be extended to all other cases. Section 52 provides that a holder in due course is one who takes the instrument before it is overdue and without notice that it had previously been dishonored, if such was the fact, and section 117 provides that the omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course. These sections refer to the case of a time bill of exchange which was in fact presented for acceptance before the date fixed for payment. Other sections of the act make this a dishonor of the instrument. It is then due and the holder may sue upon it. But the effect of sections 52 and 117 apparently enables a purchaser of such instrument after dishonor by non-acceptance and before the arrival of the fixed date of maturity to be a holder in due course. This rule should be applied in all cases where the instrument has matured as the result of the operation of an acceleration clause before the fixed date of maturity arrives.

SECTION 4.—MUST BE A PURCHASER IN GOOD FAITH

In any case where it becomes important for the holder of a negotiable instrument, in his suit thereon against the maker, drawer, or acceptor, to establish his position as that of a holder in due course, the object of the plaintiff is to be thereby enabled to shut out defenses which the defendant had against the party with whom he dealt. If there are no such defenses, it is immaterial whether the plaintiff is a holder in due course or not. If there are defenses, such as lack or failure of consideration, fraud, or payment before maturity, the plaintiff will be able to recover from the defendant only in the event that he is a holder in due course. It is perfectly apparent, therefore, that the holder acquires this extraordinary right to compel a person to pay a sum of money under these circumstances, only because the holder is an innocent purchaser. If the holder has knowledge of this defense, there is no reason why he should be given this preferred position. The law therefore properly provides that, unless the purchaser was a purchaser in good faith, he will not be a holder in due course. Several sections of the Negotiable Instruments Law deal with the requirement of good faith.

Section 52. A holder in due course is a holder who has taken the instrument (1) complete and regular on its face and (3) in good faith; and section 52 (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Section 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Section 55. The title of a person who negotiates an instrument

is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or where he negotiates it in breach of faith, or under such circumstances as to amount to fraud.

Section 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course, only to the extent of the amount theretofore paid by him.

Section 59. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

It is to be noticed that a holder, in order to be holder in due course, must have acquired title to the instrument without knowledge of two varieties of facts: (1) **Infirmities in the instrument**; and (2) **defects in title.** These two expressions: Infirmities in the instrument and defects in title have a more or less overlapping meaning, but it is necessary to note that there are two very different kinds of rights possessed by other persons, which the holder must be unaware of if he is to be holder in due course. We may more accurately refer to these rights of third parties as (1) **equities of defense** and (2) **equities of ownership.** The expression "infirmity in the instrument" is used to describe equities of defense, while the expression "defects in title" describes a kind of title which is not perfect, a situation which obviously gives rise to an equity of ownership in some other person. To illustrate the distinction between equities of defense and equities of ownership: If P. obtains M.'s note by fraud, or without consideration and P. negotiates to A., M.'s equity against P. is an **equity of defense**—an infirmity in the instrument. P.'s **title** is not defective. On the other hand, if P. obtains M.'s note for a consideration and there is no fraud—that is, obtains the instrument under circumstances where M. really is indebted to P. in the sum specified—we have a case where there cannot be any infirmity in the instrument, any equity of defense. But there may arise a claim of ownership which will render the title of a subsequent holder defective. Suppose P. intrusts this note to A. for a special purpose, perhaps with directions to deposit it to P.'s account. Suppose, further, that the instrument, at the time it left P.'s hands, was in such form that it could be negotiated by delivery, that is, was then payable to bearer, either because originally made payable to P. or bearer, or because of the blank indorsement of P. If the note were payable to P.'s order, A., by virtue of his possession of a negotiable instrument payable to bearer has the legal power to pass a good title to

an innocent purchaser, but since his possession was for a special purpose, he violates a contract duty in doing so. If A., therefore, violates his trust and negotiates to B., there is an outstanding claim of ownership, an **equity of ownership**, in P., and A. has the defective title. This is the transaction described in the last clause of section 55. Similarly the title of a thief or finder of bearer paper is likewise defective. The person who lost it or from whom it was stolen has the **equity of ownership**. At this point it should be recalled that if the person intrusted with the instrument for the special purpose, or the thief or the finder, had possession of paper then payable to the order of the payee or of some special indorsee, such party in possession does not even have a defective title. He has no title at all. He has no **power** to negotiate. If the indorsement of the payee or special indorsee be forged, no title passes to the transferee. Such a transferee, no matter how innocent, cannot be a holder in due course. He is not even a holder. He is merely a person who has physical possession of a piece of paper evidencing a series of contracts which is owned by the person whose name was forged who in law is still the holder.

Section 55 makes mention of another kind of **defect of title**; that is, another situation out of which may arise an **equity of ownership**. The first clause of the section states that a title is defective when **he**, the party who sold the instrument to the person now claiming to be a holder in due course (let us call him A.), obtained the instrument by fraud, duress, or force or fear, or other unlawful means. In the case above discussed the instrument was assumed to have been acquired by A. (1) by the voluntary act of P., the owner; (2) by finding; (3) by larceny. In each case, his title was defective. We also find, from the first part of section 55 that A.'s title will be defective if A. acquires the instrument by fraud, etc., practiced by him upon P.

In speaking of defective titles, we should keep in mind the various ways in which they are created. Wherever we find a defective title in one person, there is some other person who has the **equity of ownership**. And it is the equity of ownership to which the holder in due course is not subject.

To summarize: The holder in due course takes free from two kinds of equities: **Equities of defense; and equities of ownership.**

We shall later see that a holder not in due course will take free from some kinds of equities of ownership, but that he cannot take free from equities of defense.

A great deal of litigation over negotiable instruments raises questions relating to bad faith. If the instrument were procured by the payee from the maker by fraud, or without consideration, or under circumstances revealing some other personal defense, it is almost certain that the payee will negotiate the instrument to a holder in due course, for that is the only opportunity he has of forcing collection. It will be to the interest of the payee to negotiate to one who was absolutely bona fide, but it often happens

that the indorsee from the payee is so related in business with the payee that he does have some intimation of the existence of the defense; but, as the cases show, the maker must be able to charge the holder with considerable knowledge of the situation before he is deemed to be a purchaser in bad faith.

LUTTON v. BAKER.

(Supreme Court of Iowa, 1919. 187 Iowa, 753, 174 N. W. 599, 6 A. L. R. 1696.)

The plaintiff asserts that he is an "innocent purchaser" of a note made by Baker to Le Grand and that he is entitled to have a lien established to secure payment of said note. The trial court gave him judgment against Baker and established the lien as prayed. Baker appeals.

SALINGER, J. * * * It is assigned the court erred in holding that the note sued on could be enforced notwithstanding failure to attach revenue stamps as required by act of Congress * * * in force at the time. * * * The appellee responds * * * that there is no evidence that the failure to stamp was due to fraudulent intent; and that in the absence of such intent—inter partes, at least—such failure is of no materiality. That does not quite meet the case. The appellee asserts himself to be an innocent purchaser for value and has the burden of proof on that allegation. The defendant expressly denied that plaintiff was such purchaser, and his argument is that when a note which the revenue laws require to be stamped is not stamped it ought not be held "complete and regular on its face." * * * Indeed, the note set out in the abstract does not purport to be stamped. And, so, the buyer must have known that the stamp law had been disregarded. And the sole question is the effect of such knowledge. Section 3060a52, Code Supplement 1913, defines a holder in due course to be, among other things, one who has taken an instrument which "is complete and regular upon its face." We held in the case of In re Philpott's Estate, 169 Iowa, 555, 151 N. W. 825, Ann. Cas. 1917B, 839, that a note payable "on or before four ——— after date" is not "complete and regular on its face," is not negotiable, and he who takes the same is not a "holder in due course." We now hold that a note which lacks the stamping required by law is not "complete and regular on its face," and that therefore plaintiff is not a holder in due course, and must meet any defense that is good against the payee who transferred to plaintiff.

The defendant maker does interpose defenses which, if proved, will defeat the payee who transferred to plaintiff. One of them is that when the note was signed he and Le Grand also signed a contract that no payment should be made unless Le Grand first performed certain things that he agreed to perform. Assume that all defenses but this last one have not been established. That will not destroy this last defense if that be proved. Is it proved? The testimony, including that of Humphrey, a witness for plaintiff, clearly establishes that such a contract was made. The evidence that it was never performed or offered to be performed is undisputed. If Le Grand had not sold the note, this defense would prevent his collecting the note. As said, this plaintiff is in no better position than Le Grand. If this were all, it was error to give judgment against Baker. * * *

The decree below will be reversed. The trial court is directed to dismiss the petition and enter judgment for costs in favor of appellant Louis Baker.

ELIAS v. WHITNEY.

(Supreme Court of New York, Appellate Term, 1906. 50 Misc. Rep. 326, 98 N. Y. Supp. 667.)

TRUAX, J. * * * The evidence showed that the check in suit had been changed before it reached the plaintiff, and that a mere inspection of the check showed such change. There is no evidence showing that the defendant authorized or assented to the alteration, but the appellant says that he is "a holder in due course," and not a party to the alteration, and that, under section 205 of the negotiable instruments law (Laws 1897, p. 745, c. 612), he may enforce payment on the check, according to its original tenor. Section 91, p. 732, of the negotiable instruments law, states what constitutes a holder in due course. According to that section, a holder in due course is a holder who has taken an instrument that is complete and regular on its face. This instrument was not complete and regular on its face at the time plaintiff took it. As we have stated before, a mere inspection of the instrument showed its defect, and therefore, under subdivision 41 of the negotiable instruments law, plaintiff had notice of an infirmity in the instrument at the time he took it.

[Order setting aside verdict for plaintiff is affirmed.]

COLE v. HARRISON.

(Supreme Court of New York, Appellate Division, 1915. 167 App. Div. 336, 153 N. Y. Supp. 200.)

DOWLING, J. The action is brought upon a promissory note made by defendant to the order of Donald McLean, dated February 20, 1911, for the sum of $15,000 payable at the National Park Bank three months after date, with interest, and indorsed by Donald McLean, and by him transferred to plaintiff. It appears that the defendant was a client of McLean, who had originally obtained from her certain promissory notes signed by her to pay a balance due on an investment in what is called the "Minwax" business, purchased by her from Clifford L. Miller & Co. in January, 1910. These notes were discounted at the National Park Bank, and new notes were obtained from her from time to time by McLean; each set of notes being used ostensibly to take up prior obligations, the latter, however, never being returned to her. Finally, in February, 1911, the defendant's son being very ill, she signed at McLean's request four more notes, as those then in the bank were due, and though she at first refused, she finally signed these four notes in blank, on McLean's representation that he was to use them to pay the balance due on the Minwax transaction. When delivered, the notes bore only the defendant's signature and the ordinary printed matter. One of these notes was filled in by McLean with the date February 20, 1911, the amount $15,000, the payee himself, the place where payable the National Park Bank, the time of maturity three months, and the addition of the words "with interest" and as filled in was thereafter indorsed by McLean to the plaintiff, and is the note sued upon. The defendant never gave McLean au-

thority to fill out the note in the form in which it was finally transferred, nor to transfer it to the plaintiff.

The plaintiff testified that he had many times loaned money to McLean, who was also his attorney, and that McLean had told him he was in trouble with a woman client of his, whose money he had taken and invested in the Minwax Company, and who threatened, unless she was paid back her money, to begin disbarment proceedings against him. Nothing was said between them about the note in suit. On March 2, 1911, plaintiff finally agreed to loan McLean $15,000 to enable him to pay off this client, who was pressing him for her money, and on March 4th plaintiff gave his check to McLean, to the latter's order, in the sum of $15,000 drawn on the Brooklyn Trust Company, which was duly deposited by McLean for collection and the proceeds received by him through the National Park Bank of New York. Plaintiff testifies that on March 2d he promised McLean, by telephone, that he would send him the amount of this loan on the 4th, and that he did send his check for $15,000 on the morning of March 4th, whereupon McLean sent him the note in suit, together with two insurance policies, in the sum of $10,000 and $5,000, respectively. He says that he had always received collateral security on the other loans he had made to McLean, and that he expected such security upon this loan of $15,000, although nothing was said about the need of security, and he had no knowledge of what the nature thereof would be until he received McLean's letter. Plaintiff says that the note and the two insurance policies were inclosed in the letter from McLean which is in evidence, marked March 2d; but the letter itself contains no reference of any kind to the inclosure of a note and refers only to "two policies." It is to be noted, also, that the letter is dated March 2d: whereas the loan was not made until March 4th, and plaintiff claims he received the letter after the loan was made on that date. No explanation is given as to why the letter contains no reference to the note. The assignment of the policies bore date of March 2d, the same as the letter. Plaintiff says that the omission of any reference to the $15,000 note did not strike him as strange. When the note became due, it was not presented for payment, and no instructions had been left by plaintiff with his representative in this country to present the same for payment, but simply instructions as to what was to be done in regard to the deposit of the partial payment, which had been promised by McLean to be made when the note was due.

Plaintiff never sued McLean upon the note, and no demand was ever made upon defendant for payment until plaintiff's attorney wrote her on December 23, 1913, nearly three years after the maturity of the note. Plaintiff admits that he did not inquire of McLean who the maker of the note was when he received it, and, though the note was signed "I. S. Harrison," and he noticed when he received the note that the body of it was in McLean's handwriting, he asked no questions of any kind about the note. There was no evidence offered tending to contradict plaintiff's version of the transaction. Under these circumstances it would seem that, although the plaintiff was not entitled to the direction of a verdict in his favor, yet the finding of the jury against him was against the weight of the evidence. * * *

What constitutes good faith upon the part of a holder of a negotiable paper has been defined by the Court of Appeals in the following language: "He is not bound at his peril to be on the alert for cir-

cumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title according to settled doctrine, will prevail." Cheever v. Pittsburg Ry. Co., 150 N. Y. 59, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646.

Had plaintiff simply produced his check to the order of McLean for the full amount of the note, in the absence of any proof of knowledge on his part of the circumstances under which the note was given, and its diversion by McLean, or knowledge by him of facts making his action amount to bad faith, he would have been entitled to recover. But there are circumstances attending the transaction which, as they depend for their effect and bearing thereupon solely on the plaintiff's testimony, left his credibility as to those matters a question for the determination of the jury. Among these circumstances were the fact that McLean, to plaintiff's knowledge, was financially embarrassed, and was threatened with disbarment proceedings by a client of his, whose money was claimed to have been misapplied; that this client was a woman; that the note tendered plaintiff was apparently signed in a woman's handwriting; that the body of the instrument was all filled in to plaintiff's knowledge, in McLean's handwriting; that the letter claimed to have inclosed the note, and the policies contained no reference to the note; that plaintiff made no inquiry of any kind as to the transaction, or McLean's acquisition of the note; and that no demand was made upon defendant for payment of the note until a period of nearly three years had elapsed. And yet, while all these details combined were sufficient to raise an issue of fact as to plaintiff's good faith in the transaction, they were not enough to justify a verdict for the defendant, since something more than mere suspicion is required to prove bad faith on the part of the holder of the note.

The judgment and order appealed from will therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event.

WALTERS v. ROCK.

(Supreme Court of North Dakota, 1908. 18 N. D. 45, 115 N. W. 511.)

Action by A. N. Walters against Jacob Rock. Judgment for defendant, and plaintiff appeals.

MORGAN, C. J. Action on a promissory note by an indorsee claiming to be a purchaser in due course. The answer alleges that the note was procured through fraudulent representations on the part of the payee, and that the plaintiff took said note with knowledge of the fraud by which it was executed and delivered. The jury found in favor of the defendant. A motion for a new trial was made and denied. Plaintiff appeals from the order denying a new trial. The assignments are numerous; but the one principally relied on is that the evidence is insufficient to justify the verdict.

The original payee of the note was one Dr. Rea, of Minneapolis, who traveled as a specialist in curing various diseases. The defendant consulted him at Moorhead, Minn., and was informed that he was afflicted with a cancer, and the doctor agreed to cure him for $250. The defendant had only $25 in money, but gave his note for $250 and paid him $25 in cash, which was immediately indorsed as a payment on the note. The doctor then treated him by injecting some preparation into the alleged cancerous growth and agreed to send him some more medicine by express. In a very few days the medicine came by express, but the defendant refused to accept it for the reason that it had been consigned C. O. D. and required a payment of $101.50 before the express company could deliver it to him. The defendant then consulted a local physician, who cured him in about one week. These are the facts as related by the defendant, and must have been found to be true by the jury in view of the verdict in his favor. Accepting the same as true, we think that the allegation of fraud in the inception of the note was sustained. The promise to cure the defendant must have been made without any intention of performing it. Under our statute the making of such a promise constitutes fraud. * * *

The evidence also amply sustains the fact that the doctor was not acting in good faith in his representations. He did not send the medicines in accordance with his agreement, but sent them by express with intent to force a payment of $100 not due before the medicines could be used. He sold the note very soon after the refusal to pay the $100 to the plaintiff. Whether the plaintiff is an indorsee in due course is a question in dispute between the parties. The plaintiff claims that the note duly indorsed was delivered to him on June 6th, and he thereafter paid $202.50 therefor, having purchased on a 10 per cent. discount. He does not claim to have paid for it on that day, and first says that he does not know the day when he paid for it. He states that he paid for it later, when he made a "settlement" with the doctor for some other notes. The evidence shows that the plaintiff was accustomed to buy notes from the doctor regularly, and had been accustomed to do so for three years, and that he had some trouble in collecting some of them because the parties "did not want to pay them." He does not specifically remember the reasons why the makers refused to pay the notes, but knows that he has a considerable number of these notes now on hand, past due and uncollected. He made no inquiry concerning the financial responsibility of the defendant before purchasing the note, unless from the doctor.

The defendant was a stranger to him. He immediately placed the note in the hands of an agency for collection, although it was not yet due. He knew that the doctor was accustomed to travel throughout the country in his professional capacity, and took notes in payment of services performed. He says further: "I did not know of any dispute or defense of the note at the time I purchased it. I did not inquire." He nowhere states that he bought the note in good faith. He does not state that he had no notice of defenses at the time he paid for the note. It will be noted that it was bought and delivered to him on June 6th. He claims that he paid for it later when a "settlement" was made for this note and others. On this question he testifies: "Q. At the time that you bought this note in suit from Dr. Rea, did you buy any others from him? A. I don't remember. Q. But at the time you settled with him for this note you settled for several others at the

same time, did you not? A. Very likely so. Q. Do you remember when you paid for the note? A. I do not." On redirect examination, in response to leading questions, he says that he is positive that the "settlement" was made prior to July 15th, which would be about three weeks before the note became due. Dr. Rea was also a witness, and on the question of the negotiation of the note testified simply that the "note was sold before maturity on June 6th." Nothing was stated by him about the time of payment nor how paid.

On this testimony we are urged to declare that the verdict is not sustained by the evidence, and that it is uncontradicted that the plaintiff was an innocent purchaser. After carefully reading all of the testimony of the plaintiff we find it evasive, contradictory, and of an unsatisfactory character to prove facts entirely within the knowledge of himself and Dr. Rea. There is not even an attempt to show that there was no notice of defenses on the day that he claims to have paid for the note. If he then had notice of defenses to the note, he would not be an innocent purchaser. * * *

The plaintiff's contention, therefore, is that he is a bona fide holder by virtue of purchase and payment before day of maturity. Payment of value on a purchase before maturity is prima facie evidence that the purchase is in due course. We think that the record shows facts sufficient to sustain the verdict that plaintiff did not purchase in good faith. Conceding that payment was made before maturity, we are convinced that the jury had sufficient facts before them to warrant the inference therefrom that plaintiff did not buy the note in good faith as contemplated by the statute and the law merchant. A purchase in due course means a purchase before maturity for value, without notice, and in good faith. Plaintiff had handled Dr. Rea's notes before as an employé of a collection firm, and had purchased a large number of his notes before. Many of these notes were still uncollected and past due. As to some of these notes payment had been refused. He immediately placed the notes in other hands for collection after their purchase. He had no knowledge, and is not certain whether he made any inquiry, as to the financial responsibility of the maker. He and Dr. Rea were well acquainted and intimate in business relations. Litigation had grown out of some of these purchases of notes from Dr. Rea.

In Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550, Judge Corliss said: "It may be true in this case that the plaintiff bought before maturity for value, and without notice of any defense; and yet he may not be a purchaser in good faith. He may, when he bought, have had knowledge of facts which excited in his mind such suspicions as to the paper that he feared to make an investigation lest it would disclose a defense, and therefore he carefully shut his eyes and bought in the dark. In such a case he would not be a purchaser in good faith"—citing cases. "In this case the plaintiff is careful not to state that he bought in good faith, nor does he offer any explanation of the circumstances surrounding the purchase. * * * The plaintiff, having the burden of proof, has failed to sustain it by positive evidence. The inference of his good faith to be drawn from the other facts sworn to by him is by no means strong, and the case discloses several circumstances which cast grave doubt upon the fact of his good faith in the transaction." In the case at bar we find the same circumstances

practically as in that case and others that tend to show bad faith in not making inquiry concerning the title to the note in question. The evidence of want of notice of defective title at the time the money is claimed to have been paid is very unsatisfactory. * * *

The plaintiff also had positive knowledge of the fact that payment was refused on many of Dr. Rea's notes. It savors of a purpose to avoid inquiry amounting in law to bad faith. The rule is stated by Joyce on Defenses to Commercial Paper as follows in section 475: "But, if the acts of the holder of the paper in obtaining the paper constitute bad faith, he will not be entitled to protection as a bona fide holder. It may, therefore, be stated as a rule that suspicious circumstances alone, even though sufficient to put an ordinarily prudent person on inquiry, will not, in the absence of bad faith or a willful disregard of the facts showing an infirmity of the paper, destroy the title of a taker of negotiable paper as that of a bona fide holder." * * * The circumstances shown by the record, taken all together, are sufficient to overcome the prima facie presumption of good faith raised by proof of purchase for value before maturity. It is well settled in this state that, when it is shown that there was fraud in the inception of a note, the burden rests upon the purchaser to establish that he purchased the same in due course and in good faith.

The order appealed from is affirmed.

HARTINGTON NAT. BANK v. BRESLIN et al.

(Supreme Court of Nebraska, 1910. 88 Neb. 47, 128 N. W. 659, 31 L. R. A. [N. S.] 130, Ann. Cas. 1912B, 1008.)

ROSE, J. This is a suit on a promissory note for $400, dated June 18, 1907, and due six months hence. W. J. Breslin and John Wiebelhaus were makers and the Hartington National Bank was the payee and holder. The summons was not served on Breslin and the controversy is between the bank as plaintiff and Wiebelhaus as defendant. From a judgment on the verdict of a jury for the full amount of plaintiff's claim, defendant has appealed.

The substance of the defense pleaded is: Defendant and Breslin signed the note, but left a blank for the name of the payee. It was agreed between them that the note should be used by Breslin in purchasing a meat market at Fordyce from the owner whose name was at the time unknown but which afterward was found to be Jacob Hauri. In the event of a purchase Hauri's name was to be inserted in the blank, but otherwise the note was to be returned to defendant. The insertion of the name of the bank as payee was not authorized by defendant and he never consented thereto. The proof of these facts is uncontradicted. * * *

When the note was delivered to plaintiff it was a perfect instrument, with the exception of a blank for the name of the payee. It had not been altered and bore on its face no intimation of the agreements pleaded as a defense. * * * Afterward plaintiff inserted its own name in the blank as payee, having had no actual notice of the alleged agreements between the makers.

Plaintiff contends that defendant made no defense to the note and that on the undisputed evidence the judgment rendered was proper. This position seems to be correct, if the controversy is to be determined without regard to the Negotiable Instruments Law of 1905. * * *

According to the rules of the law merchant, when defendant signed the note without restriction, leaving a blank for the name of the payee, and intrusted it to his comaker, he gave to a bona fide holder implied authority to fill the blank and perfect the instrument. * * *

Under the law merchant a bona fide holder was permitted to insert his name in a blank left for the name of the payee. * * * On the record presented there can be no doubt that in taking the note the bank acted honestly, relying upon a well-established custom. * * * This rule should be applied in the present case unless it has been changed by statute. Before the note was signed, however, the negotiable instruments law was passed and by it the transaction in controversy must be tested. Generally this act retains the rules of the law merchant, and its purpose, as suggested by its title, is "to establish a law uniform with the laws of other states." While England, and most of the states of this country, have been consistent in making such statutes uniform, an examination of the holdings of the courts in which those acts have been construed indicates a diversity of opinion. The view, however, that the provisions of section 14 of the Nebraska negotiable instruments act, which is invoked by defendant herein, change the rules of the law merchant in material respects appears to be unanimous. * * *

Section 14 provides: "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time." * * *

Within the meaning of this language, defendant became a party to the note "prior to its completion," and therefore in order that it may be enforced against him the blank "must be filled up strictly in accordance with the authority given." * * * That defendant gave plaintiff no authority to fill the blank with its own name is shown by uncontradicted testimony. The verdict against him, therefore, is not sustained by sufficient evidence—a question raised in both courts by an assignment of error. For this reason the enforcement of the statute requires a reversal, which is ordered.

ROCHESTER & C. TURNPIKE ROAD CO. v. PAVIOUR.

(Court of Appeals of New York, 1900. 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790.)

Action by the Rochester & Charlotte Turnpike Road Company against Robert S. Paviour. From a judgment of the Appellate Division, affirming a judgment in favor of plaintiff, defendant appeals.

In 1896 the plaintiff, a domestic turnpike corporation, operated a

turnpike which extended from the city of Rochester to the village of Charlotte, and one Marsenus H. Briggs was, and for several years had been, its treasurer. In June, 1896, the defendant, who resided at Rochester, received a letter from Mrs. O. S. Warren, of Silver City, N. M., inclosing four fire insurance policies, and requesting him to collect the premiums upon the same. Said policies were issued by various companies, through Mrs. Warren as their agent, to Walter B. Duffy, a prominent business man of Rochester, upon buildings situated in Pyramid, N. M. For several years Mrs. Warren had forwarded similar policies on this property to the defendant, who had collected the premiums for her, and remitted the same, after deducting the amount agreed upon for his compensation. It was his habit to deliver the policies to Mr. Briggs, who paid him the premiums thereon, sometimes in cash and sometimes by the check of Mr. Duffy or of George C. Buell, another prominent business man of Rochester, but never with the check of the plaintiff. The defendant did not know who was liable for the premiums except as he learned it from the policies, and it did not expressly appear what relation Mr. Briggs sustained to the owner of the property insured. Upon the receipt of said letter in June, 1896, the defendant, according to his custom, delivered the policies to Mr. Briggs, and in July two other policies upon the same property were received from Mrs. Warren, which he also delivered to Mr. Briggs, who was a man of repute and a member of a prominent law firm in Rochester. The premiums were not paid at the time either set of policies was delivered; but, after payment had been demanded several times by the defendant, Briggs gave him a check on account, dated June 17, 1896, drawn upon the Central Bank of Rochester, payable to the order of the defendant, for $150, signed, "Rochester & Charlotte Turnpike Road Co. M. H. Briggs, Treas." On the 24th of July following, Briggs gave the defendant a check, similar in all respects, except that it was for the sum of $300, and subsequently he paid the balance of the premiums from his own funds. The defendant deposited these checks in the Traders' Bank of Rochester, where he did his banking business, procured drafts for the amount going to Mrs. Warren, and sent them to her. The checks were paid upon presentation in the ordinary course of business from moneys belonging to the plaintiff on deposit in the Central Bank. This action was brought to recover the amount paid by means of these checks as money of the plaintiff received by the defendant to its use. The plaintiff had no interest in the policies, and no business relations with the defendant, and was indebted neither to him nor to Briggs, who used the checks without authority, and thus embezzled the money drawn thereby. At the close of the evidence the court directed a verdict for the plaintiff.

VANN, J. By delivering the policies to Briggs without collecting the premiums at the time, the defendant apparently gave credit for the same, and thus made the debt his own. At all events, he subsequently treated it as a debt owing by Briggs to himself, the same as he had similar claims under like circumstances in previous years. Briggs had no authority, either actual or apparent, to give the checks of the plaintiff in payment of his own debt or that of a third person. If the defendant knew or believed, or had good reason to believe, that, in giving the checks, Briggs was appropriating the money of the plaintiff to the payment of his own debt, or one that he treated as his own, he had no right to accept them without inquiry. While he was not bound to

be on the watch for facts which would put a very cautious man on his guard, he was bound to act in good faith. * * * Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith, and the law will withhold from him the protection that it would otherwise extend.

The checks themselves gave notice of a suspicious fact, and invited inquiry in relation thereto. They showed upon their face that Briggs was apparently using the money of the plaintiff for his own purposes, since they were not his checks, but the checks of a corporation issued by him as its treasurer. In the absence of express authority, or of that which may be implied from past conduct known to the corporation, he could not lawfully use the checks, which stood as its money, for such a purpose, as the defendant is presumed to have known. There was no express authority and nothing to indicate that Briggs was impliedly authorized to thus use the money of the plaintiff, and the presumption was the other way. The plaintiff, as its name indicated, was not a trading corporation, but a local plank-road company, with no authority to own buildings situated out of the state. It would be extraordinary for a concern which merely operated a short plank road in this state to have any interest in buildings in New Mexico, or to be indebted for premiums upon policies issued thereon, and the admitted facts compel us to assume that the defendant so regarded it. Moreover, the policies themselves, as the defendant knew, were not issued in the name of the plaintiff as the owner of the buildings, and there was no connection, apparent or otherwise, between it and the policies. Without inquiry he accepted checks drawn by Briggs as treasurer of the plaintiff in payment of a debt which he had no reason to believe was for it to pay, and which he had strong reason to believe had become the debt of Briggs himself. He called for no explanation from him, made no inquiry at the office of the plaintiff, or of any one representing it, which would naturally have disclosed the fraud, but accepted the checks without question, drew the money, and thereby ran the risk of being called upon to restore it.

The facts known to the defendant should have aroused his suspicion, and led him, as an honest man, to make some investigation, before he accepted the money of a corporation, which owed him nothing, in payment of a claim that he held against some one else. * * * Among the heaviest losses in business are those which result from a blind trust in men on account of their standing in the community, without making the investigation required by common prudence. There was a shadow on the checks, and the defendant could not, in good faith, accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicion which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint. * * *

As the rules of law governing the case are now well settled, we shall

refer to but few authorities, and those of recent date in this court. In Wilson v. Railroad Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625, it was stated, as a general rule, "that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. Prima facie the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation." It was also held in that case that the purchaser of a promissory note, purporting to have been issued by a corporation, who made the purchase under circumstances which devolved upon him the duty of inquiry as to its validity, assumes the risk, by failing to inquire, of proving that the facts he could have discovered, had he made inquiry, would have protected him. In Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234, an agent, who had charge of certain premises known as the "Glass Buildings," deposited the rents collected by him to the credit of a bank account kept in his name as "Agent, Glass Buildings." Without authority he gave a check on this account, signed by him as "Agent, Glass Buildings," in payment of his own debt. The check was paid, and, upon the trial of an action brought five years afterwards to recover the amount thereof, there was no evidence of bad faith on the part of the defendant who took the check, except that afforded by the check itself and the nature of the debt. The court held that the form of the check was sufficient to indicate to the defendant the existence of an agency, and to put him on inquiry as to the agent's authority to so use the money. In deciding the case, the court said: "We think that the form of the signature to the check was sufficient to put the payee on inquiry as to the right of the agent to pay his personal debt out of the fund. The buildings and the bank were both well known, were in the same city, and very near to the place where the check was received by the defendant, and, had an inquiry been made at the bank or at the buildings, it would have been ascertained that the account was held by William Boswell, not as owner, but as agent for these plaintiffs. In case a person having notice that money or property is held by another in a fiduciary capacity receives it without inquiry from the agent, in satisfaction of his personal debt, the sum or property so received may be recovered by the true owner, unless the agent was authorized to so dispose of it." In Cheever v. Railroad Co., 150 N. Y. 59, 67, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646, the paper was regular on its face, and this fact protected the plaintiff; but the court, referring to "a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit," said: "When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it." * * *

In the case at bar the appearances were not deceptive, but suggested the true state of affairs, which worked a fraud on the plaintiff. * * * In the case now before us the question of notice is supreme. The checks, when read in the light of the facts known to the defendant, were notice to him that he was apparently accepting money from one to whom it did not belong, and this cast upon him the duty of inquiring into the matter so as to see whether the facts were in accord with the appearances; for, if they were, he knew that he could

not honestly take the checks. The judgment appealed from should be affirmed, with costs.

FILLEBROWN et al. v. HAYWARD et al.

(Supreme Judicial Court of Massachusetts, 1906. 190 Mass. 472, 77 N. E. 45.)

Action by Charles B. Fillebrown and others, as trustees in bankruptcy of the Cable Rubber Company, against Kezia W. Hayward and another. From a decree in favor of defendants, complainants appeal.

BRALEY, J. * * * The question, however, of most consequence remains for consideration. * * * After the period of service had expired to which reference already has been made, the defendant having resigned her offices as treasurer and director sold her stock in the corporation to one Cable, who then was not only treasurer and president, but with the acquiescence of the directors also acted as manager of the corporation with a general control of its affairs. * * * Upon the purchase of this stock he made a large money payment, and gave his promissory notes for the balance, so divided that one of them should mature at the beginning of each month for a period of five years. It was undisputed that upon these notes as they severally matured at least the sum of $13,000 was paid by checks drawn by him from time to time on the treasury of the corporation. The books of account disclose in detail the number and amount of these checks, and a balance was always struck by crediting as expense a lump sum sufficient to offset the debit items. In his dealings with the defendant, although in a few instances when he caused the checks to be made payable to the order of the bookkeeper who indorsed them either to himself or to the defendant, and upon one occasion when the check was made payable directly to her order, this course of dealing was uniformly followed. An examination properly conducted would have shown that when the defendant received these monthly payments as between himself and the company his account would have appeared to have been constantly overdrawn, but she had no actual knowledge of this condition of affairs, or that the money she was receiving came clandestinely from the corporation rather than lawfully from him. The plaintiffs strenuously contend that, notwithstanding this, the form of the check should have suggested to her that he was misappropriating the funds of the company, and therefore she should be charged with constructive notice that he was using corporate assets for the payment of his maturing notes.

The early doctrine on this subject, so far as it relates to negotiable paper, is found in Ayer v. Hutchins, 4 Mass. 370, 372, 3 Am. Dec. 232, * * * where it is said that circumstances which ordinarily would excite the suspicions of a reasonably prudent and careful man were sufficient to put the party receiving negotiable paper not overdue upon his inquiry as to suspicious defects or infirmity of title in the prior holder. * * * The rule thus formulated gave way later to what has been called the modern doctrine, that neither knowledge of suspicious circumstances, nor doubts as to the genuineness of the title, nor gross negligence on the part of the taker, either singly or together, were sufficient to defeat his recovery, unless amounting to proof of want of good faith. * * *

At the time the first note of the series matured, and the first check in payment was given, St. 1898, p. 492, c. 533, commonly known as

the "Negotiable Instruments Act," now Rev. Laws, c. 73, had become operative. By section 56 of the original act, now section 73 in the revision, the common-law rule shown by these decisions relating to implied notice to the purchaser for value of negotiable paper of a defect in the title of a previous owner was codified. The plaintiffs therefore cannot recover the proceeds of the checks unless the defendant took them in bad faith, and this inquiry is a question of fact. * * * If each check was signed by him as treasurer, this of itself was not such an affirmative representation as to indicate that he was acting in a fiduciary capacity by which his authority was restricted and limited, as authority to draw and issue checks in the name of the corporation was incidental to his office, and the holder in due course of business would receive them under a presumption that they were lawfully issued. * * *

While the defendant may be held to have known that by purchasing her stock Cable had acquired control of the corporation, there does not appear to have been any reasonable ground for an assumption on her part that its business under his management was not profitable, or had been impaired and then ruined, until the company's assignment for the benefit of its creditors was announced. Before her retirement for at least two years they had been mutually engaged in conducting its business affairs, and neither during this period, or after her withdrawal, is it shown that there was anything in his conduct indicating to her that he was dishonest or incompetent. There was therefore no reason why she should not have retained her confidence in him, and, even if her former experience had made her familiar with the duties of the office which he held, it could be found that she received the checks without realizing the possible fact that, notwithstanding their form, they were drafts upon the funds of the company in payment of her own debt. It is more than probable that as note after note matured and payments were thus made she gave no thought to the general transaction, except to get her pay; but, if so, she still may have inferred that the money so appropriated was in payment of his own salary, or otherwise was being lawfully withdrawn. * * * But while she may have been incautious and unsuspecting, where others more accustomed to mercantile affairs might have been mistrustful, there is no evidence that at any time she was possessed of any knowledge of what undoubtedly to a certain extent was an embezzlement on his part, or, having doubts as to how he obtained the money, she deliberately decided for her own advantage not to make any inquiries to ascertain why instead of paying with checks drawn on a bank account of his own, or in money, he used checks issued by him as treasurer, though if such conduct had been shown, then it might be inferred that she ignored significant facts with a purpose not to know anything more, and this would have been enough to indicate that, suspecting something was wrong, she intended to avoid the effect of the evidence. * * * But having taken before maturity for a valuable consideration negotiable paper which was regular upon its face, without knowledge of any defect in the title, even if there might have been some circumstances which would have raised doubts in the mind of a more prudent person, the defendant's right to retain the proceeds of the checks cannot be divested without proof that she knew, or in the face of facts sufficient to put her upon inquiry purposely refrained from knowing of the fraud of Cable, although, if obliged to bring suit upon them,

after evidence had been introduced in defense that they had been fraudulently issued, the burden would have remained upon her to prove that she was a holder in good faith and for value. * * *

Decree affirmed.

SECTION 5.—PAYEE MAY BE A HOLDER IN DUE COURSE

The preceding sections have shown that a holder, in order to acquire the advantages of being a holder in due course, must have taken the instrument (1) for value; (2) before maturity; and (3) in good faith. The question is sometimes presented as to whether the payee who fulfills all of these conditions may be a holder in due course. In the great majority of cases the payee cannot fulfill all three of these requirements, because the payee will know of the defense possessed by the person with whom he dealt. If the payee obtained an instrument by fraud, or without consideration from the maker, clearly the payee cannot be a holder in due course, for he is not a taker in good faith. But it is possible to find a situation where the payee does fulfill all three requirements, and the new question then arises as to whether it is possible for the payee to be regarded as a holder in due course. It is possible to argue that no person can be a holder in due course unless such person acquired title from a **holder.** The payee does not acquire title from a **holder.** The answer to this question all depends on whether or not a payee can be regarded as a **holder,** because section 52 of the Negotiable Instruments Law provides that a holder in due course is a **holder** who has taken the instrument under the conditions which we have heretofore analyzed. The following sections of the act are involved:

Section 191, clause 7. "Holder" means the payee or indorsee of a bill or note, who is in possession of it or the bearer thereof.

This section seems to put an end to the problem, for it expressly says that the payee is a holder. But we have already been made familiar with the situation, which frequently arises in the law, that the apparent meaning of one section of a statute may be cut down or even expanded by other sections of the same act or of a different act, and we have that situation here.

The first of the two sections which may affect the meaning of the word "holder," as defined in section 191, is as follows:

Section 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instru-

ment. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

This section makes the defense of "no delivery" available between immediate parties and remote parties other than holders in due course. May the payee be a holder in due course so that the defense of "no delivery" or of conditional delivery of a completed instrument cannot be made successfully against him?

To be a holder in due course one must be a holder. A payee is a holder by section 191. But section 16 states that the defense of "no delivery" or of "conditional delivery" is available between immediate parties. Therefore our inquiry narrows down to this: Is the payee one of the immediate parties spoken of in section 16? If so, section 16 controls section 191 to this extent. This problem is taken up in the case following.

There is a second type of situation, wherein it is not altogether clear whether a payee is or is not a holder in due course. This question, which is also discussed in the case immediately following, concerns instruments which were incomplete at the time they were intrusted by the maker or drawer to some person for delivery to the payee. Suppose, for illustration, that the drawer of a check inserts the name of a payee, signs his name as drawer, and leaves the amount blank, and intrusts the instrument to the agent of the drawer and authorizes this agent to fill up the instrument for a specified amount. Then suppose the agent so intrusted with the instrument fills up the instrument for an amount in excess of the authority given, and such agent delivers the instrument to the payee, obtains the money and fraudulently converts it. May the payee recover the full amount from the drawer—assuming, of course, that the drawer was successful in stopping payment at the drawee bank. This question involves section 14 of the Negotiable Instruments Law, which provides as follows:

Where an instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

This section makes it perfectly clear that a holder who is not a holder in due course cannot recover from prior parties free from the defense that the instrument was filled up in excess of authority; that is, if there was authority to fill up for $500, and the instrument were filled up for $1,000, a holder not in due course could recover no more than $500, but the probabilities are that such holder not in due course could recover nothing in a suit on the instrument, because the section states that in order that any such instrument when completed may be enforced * * * it must be filled up strictly in accordance with the authority given. It would be enforcing the instrument to allow the holder not in due course to recover $500. And it is just that, which the section states cannot be done. However, if the holder not in due course had no actual knowledge of the fraud there is every reason to suppose that he could recover $500 on the original debt; that is, upon the theory that he had paid out $500 at least for the use of the defendant, drawer.

One further observation is necessary before taking up the particular question: May the payee be a holder in due course of an instrument delivered in an incomplete state? That point is this: The last clause of section 14 states that if any such instrument, after completion, is negotiated to a holder in due course, it is valid, etc.; that is, the section is stating that a transferee of the instrument cannot be a holder in due course, if such transferee took the instrument before completion, or at the time the instrument was being completed. In order to be a holder in due course, he must have taken the instrument after it was filled up; that is, under circumstances where he would not know that it was intrusted by the maker or drawer to the agent in an incomplete state. The law was otherwise on this point before the Negotiable Instruments Law was adopted. Before the act, a person who was in all other respects a holder in due course did not lose that position merely because he saw the instrument filled up in his presence, or knew that it had been filled up after the drawer intrusted it to his agent. The Negotiable Instruments Law adopted the rule on this point which had been adopted by the English courts.

Our question, then, narrows down to this: Assuming that the payee took the instrument for value, before maturity, and in good faith—i. e., without knowledge that it was entrusted by the maker or drawer in an incomplete state—may such a payer be a holder in due course? The answer to this question depends upon the subordinate question: Is it possible to negotiate an instrument to the payee? Notice that the last sentence of section 14 speaks of negotiating an instrument to a holder in due course; that is, if the instrument got into the hands of the payee in any other method than by negotiation, it would seem that the payee could not be a holder in due course. Generally it is true that we use the word "negotiate" to describe a transfer of legal title to a negotiable instrument by the payee to an indorsee, or by one indorsee to an-

other indorsee. But may the word "negotiate" be used to describe the act of delivery by a maker or drawer to the payee?

Section 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof.

Section 191, clause 10. "Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

We now have two questions before us: (1) May the payee be a holder in due course of an instrument which was in a complete form when it left the hands of the maker or drawer? (2) May the payee be a holder in due course of an instrument which at the time it left the hands of the maker or drawer was incomplete in some material respect? Obviously, in both of these cases, the maker or drawer must not have dealt face to face with the payee. There will always be some person to whom the instrument was first intrusted by the maker or drawer, and this person at a later time dealt with the payee.

The next case discusses these two questions.

LIBERTY TRUST CO. v. TILTON.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 462, 105 N. E. 605, L. R. A. 1915B, 144.)

Action by the Liberty Trust Company against Frank B. Tilton. Judgment for plaintiff in the municipal court of Boston. From an order dismissing the report to the Appellate Division, plaintiff appeals.

RUGG, C. J. One Perley G. Tilton signed a note to the order of the plaintiff and presented it complete in every respect except its amount, which was blank, to the defendant Frank B. Tilton, who for the accommodation of Perley G. Tilton signed it in blank on the back upon the express representation and agreement by Perley G. Tilton that the defendant's signature should not be operative nor be delivered unless and until one Leonard Grant also should sign on the back and that then it should be filled out for $200, and no more. Leonard Grant did not sign the instrument, the amount of $400 was filled in and the instrument, without the knowledge or authority of the defendant and in violation of the agreement between him and Perley G. Tilton, was delivered complete in form to the plaintiff, the payee, who took it for value in good faith and without knowledge of the agreement between the maker and defendant.

The question is whether the defendant is liable to the plaintiff. This point has not been decided in Massachusetts.

It is plain that prior to the enactment of the Negotiable Instruments Act the plaintiff could recover. The payee could be a bona fide holder for value without notice. * * * The signing in blank authorized the filling of the blank by the one to whom the signer delivered it, although the specific directions might not have been followed. Androscoggin Bank v. Kimball, 10 Cush. 373. This is the general common-law rule. * * * But although the point now in issue has not been decided expressly in this commonwealth, in principle it is covered by Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 145, 66 N. E. 646, 97 Am. St. Rep. 426. In that decision this case was put: The maker handed

a check complete in every respect to her husband upon express instructions to deliver to the payee on her own account, but the check fraudulently was handed by the husband to the payee in payment of a debt due from him to the payee, and it was accepted in good faith by the payee. It was held that the payee under these circumstances was a holder in due course. * * * The point there decided in substance was that where the instrument when signed by the party sought to be charged was complete as to its form, a payee might be a holder in due course, although the delivery was contrary to the instructions.

The effect of that decision was to hold that the words "immediate parties" as used in section 33, viz., "as between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument," did not necessarily include the payee. Hence, "immediate parties" in that connection excludes a party who is a holder in due course. In such case these words must be confined to parties who are "immediate" to the conditions or limitations placed upon the delivery in the sense of knowing or being chargeable with notice of them. A payee who is a holder in due course is not an immediate party in the sense of that section. This result follows from holding that a payee may be a "holder in due course" as defined in section 52 because he could become such holder only on condition "(4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument." Thus he could not be such holder unless the paper was "negotiated" to him. Therefore the word "negotiated" was held to describe the means by which a payee might acquire a note. It was given its common legal significance of concluded by bargain or agreement. * * * A promissory note complete as to form and payable to a named person may be negotiated to that person by being sold to him or taken by him for value. This is the common and popular signification of the word. It was the sense in which it was used in the law merchant prior to the Negotiable Instruments Act. Its meaning has not been changed by the act. * * *

The soundness of that decision in this respect is confirmed by other provisions of the act. Negotiation is defined by section 30, whereby it is provided that "an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." "Holder" is defined in section 191 to be "the payee or indorsee of a bill or note who is in possession of it." The remaining sentence of section 30, viz., "If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery," was not intended to include all the ways in which an instrument might be negotiated, nor to restrict the comprehensive terms of the preceding sentence. Plainly under these two sections a negotiable instrument payable to a named payee is negotiated when the physical possession of it is handed for value to the person named as payee. One effect of the last sentence of section 30 is to describe the method by which the person who first becomes holder may pass title. It does not comprehend all the ways by which an instrument may be negotiated.

The word "negotiate" being defined thus in the act, and being given

a definition in conformity to that attached to it by the common law before the passage of the act, it must be held to have the same meaning throughout the statute in the absence of a strongly countervailing context requiring a different signification. There is nothing in section 14 to indicate that it there was used in any different sense. * * *

The defendant, not otherwise a party to the instrument, having signed in blank before delivery, became liable as indorser to the payee. Section 64.

It requires no discussion to show that under the circumstances here disclosed section 32 of the act has no bearing. The defendant transferred actual possession of the incomplete instrument to Perley G. Tilton. Thus it was "delivered" within the meaning of that section so far as the defendant was concerned. Section 191.

The conclusion follows that the payee named in a promissory note, who purchases it complete in form for value before maturity, in good faith and without notice of any infirmity in title or otherwise, is a person to whom it has been negotiated as holder in due course, notwithstanding it was signed in blank by the party to be charged, whose instructions as to the filling of blanks and the delivery have not been followed by the one to whom it was intrusted by him in its incomplete state. * * *

The conclusion here reached is at variance also with Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275. But that decision, rendered since Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, recognizes its inconsistencies with our case. Desirable as is uniformity of interpretation touching the Negotiable Instruments Act by courts of the several states where it is in force, * * * we remain content with the principles laid down in the Steuer Case. The rational application of that principle decides this case. * * *

It was declared both in Herdman v. Wheeler and in Vander Ploeg v. Van Zuuk that the judges were "very reluctant to come to the conclusion" there reached. We feel that the result to which we are led by a chain of reasoning not developed in either of those cases is in conformity with the terms of the act, and, being in accordance with the common law, is highly desirable as not upsetting the general understanding and practice of the commercial world.

No error is shown upon the record. Order dismissing report affirmed.

For a moment, note the business situation involved in the preceding case. Here is a large business establishment. Its disbursements by checks run into the hundreds or thousands of dollars every day, or week, or month. The board of directors may have delegated authority to but one man to sign the company's name to checks. Doubtless such person is a thoroughly trustworthy person, probably heavily bonded. However, such person relies upon information from other employees as to when obligations are payable. Perhaps they bring the statements received from the company's creditors to his office, and perhaps the checks, after they are drawn, are delivered over to these or other employees to be mailed or delivered. The points which have just been illustrated

show how the fraudulent agent may make way with the instrument in his own interest, and the concern which employs him will stand the loss. If the instrument is a completed instrument, payable, let us say, to P. or order, and the agent is directed to deliver this check or note to P. in payment of his employer's debt due P., we have seen that, if the agent transfers this instrument to P. in payment of his own debt due P., the law regards P. as a holder in due course; that is, that the agent's debt was paid by this check and the employer's debt was not paid. Or it is possible that the agent owed no debt at all to P., but transferred the instrument to P. and obtained cash for it. P. is still a holder in due course. Where an instrument is in form payable to bearer, it is much easier for a fraudulent employee to convert the instrument; but we see here that it is possible for an agent in possession of an instrument payable to a payee or order, complete in all respects, to make a fraudulent disposition of it without forging the indorsement of the payee. All he need do is to transfer to the payee for some purpose of his own, and the law protects the payee, assuming, of course, that in all other respects the payee took in good faith.

However, it is not nearly so common for the fraudulent agent of the drawer to make a fraudulent disposition of a completed instrument payable to the order of a named payee, because, after all, it is fairly difficult for the fraudulent agent thus to deal with the payee. It is much more common for frauds to be practiced upon drawers of negotiable instruments which were intrusted by the drawer with his agent in incomplete form, who fills up the instrument in excess of authority and then fraudulently converts. It is easy for the person who signs the checks to affix his signature, and then to trust to his employee to fill up the instrument for the proper amount; but it happens quite frequently that the trust is abused. The probabilities are that an employee who has succeeded in perpetrating such a fraud once will do so frequently.

It is not possible to prevent all frauds, but a person who is charged with the responsibilities of disbursing large sums of money should be alive to the possibilities for the perpetration of fraudulent schemes, and, at least, not court them by making the opportunity for success easier.

SECTION 6.—TRANSFEREE FROM A HOLDER IN DUE COURSE IS A HOLDER IN DUE COURSE

N. I. L., Section 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

INHABITANTS OF THE TOWNSHIP OF MONTCLAIR v. RAMSDELL.

(Supreme Court of the United States, 1883. 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431.)

Action brought by defendant in error, Ramsdell, on bonds of the Township of Montclair, issued in aid of a railroad company. Verdict and judgment for plaintiff, in the sum of $21,506.49. Defendant brings this writ of error.

HARLAN, J. * * * Counsel asked the court to give, but the court refused, the following instructions to the jury: "If the evidence satisfies the jury that there were circumstances of fraud or illegality in the inception of the bonds, or in the circumstances under which they were issued and disposed of by the commissioners then the plaintiff cannot recover on the bonds without some proof that he purchased them for value, or gave some consideration for them." * * *

It is not necessary to extend this opinion by a review of the adjudications in the American and English courts to which our attention has been called, or to deduce therefrom a general rule to govern every case in which it may be claimed that the proof upon the part of a defendant in a suit upon a negotiable security, requires the holder, before he can recover, to show that he paid value. Without entering upon a critical examination of the authorities upon this important question of commercial law, and assuming, for the purposes of this case merely, that the proof, of the exclusion of which the Township complains, was competent evidence for some purposes under the plea of non est factum, we are of opinion that the instruction in question ought to have been refused. Its rejection was proper for the reason, if there were no other, that it required the jury, if they believed either fraud or illegality in the inception of the bonds to have been established, to find for the Township, unless the plaintiff proved that he purchased for value or gave some consideration for them. Such is not, law; for, if any previous holder of the bonds in suit was a bona fide holder for value, the plaintiff, without showing that he had himself paid value, could avail himself of the position of such previous holder. In Byles on Bills, 119, 124, it is correctly said that "If any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title." In Hunter v. Wilson, 19 L. J. (N. S.) 8, the plea was that the bill of exchange was drawn by a named person, at the request and for the accommodation of the defendant, without any consideration or value whatever, and that it was indorsed by that person without any consideration or value given by the plaintiff for such indorsement either to the defendant or to said person, or to any other person whatsoever. It was held that the plea ought to have contained a statement equivalent to an allegation, that none of the previous parties to the bill had given value for the indorsement. One of the judges remarked that "Some party to the bill may have given value for it, so as to vest a valid title in the plaintiff. We cannot tell through how many hands it may have passed." It is not necessary in this case to hold that the plea in such a case should aver that no previous holder of a negotiable security paid value. But the case last cited is authority for the proposition that the present plaintiff may be protected by showing that some previous holder paid value. * * *

The judgment is affirmed.

MILES et al. v. DODSON.

(Supreme Court of Arkansas, 1912. 102 Ark. 422, 144 S. W. 908, 50 L. R. A. [N. S.] 83.)

Action by C. W. Dodson against F. W. Miles and others. From a judgment for plaintiff, defendants appeal.

FRAUENTHAL, J. This was an action upon a note originally instituted in the circuit court by C. W. Dodson against F. W. Miles and the other makers thereof. The note is a negotiable instrument for $575.25, dated August 20, 1903, and due January 1, 1905, payable to the order of E. H. Smith. The plaintiff claimed that he was an innocent purchaser of the note. The defendants alleged payment of the note and that plaintiff had acquired it after its maturity and after notice that it had been paid. * * *

It is urged by counsel for defendants that the plaintiff purchased the note from the bank in February, 1905, which was after its maturity, and, on that account, was not an innocent purchaser thereof, but took it subject to all defenses that the makers had against the original payee, Smith, and they cite to sustain this contention Nisbett v. Brown & Norton, 30 Ark. 590, and Sorrells v. McHenry, 38 Ark. 127. But under the facts of this case we do not think that the makers can resist the payment of this note by any defense which they might interpose to it in the hands of the original payee, even if it should be held that the plaintiff obtained the note from the bank after its maturity. The note had been transferred by the payee, Smith, to Dodson & Son in August, 1903, long prior to its maturity. If Dodson & Son were at that time holders thereof for value in the due course of business, then any subsequent purchaser thereof from them, even though he obtained it after maturity, would be protected against any defense which the makers might have or be entitled to assert against the original payee. As is said in 1 Daniel on Negotiable Instruments, p. 801: "As soon as the paper comes into the hands of a holder unaffected by any defect, its character as a negotiable security is established; and the power of transferring it to others with the same immunity which attaches in his own hands is incident to his legal right and necessary to sustain the character and value of the instrument and to protect the bona fide holder in its enjoyment." And the author further says: "If the holder acquired the paper after maturity from one who became a bona fide holder for value and without notice before maturity, he is then protected by the strength of his transferor's title." * * *

The decree is, accordingly, affirmed.

SECTION 7.—RIGHTS OF THE REACQUIRER

N. I. L., Section 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

N. I. L., Section 58. * * * A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

N. I. L., Section 121. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of a third person, and has been paid by the drawer; (2) and where it was made or accepted for accommodation, and has been paid by the party accommodated.

The position occupied by a reacquirer of a negotiable instrument is not definitely fixed by the Negotiable Instruments Law. A reacquirer certainly may not recover from any subsequent party for the breach of the same obligation which the reacquirer by his indorsement or delivery owed to such party. These obligations simply cancel each other. This rule thus to prevent circuity of action is recognized by section 50. The principal difficulty arises in connection with sections 58 and 121. Section 58 prevents the payee, who obtained the instrument subject to a defense as against himself, from bettering his position by negotiating to a holder in due course and then repurchasing, but the section permits any person who was not himself a party to any fraud or illegality to succeed to the position of the holder in due course. A holder, who was not a party to the fraud might, however, have such knowledge of the defense that he would not be a holder in due course. By passing title to a holder in due course and reacquiring, does he become a holder in due course? Under the common law he did not, by such reacquisition, become a holder in due course, and, under section 121, which remits such party to his former rights, he could not recover as a holder in due course. Since he is not "a party to any fraud" but is merely a party with notice of the fraud of a predecessor in title, under section 58, it would seem that he would be a holder in due course. Most of the cases under the act have held that a reacquirer, who, because of notice of fraud, was not a holder in due course at the time he negotiated the instrument, does not succeed to the rights of the holder in due course from whom he repurchased. But there are some cases, as for example where the reacquirer originally was a donee from the payee, or an accommodation indorser, where it would seem that the reacquirer should be deemed a holder in due course if he purchased from one who occupied that position.[1]

[1] See the excellent discussion of these problems by Professor Chafee, in his article, "The Reacquisition of a Negotiable Instrument by a Prior Party," 21 Columbia Law Review, 538.

ARAGON COFFEE CO. v. ROGERS.

(Supreme Court of Appeals of Virginia, 1906. 105 Va. 51, 52 S. E. 843, 8 Ann. Cas. 623.)

Action by Alfred M. Rogers against J. W. Harrison, doing business under the name and style of Aragon Coffee Company. There was a judgment for plaintiff, and defendant brings error. * * *

KEITH, P. J. W. Harrison, doing business under the name and style of the Aragon Coffee Company, of Richmond city, purchased of Hills Bros. Co., a corporation in the city of New York, 500 bags of coffee, for which it made its negotiable note for $3,727.02, dated January 11, 1904, payable four months after date to Hills Bros. Co., or order, at Planters' National Bank, Richmond, Va. Before the maturity of this note it was indorsed to the National Park Bank of New York, who it is conceded acquired it in the ordinary course of business, and was an innocent holder of it for value and without notice. When the note fell due, payment was demanded and refused, and the note was duly protested. On November 14, 1904, this note was indorsed to Alfred M. Rogers, without recourse, who paid to the National Park Bank $3,841.69, the full amount represented by the note, principal, and interest.

In March, 1905, Rogers sued the Aragon Coffee Company upon this note. The defendant pleaded nil debet and a plea of set-off, in which he avers that he purchased of Hills Bros. Co. a certain lot of coffee, which was represented to be sound and as good. * * * The plea then alleges that the coffee was not sound and free from defects, but was unsound, and that both the sample and coffee had been tampered with and adulterated, but so skillfully and cunningly that the defendant did not discover the fraud and could not have discovered it without such a careful examination as no man would make unless he had reason to suspect the perpetration of a fraud. * * * The plea further avers that Hills Bros. Co. is the real plaintiff in the suit, and that it has formed an unlawful combination with the National Park Bank of New York and Alfred M. Rogers, the object of which was wrongfully and unlawfully and by deceit to cut defendant off and prevent him from showing his rightful and lawful set-offs and equities against said note. In conclusion he claims to have been damaged by the fraud practiced upon him in the sum of $1,987.10, which sum he seeks to have set off against the note, and the balance of $1,740.92 was brought into court, which the defendant stated he was ready to pay to the plaintiff. * * *

We observe in limine that there is no occasion to discuss the transaction as between the Aragon Coffee Company and Hills Bros. Co. The evidence is conclusive to show a bald and iniquitous fraud. The only question which we need to consider is whether or not the parties before the court occupy such a relation to the transaction as that, under the law merchant, we must shut our eyes to the truth and close the door upon all investigation.

The National Park Bank, being the holder for value and without notice, could transmit a complete title to a third person, even though that third person had knowledge of the facts which would have defeated a recovery upon the note in the hands of the payee; the general rule being that, if a person taking with notice purchase from one without notice, he is entitled to stand in the latter's shoes and take

shelter under his good faith. If it were not so, the bona fide purchaser without notice might be unable to dispose of the property, and thus its value in his hands be materially deteriorated. A bona fide holder, it is said, is entitled to have the whole world for his market.

But there is an exception to this rule, which is well established: If the payee sell negotiable paper to an innocent third party and repurchase it, he does not thereby acquire any better right against the maker than he possessed in the first instance. * * *

Judge Cooley, in Kost v. Bender, 25 Mich. 515, says: "As a general rule, the bona fide holder of negotiable paper has a right to sell the same, with all the rights and equities attaching to it in his own hands, to whoever may see fit to buy of him, whether such purchaser was aware of the original infirmity or not. Without this right he would not have the full protection which the law merchant designs to afford him, and negotiable paper would cease to be a safe and reliable medium for the exchanges of commerce. For, if one can stop the negotiability of paper against which there is no defense, held by another, it is obvious that an important element in its value is at once taken away. But this rule has never been applied to a purchase by the original payee, and it is not essential to the protection of the innocent indorsee that it should be. It cannot be very important to him that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community, the market value of his security is not likely to be affected by the circumstance that a single individual cannot compete for its purchase—especially when it is considered that the nature of the negotiable securities is such that their market value is very little influenced by competition. Nor is there any rule or principle of law that would be violated by permitting the maker to set up his defense against the payee, when he becomes the indorsee, with the same effect that he might have done before it had been sold at all; nor is there any valid reason against it."

In this case, then, it was not sufficient for the defendant to show that there was fraud in the transaction between him and Hills Bros. Co., for, notwithstanding that fraud, the National Park Bank, being a bona fide holder of the note, could transmit, and Rogers, the plaintiff, could acquire, a title to the note, free from all antecedent equities, unless there was evidence tending to prove that Rogers purchased, not for himself, but for the original payee in the note, Hills Bros. Co., and that this company and not Rogers was the actual beneficial plaintiff. We will therefore consider the evidence in the light of these principles. * * *

[After considering the evidence the court continued:] The case under consideration is, in our judgment, far stronger to show a collusive purchase upon the part of Rogers than the one cited. The facts which are set forth in this opinion, coupled with the conduct of the plaintiff when upon the stand as a witness, inexplicable upon any reasonable hypotheses, except that he feared to disclose the truth and preferred to take the chance of success by permitting the court and jury to grope for facts in the dark, when a word from him giving a rational account of his conduct would have dispelled all doubt, warranted the jury in believing that the National Park Bank, being possessed of funds belonging to Hills Bros. Co., which company was ultimately liable to it for the note, concluded not to risk a lawsuit but

to look to its immediate indorser, Hills Bros. Co., and so informed that company, which then hatched the scheme of a purchase of the note by Rogers, and thus hoped to consummate its fraud.

We think, upon the whole case, it was for the jury to say whether Rogers was a purchaser in good faith or was conniving with Hills Bros. Co., to purchase the note as their agent, in order to defeat the equities of the Aragon Coffee Company. It follows that the judgment upon the demurrer should have been in favor of the defendant, and this court will enter such judgment as the circuit court ought to have rendered.

RATCLIFFE v. COSTELLO et al.

(Supreme Court of Appeals of Virginia, 1915. 117 Va. 563, 85 S. E. 469.)

Action by G. M. Ratcliffe as indorsee from the payee N. B. Bullock, against Robert Costello and another as makers of a note. There was a judgment for defendant, and plaintiff brings error.

KEITH, P. * * * We have searched the record in this case diligently, and have been unable to find a scintilla of evidence proving, or tending to prove, that Ratcliffe had actual knowledge of any infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, but on the contrary he stood before the court, by evidence wholly uncontradicted, as a holder in due course of an instrument complete upon its face, which had not been dishonored, and that he took it in good faith and for value, without notice of any infirmity in the instrument or defect in the title of the person negotiating it.

There seems to have been some misapprehension with respect to the case of Aragon Coffee Co. v. Rogers, 105 Va. 51, 52 S. E. 843, 8 Ann. Cas. 623. It will be recalled that Ratcliffe, after he purchased the notes, sold them with a guaranty to his vendees that they should be paid, and that in order to keep faith with them he took the notes back after the first one was protested. It is true that when the notes came back to his possession they came under circumstances which would have imputed to him knowledge of the infirmities in the instruments, but that knowledge did not relate back so as to impair his original position as a purchaser for value and without notice. In the case of Aragon Coffee Company exactly the converse of these facts existed. The original payee in that case was the party guilty of a gross fraud, as a result of which the negotiable note in that case was given. He indorsed it to an innocent holder and afterwards repurchased it; and the court held that if a payee sells a negotiable instrument to an innocent third party and then repurchases it, he does not thereby acquire a better title against the maker than he had in the first instance. We refer to that case and the authorities there cited as not at all in conflict with the position of the plaintiff in error in this case. * * *

The judgment of the circuit court must be reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views herein expressed.

COMSTOCK v. BUCKLEY et al.

(Supreme Court of Wisconsin, 1910. 141 Wis. 228, 124 N. W. 414, 135 Am. St. Rep. 34.)

Action upon a promissory note, $2,500, dated April 21, 1900, signed by J. O. & W. S. Buckley, a copartnership, payable to the order of Thomas F. Somers, at six months date, with 6 per cent. interest, and indorsed by Thomas F. Somers, Charles Buehner, John Graf, Peter J. Somers, John Zilg, C. S. Otjen, H. F. Bosworth, and W. E. Haskin in the order aforesaid. It appeared that said note, so indorsed without any consideration to the indorsers, but for the accommodation of a mining company in which they were all concerned and for which the two Buckleys were financial agents, was delivered to Henry Herman, as a note broker, to negotiate and pay over the proceeds to said agents; that said Herman during the life of said note did dispose of the same fraudulently, as claimed, to one Wight, an innocent holder, who paid value to Herman, and concededly obtained good title to the note. Herman, it is claimed, applied the proceeds to his own use without informing defendants that he had disposed of the note. At maturity the note was protested for nonpayment, and shortly thereafter, October 25, 1900, was paid by Henry Herman and returned to his possession. Thereafter, November 27, 1900, Herman sold said note for value approximating its face to the plaintiff, who had notice of its dishonor, the certificate of protest being attached and who at the same time entered into an agreement with Herman for a definite date of extension of the time of payment. At the close of the trial, upon these facts, the court directed a verdict for the plaintiff for the full amount. From judgment on such verdict the defendants appeal.

DODGE, J. * * * Justification of the action of the trial court is also attempted on the ground that, by the discount of the note for full value to Wight, he acquired a perfect title as against all parties, and that such title he might effectively transfer to another, although that other were charged with notice of some defects in the title of some previous holder. This is undoubtedly the general rule, and, if the sale by Herman to Wight had been an honest one on Herman's part, within his authority as agent, then Wight might have sold the note back to Herman in his individual capacity, and he have acquired a good title thereby which again he might transfer to another. * * *

This principle, which is so trite as hardly to warrant citation of authority, is recognized by the negotiable instrument law, Section 58. * * * If Herman made the sale to Wight fraudulently, he could not, under this statute, acquire the good title which Wight held only by virtue of being a holder of the instrument in due course. When it came back to his hands, it reassumed the same position it formerly occupied, and he could dispose of it to another, not an innocent holder, only within the limits of his own rights and authority. The question whether Herman acted fraudulently in negotiating the note to Wight was involved in conflict of evidence either received or offered and much uncertainty of inference from such evidence and should have been passed on by the jury; as, also, the question whether his payment to Wight was an attempted purchase by him individually or payment of the note on behalf of his principal. * * *

Judgment reversed and cause remanded for a new trial.

LILL v. GLEASON.

(Supreme Court of Kansas, 1914. 92 Kan. 754, 142 Pac. 287.)

Action by Michael Lill against Nelson Gleason. From judgment for defendant, plaintiff appeals.

BURCH, J. On April 15, 1908, Nelson Gleason executed and delivered his negotiable promissory note to the Peerless Machinery & Supply Company for $1,000, due on September 1, 1908. The note was given for stock in the machinery company and was accompanied by a written contract permitting Gleason to return the stock and receive his note duly canceled by giving notice of his intention to the machinery company on or before August 1, 1908. On July 25, 1908, the notice was given but the note was not returned. The machinery company indorsed the note in blank before maturity and left it with the Andale State Bank as security for money to be advanced to the machinery company under a contract providing that advancements should be made up to the sum of $3,500, when collateral security indorsed by Michael Lill was deposited with the bank. The bank refused to make any advancement on the note until it was indorsed by Lill. Lill then went to the bank and wrote his name on the back of the note, pursuant to a contract with the machinery company to do so, which contract provided for security to Lill for his indorsement out of the company's assets. The bank then cashed the note. Gleason had no concern with any of these transactions. When Lill indorsed the note and the advancement was made, neither he nor the bank had any notice of the contract between Gleason and the machinery company. When the note matured, Gleason refused to pay. Upon demand of the bank, Lill took up the note and received it without indorsement from the bank.

In an action by Lill against Gleason, the court found the foregoing facts and held that Lill was not a holder in due course, and that Gleason's defense to the note under his stock contract with the machinery company was good. Lill appeals.

The rights of the parties are governed by the Negotiable Instruments Law. * * * Lill became a party to the note for the accommodation of the payee, * * * and his original status, so far as liability was concerned, was that of an indorser, since he did not indicate an intention to be bound in some other capacity. * * * He thus became secondarily liable to all parties subsequent to the payee, * * * in this instance to the Andale State Bank. When Lill paid the note it was not discharged. It was the policy of the law merchant and is the policy of the Negotiable Instruments Law to keep a negotiable instrument alive and negotiable as far as possible until the principal debtor has discharged his obligation. Discharge could not take place under either section 119 or section 121, and the general rule is that payment by a party other than the principal debtor does not discharge parties prior to the one making the payment, and the payment, instead of extinguishing the instrument, operates as a transfer of it to the party paying. * * *

The contract of an indorser for the accommodation of the payee is wholly independent of that of the maker, and such indorser, upon making payment, succeeds to the title and rights of the holder as against the maker. * * * Sheahan v. Davis, 27 Or. 278, 40 Pac. 405, 28 L. R. A. 476, 50 Am. St. Rep. 722.

The note having been indorsed by the payee in blank, it became payable to bearer and negotiable by delivery. * * * When it was delivered by the bank to Lill, he became the bearer and holder. * * * Having derived title from the bank, which was a holder in due course, and not having been a party to any fraud or illegality affecting the instrument, Lill became possessed of all the rights of the bank against the maker. * * * It made no difference that the paper was overdue and unpaid, and would have made no difference if it had been shown that, when he acquired title, Lill had learned of the contract between Gleason and the supply company to which, as between them, the note was subject. * * * The Negotiable Instruments Law merely affirms the settled principle of the law merchant that, when a negotiable instrument once passes into the hands of a holder by indorsement in due course, the maker's right to interpose defenses good against the payee is cut off as to all subsequent holders not parties to fraud or illegality affecting the instrument. The reason is that, if a holder in due course could not invest his transferee with his own capacity to recover on the paper, his property rights would be materially and prejudicially reduced. [Court quotes section 121.]

It is plain that the expression "remitted to his former rights" does not apply to Lill. He was a party secondarily liable who paid the instrument, but he had no former rights to which he might be remitted. After the payee had indorsed the note, Lill indorsed it to accommodate the payee in disposing of it to the bank. Standing in that situation, Lill had no title to the note or claim on either the maker or the payee. After he paid the note, he had a right of some kind against somebody—the right to reimbursement from the party accommodated, the right to enforce the note against the defaulting maker, or both—but until he paid the note no obligation arose in his favor on the part of anybody, and of course the statute did not remit him to a situation in which he was entirely remediless. The words "remitted to his former rights" must therefore be restricted in their application to a party secondarily liable, who has himself been connected with the title to the instrument.

"Manifestly this section refers only to indorsers for value and not for mere accommodation. An indorser for value at some time prior to his indorsement owned the note with the right to sue upon it at maturity. With this right he parted when he discounted the paper by indorsement to a purchaser for value, who in turn by like process may transfer the title becoming liable by his indorsement to the new indorsee, and so on without limit until the maturity of the instrument. Then whichever of the successive indorsers is compelled to pay is restored to his former rights, within the meaning of this section, upon striking out his own and subsequent indorsements. The case is entirely different, in reason, concerning, an accommodation indorser or a guarantor. Neither of them has any 'former rights,' nor, indeed, any right whatever, until he pays the note or bill." Noble v. Beeman-Spaulding-Woodward Co., 65 Or. 93, 107, 131 Pac. 1006, 1012, 46 L. R. A. (N. S.) 162.

In the case of Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671, it was well said that section 128 was intended to apply where the person secondarily liable can trace his title on the face of the note and its indorsements through the prior parties to the party whom he seeks to

hold. This case, however, seems to decide generally that, because an accommodation indorser has no rights before he has made payment to which he could be remitted, payment by him extinguishes the note. Such a result as to one in Lill's situation cannot be deduced from section 119 or any other section of the Negotiable Instruments Law, is opposed to the express declaration of section 121 that payment by a party secondarily liable does not discharge the instrument, and is contrary to the policy of the law merchant. No reason is apparent why Lill, after having acquired the paper, might not have negotiated it to another, had he seen fit to do so. * * *

One of the defenses to the action was that Lill acquired title to the note in December, 1909, from the trustee in bankruptcy of the machinery company. Lill was a creditor of the machinery company and held, as collateral security for his indebtedness, a number of notes which had been to the machinery company. Lill compounded his indebtedness with the trustee, by order of the bankruptcy court duly obtained in December, 1909, and accepted in satisfaction the collateral notes in his possession. For some reason the Gleason note was included in the list of securities. Lill paid the note and received it from the bank on March 6, 1909. At the time the machinery company was adjudged bankrupt, the note belonged to the bank as a holder in due course. After the bank transferred it to Lill, the note belonged to him, and consequently the trustee in bankruptcy had no title whatever to the instrument which he could pass to Lill. If, in the adjustment of his affairs with the estate of the bankrupt, Lill secured a release of whatever claim the trustee made to the note, it was no concern of the maker, and the title acquired from the bank was not impaired.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the plaintiff.

SECTION 8.—RIGHTS OF A TRANSFEREE FROM A HOLDER IN DUE COURSE OF UNINDORSED PAPER PAYABLE TO THE ORDER OF THE TRANSFEROR

The situation which we are about to analyze is not a common one. It is likely to arise wholly as a matter of accident. The situation has a double aspect. (1) P., the payee of a negotiable instrument which is in form payable to his order, P. not being a holder in due course, transfers the instrument for value, before maturity, to A., who takes in good faith. We may substitute for the payee any other holder—i. e., any special indorsee—provided such special indorsee is not a holder in due course, and then examine into the rights of his transferee who took the instrument without indorsement of the transferor. The problem is the same in either case. (2) The second aspect of the problem is like the first with the exception that the transferor is a holder in due course. The transferor may be the payee of an instrument payable to his order or a special indorsee, and he makes the transfer without indorsement. Is the transferee in either of these cases a holder in due course? The section involved is as follows:

Section 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course the negotiation takes effect as of the time when the indorsement is actually made.

Clearly, the transferee of unindorsed paper payable to the order of the transferor, such transferor not being a holder in due course, is not a holder in due course, because the section states that the transferee acquires "such title as the transferor had therein"; that is, the transferee acquires only the rights of his transferor and not greater rights. Had he taken by indorsement, then, if he bought for value, before maturity, and in good faith, he would have been a holder in due course. As stated above, this transaction is apt to arise through oversight; but it is seen that it is decidedly to the interest of the transferee to see to it that the instrument is duly indorsed to him, so that he will be properly guarded against defenses of the maker or drawer. The section does go on to give to such a transferee the right to have such indorsement, but it may take considerable time to convert his right into an actuality. The right to have a thing and the actual possession of it are very different. It is to be noticed that, if at any time before the transferee actually obtains the indorsement, notice should come to the transferee of the existence of a defense possessed by the maker, drawer, or acceptor as against the payee, such knowledge prevents the transferee from becoming a holder in due course, because the section states that the negotiation takes effect **"as of the time when the indorsement is actually made."** Up until that time the transferee has only such rights as his transferor had.

The second question then arises: May the transferee of unindorsed paper payable to the order of a transferor who was a holder in due course, be a holder in due course? Section 49 speaks of such person as a transferee. He is not referred to as a holder. We have already seen that only those persons may be holders in due course who are holders, as that term is defined in the act. The answer to the above question depends, on the question whether such a person can be deemed a holder under section 191 which defines a holder as the "payee or indorsee of a bill or note who is in possession of it or the bearer thereof." Perhaps such a transferee is not an indorsee because an indorsee is a person who acquires possession by negotiation. But is it possible to urge that, although a transferee is not a holder and therefore is not technically a holder in due course, such a transferee has all the rights of a holder in due course?

SMITH v. NELSON LAND & CATTLE CO.

(United States Circuit Court of Appeals, Eighth Circuit, 1914. 212 Fed. 56, 128 C. C. A. 512.)

CARLAND, Circuit Judge. These are appeals from a judgment rendered in an action brought by the Cattle Company against George H. Smith et al., for the purpose of having certain promissory notes, a mortgage securing the same, and assigments of certain land contracts and certificates executed for the same purpose canceled. Smith filed a cross-bill, asking to have the amount for which he held the notes, mortgage, contracts, and certificates as security ascertained, and a sale of the security to satisfy the same. The trial court granted the relief prayed by Smith as to one note of $1,600, and canceled four other notes of $3,350 each as prayed by the Cattle Company. The facts which determine the correctness of the ruling below appear from the record as follows: November 19, 1907, the Cattle Company, by Fred P. Nelson, president, and Gust A. Nelson, secretary and treasurer, Celia M. Nelson, and Hugo E. Nelson executed and delivered to E. H. Luikart five promissory notes. * * * The Cattle Company was a corporation, and signed the notes before delivery without any consideration therefor passing to it. Luikart, the payee of the notes, for value received indorsed and delivered the notes in due course to Roy C. Smith and Albert Anthes, doing business under the firm name of Anthes & Smith. * * *

The mortgage was duly assigned by Luikart to Anthes & Smith, and the land contracts and certificates transferred to them by delivery. Subsequent to the indorsement of the notes to Anthes & Smith, but before maturity, they were transferred by them to the defendant and cross-complainant, George H. Smith, in part payment of an antecedent debt owing to Smith by Anthes & Smith. The mortgage, land contracts, and certificates were also transferred with the notes. The note for $1,600, due November 19, 1908, was indorsed to George H. Smith in blank by Anthes & Smith. None of the other notes were indorsed by them. * * *

Upon the foregoing facts the Cattle Company claims that the execution of the notes by it as an accommodation maker, without consideration, was ultra vires and void, and that the invalidity of the notes for the above reason can be urged against George H. Smith, the present owner and holder of the same, for the reason that * * * George H. Smith is not a holder in due course. The trial court decided * * * as to the remaining four notes that George H. Smith was not a holder in due course, because they were not transferred to him by indorsement, and therefore were void in his hands for want of power in the Cattle Company to execute the same. * * *

It remains to inquire as to the rights of George H. Smith. * * * We think that. if George H. Smith must stand on the character of his own title, and cannot claim protection by virtue of the title of Anthes & Smith, then the ruling of the trial court as to the other four notes was right. An indorsee of negotiable paper in due course may obtain a better title than his indorser, and in that event may stand upon such title; but is it necessary that he be an indorsee in order to claim the title of a transferror, who was an indorsee in due course? In other words, cannot George H. Smith, although the notes were transferred to him by delivery, use the Anthes & Smith title to insulate the ultra

vires attack of the Cattle Company? Does not the transferee for value of negotiable paper obtain whatever title his transferror had, irrespective of the mode of transfer? As we have heretofore said, these notes are Kansas contracts; and, if there are statutes of that state which determine the legal position of the holders thereof, they must be enforced. [Court here quotes section 49.]

The last clause of section 49 has no application to the question now under discussion, for there never was any indorsement of the four notes in question by Anthes & Smith; and counsel for George H. Smith are not claiming that he was an indorsee in due course, but that under the first clause of this section * * * George H. Smith obtained whatever title Anthes & Smith had. The last section does not read: "But a holder in due course who derives his title through a holder in due course and who is not," etc. Such language would be entirely useless, for if the holder was a holder in due course, he would be fully protected in any event. The law was enacted in order to protect all holders of whatever character of negotiable paper, providing they derive their title to the same from a holder in due course. Anthes & Smith were holders in due course, free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and could have enforced payment of the notes for the full amount thereof against all parties liable thereon. * * * Being such holders when they transferred the notes to George H. Smith for value without indorsing them, the transfer vested in George H. Smith such title as Anthes & Smith had. * * * This provision of the law negatives the idea that there can be no transfer except by indorsement, for the reason that the law declares what title a transferee shall acquire, when it is transferred to him without indorsement. It is true section 58 uses the word "holder" in describing the persons who shall derive their title to negotiable instruments from a holder in due course; and counsel for the Cattle Company urge the proposition that George H. Smith was not a holder under the provisions of section 2 of the Negotiable Instruments Law of Kansas. That section provides as follows: "Definitions and meaning of terms. In this act, unless the context otherwise requires: * * * 'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof."

The same section provides that the word "bearer" when used in the act means the person in possession of a bill or note which is payable to bearer. It is claimed that George H. Smith was not the bearer of the notes because they were not payable to bearer, and that he was not a payee or indorsee for the reason that he was not named as payee in the notes and they are not indorsed to him. It will be noticed, however, that the law only provides that these definitions shall apply unless the context of any particular portion of the law otherwise requires. To decide that the word "holder" as used in the first part of the last clause of section 58, hereinbefore quoted, does not include a transferee like George H. Smith, who received the notes in question from Anthes & Smith without their indorsement, would be inconsistent with the first clause of section 49, above quoted, for that section provides that where a holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as transferror has therein. This section simply uses the words "transfer" and "transferee," and in no way declares that a transferee

shall also be a holder within the definition of section 2, above mentioned. We, therefore, think, within the language of said section 2, that the context of sections 49 and 58 require that the word "holder" used in the beginning of the last clause of section 58, should be held to include any transferee of negotiable paper.

The result of what we have said is that we are of the opinion that George H. Smith has the same title to the four notes in controversy that was possessed by Anthes & Smith, by virtue of the statutes of Kansas, and that, possessing such title, he is entitled to enforce payment of the same against the Cattle Company. We have thus far considered the question last discussed with reference to the statutes of Kansas, and we think our interpretation of the same is in line with the decision of the Supreme Court of Kansas in Underwood v. Fosha, 89 Kan. 768, 133 Pac. 866; and we think the weight of authority, independent of statute, is in favor of the views hereinbefore expressed.

* * *

The case of First National Bank v. McCullough, 50 Or. 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758, is relied upon by counsel for the Cattle Company. This case may be said to be contrary to the views hereinbefore expressed. It has been reported in 17 L. R. A. (N. S.) 1105, and an interesting note accompanies the report of the case, in which the annotator does not agree with the conclusion reached in the case cited.

We place our decision upon the statutes of Kansas as construed by the Supreme Court of that state, and as we construe them. We cannot see how the ruling thus established can work any injustice. The Cattle Company could not have avoided the notes on the ground of ultra vires in the hands of Anthes & Smith, and they are in no worse position now than they would have been if Anthes & Smith still owned them.

The decree below is reversed, and the cause is remanded, with directions to dismiss the original bill at the costs of the complainant and to enter a decree in favor of the cross-complainant, George H. Smith, as prayed for in his cross-bill, and that he also recover his costs.

CHAPTER IV

RIGHTS OF THE HOLDER AGAINST THE MAKER AND ACCEPTOR

Section
1. Introduction.
2. Defenses and Claims of Ownership Not Available Against Holders in Due Course.
3. Defenses and Claims of Ownership Available Against Holder in Due Course.
4. Right of the Drawee to Recover Money Paid to the Holder under Mistake.
5. Right of the Drawee with Respect to Instruments Payable to the Order of a Fictitious Payee.
6. Relation of the Drawee Bank to the Drawer.
7. Rights and Liabilities of Parties with Respect to Acceptances and Payments for Honor.
8. Bills in a Set.

SECTION 1.—INTRODUCTION

A complete definition of a negotiable instrument would concern itself with two matters: (1) Operative facts; and (2) their legal effect. The statement that a particular written instrument is negotiable means that certain facts operate to produce other facts. Both of these groups of facts must, to some extent, be considered simultaneously. Practically, however, it is impossible to do this effectively, consequently the emphasis is thrown first upon one group, and then upon the other. Not until both groups of facts have been examined intensively is it possible to obtain a reasonably complete knowledge of the real meaning of a rule of law. In Chapter I we were interested in the question: What facts will operate to make an instrument negotiable? But we were not concerned, except secondarily with the question: What are the various legal effects produced by such an instrument? In Chapter II the emphasis was thrown upon some of the legal effects of negotiability. Chapter III was an examination into the detail facts which render a holder of a negotiable instrument a holder in due course, but the nature of the rights acquired by the holder in due course were adverted to only incidentally. The present chapter and Chapter V following are concerned with the inquiry into the nature and extent of the rights acquired by the holder in due course, the most important consequence of negotiability. In this chapter the question is: What rights are acquired against parties primarily liable on the instrument—the maker and acceptor? In the next chapter the question is: What rights are acquired against parties secondarily liable on the instrument, the drawer and indorsers? The chief problem is to determine the rights of the holder in due course against parties primarily and secondarily liable, although we shall also be inquiring into the rights against the same parties by holders not in due course. That the liability

of the maker and acceptor is a primary liability is recognized by the following sections:

Section 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

Section 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits (1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and (2) the existence of the payee and his then capacity to indorse.

The most distinctive feature of the law of negotiable instruments is the special position accorded to the holder in due course. The Negotiable Instruments Law provides as follows:

Section 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Section 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.

Defenses which cannot be set up to defeat the claim of the holder in due course are called personal defenses; defenses which may be successfully interposed against the holder in due course are called real defenses. All defenses and claims not real are personal. Real defenses divide themselves into three groups: (1) Those where in reality there never was a contract executed by the party sued; (2) those where there is a contract but for reasons of public policy the holder in due course is not permitted to enforce it; (3) where there was a contract but the party suing had no title thereto.

The first group—where there never was a contract executed by the defendant—is further divided into three groups: (a) Where the defendant's name was forged or otherwise placed upon the instrument without his authority; (b) where the defendant did sign the instrument, but did so under such circumstances that he had no reason to suppose that he was executing a negotiable instrument; (c) where the defendant knowingly signed a negotiable instrument, but left it in an incomplete state, the instrument getting into circulation without the authority of the maker and without negligence on his part. In the second group of cases—where there was a real contract executed by the defendant—we have two types of situations: (a) Certain kinds of illegal contracts; (b) contracts executed by persons who do not have full capacity to contract. In the third class, the party attempting to enforce the instrument is claiming title through a forged indorsement, or is himself a thief or other converter of bearer paper.

SECTION 2.—DEFENSES AND CLAIMS OF OWNERSHIP NOT AVAILABLE AGAINST HOLDERS IN DUE COURSE

(a) ABSENCE OF CONSIDERATION

INTERSTATE FINANCE CO. v. SCHROEDER.

(Supreme Court of Appeals of West Virginia, 1914. 74 W. Va. 67, 81 S. E. 552.)

MILLER, P. The action, begun before a justice, was upon three negotiable instruments, drafts or inland bills of exchange, dated Chicago, Ill., March 31, 1910, and payable in six, eight and ten months respectively, at the office of the drawer, drawn in its favor, by Commercial Jewelry Company, on the defendant Henry A. Schroder, and by him duly accepted, and each for the sum of forty-eight dollars.

The case was tried in the circuit court * * * resulting in a verdict and judgment for plaintiff for $151.92, the full amount sued for.

The first complaint is that the circuit court erred in refusing to permit defendant to prove by his own evidence as against plaintiff, failure of consideration, as between drawer and drawee; and also to exhibit and show in evidence certain goods sold him by the drawer and payee, and that there was fraud and misrepresentation practiced upon him by said drawer "at the time he accepted said negotiable instruments."

By section 59, * * * every holder of a negotiable instrument is prima facie holder in due course; and by section 28, thereof, * * * failure of consideration is not a defense as against a holder in due course. By section 57, * * * "a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." These provisions of our new negotiable instruments law, are merely declaratory of the law as it previously existed. Said section 59 further provides that if it be "shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." But failure of consideration does not render title to an instrument defective. By section 55 of that act, "the title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for any illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." * * * If failure of consideration is admissible under the general issue, it is not available as against a holder in due course. * * *

In view of these provisions of the statute law, the court below, we think, properly ruled that the proposed proof of failure or partial failure of consideration was not admissible in evidence as against plaintiff.

It would follow that, if the absence of consideration is a personal defense, the defenses of nonfulfillment of conditions, of breach of contract, rights of set-off, of counterclaim, and recoupment would also be defenses not available against a holder in due course.

(b) FRAUD

Transactions involving the procuring of negotiable instruments by fraudulent representations are as varied as human ingenuity can devise. Frequently the misrepresentations take the form of untrue statements knowingly made concerning the value or general characteristics of the property offered in exchange for the instrument. Sometimes the fraud consists in misrepresenting the solvency or the identity of the person who obtains the instrument. In whatever form the fraud arises, so long as the party signing the negotiable instrument did so under circumstances where it was fair to assume that the signer knew, or by the exercise of reasonable care should have known, that he was executing a negotiable instrument, his defense is a purely personal defense, not available against a holder in due course. A few courts have reached a result contrary to that reached in the first case, but it is believed that the Colorado case represents the better rule. If the law throws the loss upon the maker in such a case as this, it follows quite clearly that, in the more common types of fraudulent procurement of a negotiable instrument, the defense of fraud is purely personal, not available against a holder in due course. The case is not one where a holder in due course sues the drawer, but the result would have been the same, had the suit arisen in this way.

TWYMAN v. AVERA LOAN & INVESTMENT CO.

(Court of Appeals of Georgia, 1918. 23 Ga. App. 136, 98 S. E. 239.)

Action by the Avera Loan & Investment Company against Reuben Twyman. Judgment for plaintiff upon a directed verdict, and defendant excepts and brings error.

BLOODWORTH, J. The motion for rehearing in this case is based upon the ground that the court overlooked the following evidence of defendant: "He just handed me the deed and the other papers, and said, 'Sign here, right here,' and I thought I was signing a receipt for the deed. * * * He did not read to me this paper. I did not read the paper. Mr. Walker did not read it to me. I could not read it. No one read it to me." * * * On cross-examination the defendant said: "I can write and read the English language. I can write some and read a little bit—nothing to amount to anything."

In the evidence there is nothing to show that the defendant made any effort to read the note and found that he could not do so, or that at the time he signed it there existed any emergency which would excuse his failure to read, or that his failure to read was brought about by any "misleading artifice or device perpetrated by the opposite party, amounting to actual fraud such as would reasonably prevent him

from reading it." On the contrary, it clearly appears that he signed the note upon presentation, without apprising himself of its contents otherwise than by accepting statements with reference thereto made by the representative of the opposite party, and between whom and defendant there existed no fiduciary or confidential relation. * * *

Rehearing denied.

BOATSMAN v. STOCKMEN'S NAT. BANK.

(Supreme Court of Colorado, 1914. · 56 Colo. 495, 138 Pac. 764, 50 L. R. A. [N. S.] 107.)

Action by John Boatsman, administrator of Carroll Nichols, deceased, against the Stockmen's National Bank. Judgment for defendant, and plaintiff brings error.

BAILEY, J. Carroll Nichols, a real estate dealer at the town of Morrill, Scotts Bluff County, Nebraska, died in April, 1911. John Boatsman, as administrator of his estate, brought this action in the district court of Morgan County, against the Stockmen's National Bank of Brush, Colorado, by which it is sought to recover $1,500.00 and interest alleged to have been wrongfully paid out by it on account of Nichols to one H. M. Warren on a forged deed. The quarter section of land involved in the controversy is situate in Scotts Bluff County, Nebraska, and is owned by Charles E. Murphy, a resident of Utah. Warren was also a real estate dealer, residing at Mitchell, Nebraska, near Morrill. Nichols knew Warren, but did not know Murphy. On May 23d, 1910, Warren wrote Nichols a letter in the name of Murphy, proposing a quick sale of the land and soliciting an offer therefor. The name of Murphy was wrongfully used, without his knowledge or consent, throughout the whole transaction. In answer to that letter Nichols telegraphed an offer of $2,500.00 for the land. Warren acknowledged receipt of the offer in a letter dated May 25th, 1910. Four days later Warren again wrote Nichols, directing him to send the deed to the defendant bank at Brush, Colorado, for execution, with draft to pay for the land. The deed, naming Boatsman as grantee, who loaned Nichols the money to buy, was accordingly mailed by Nichols to Murphy at Brush, Colorado, which Warren received and thereupon executed, as Murphy, acknowledged the same before a Notary Public, presented it to the defendant bank and requested payment of the $2,500.00. Finding no money at the bank, he requested it to telegraph to the Farmers & Merchants Bank of Morrill, Nebraska, with whom Nichols did business, with the following result:

"Brush, Colo. 6—1st '10

"Farmers and Merchants Bank Morrill Nebraska

"Deed Chas Murphy to John Boatsman duly executed and in our hand Murphy wants money wired to this bank at once or will call deal off. Stockmens Natl. Bank."

"June 2, 1910.

"Stockmens National Bank, Brush, Colo.

"If warranty deed is regular, pay Charles Murphy twenty-five hundred dollars. We remit. Register deed to us.

"Farmers & Merchants Bank

"Morrill, Nebraska."

The defendant bank thereupon paid Warren $1,500.00 cash and a $1,000.00 draft on the City National Bank of Omaha, Nebraska, and took the deed for delivery. The following September the imposition was discovered and payment stopped on the draft. Soon thereafter Warren was tried, convicted and sentenced to a term in the Colorado penitentiary on a plea of guilty to a charge of forgery.

Nichols demanded of the defendant bank the return of the $1,500.00 paid to Warren believing him to be Murphy. The bank refused payment and this suit followed. A demurrer to the complaint was interposed and sustained upon the ground that it stated no cause of action. Plaintiff elected to stand by his case as made, the action was dismissed, and he brings the case here to review such judgment.

The gist of the complaint is that the defendant bank negligently paid the imposter $1,500.00. In such cases the controlling inquiry is whether the drawer, by failure to use ordinary diligence to avert a loss, has so increased the risk and responsibility of the drawee as to take the case out of the general rule of liability for payment of money on a forged instrument. When the facts show that such is the case, it is uniformly held that the drawer must bear the loss.

It will be presumed that the defendant bank had full knowledge of all dealings between Nichols and Warren, pretending to be Murphy, which the complaint discloses. The deception was complete as to both the defendant bank and Nichols. Warren appeared at the bank with the deed which Nichols had prepared and forwarded, purporting to be duly executed by Charles E. Murphy before a Notary Public. The defendant bank telegraphed the Nebraska bank, with whom Nichols did business, that Charles Murphy had presented the deed and awaited immediate remittance or the deal would fail. Nichols forthwith sent the money, and the defendant bank thereupon accepted the deed and made payment. By the letter of May 29th, 1910, Warren requested Nichols to make the draft payable to bearer to avoid identification, as he was not known in that community, and stated that he was very anxious to get the matter off his hands, that the acceptance of the price offered was a great sacrifice on his part and must be acted upon immediately if at all. This is substantially a reiteration in these particulars of the letter of May 25th, four days earlier. Such statement might well have aroused the suspicion of an ordinary business man in dealing with a stranger and put him on inquiry.

But the attitude of Nichols is shown by the fact that he acted in harmony with every suggestion of Warren. The record fails to show that he took any precaution for his own protection against this stranger. Evidently the price asked was low, and Nichols was so thoroughly interested in making an advantageous deal that he completely lost sight of the possibility of deception. By mailing the deed to the stranger for execution, he not only placed in his hands an instrument peculiarly well adapted to perpetrate a fraud upon the bank, but so increased its ordinary risk as to take the case out of the general rule applicable in cases of payment of money on forged instruments. The bank was fully justified, in the circumstances of this case, in paying the money to the person presenting the deed duly acknowledged, and it discharged every duty imposed upon it by law to escape liability. The law will not permit a drawer who has, through lack of diligence, been misled into making a direction for the payment of money on a forged deed, to shift the burden of loss by placing an undue and

extraordinary responsibility upon the drawee bank. The representative of Nichols is here contending that such extraordinary risk attaches to the bank, notwithstanding the total failure of Nichols to use even the most ordinary means to prevent deception. The rule of law which he claims is applicable does not reach the present situation. Generally on payment of money on a forged instrument, in the absence of negligence on the part of the depositor whose check it purports to be, the bank cannot charge the amount to his account. * * * But where there is a failure on the part of the depositor to use diligence to avert a loss, and such we think may fairly be said to be the fact in the present dispute, a different rule applies.

The rule is stated in the case of Land Title & Trust Co. v. Northwestern National Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717, as follows: "The reason of the rule that when a bank pays a depositor's check on a forged indorsement, or a raised check, it is held to have paid it out of its own funds and cannot charge the payment to the depositor's account, is that there is an implied agreement by the bank with its depositor that it will not disburse the money standing to his credit, except on his order. * * * It is confined to cases in which the depositor has done nothing to increase the risk of the bank. It should not apply when the check is issued to one whom the drawer intends to designate as the payee: First, because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used; the bank is deprived of the protection afforded by the fact that a bona fide holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks; there is thrown upon the bank the risk of antecedent fraud practiced upon the drawer of the check, of which it has neither knowledge nor means of knowledge." * * *

Under the facts here disclosed the way was made plain and easy for the perpetration of a fraud upon the bank through lack of care on the part of Nichols in sending a deed for execution to a stranger, and in arming him with letters and telegrams which, together with the deed, could be presented to the bank as a means of identification, so that the purchase price would be paid to him, a perfectly natural and proper thing, under such circumstances, for the bank to do.

The matter is thus reduced to the simple proposition that where two innocent parties have both been deceived, the loss must be borne by the one who primarily made such loss possible. The vital mistake was made by Nichols in dealing with Warren believing him to be Murphy. This was the fundamental and primary error, the responsibility for which rests solely upon Nichols. It was this initial error which led directly to the loss. * * *

Moreover, under the facts disclosed, it appears that the money was paid to the very person to whom Nichols actually intended it should be, the one through whose agency the transaction was brought about. It is idle to say, as does plaintiff, that Nichols never in fact dealt with Warren, the imposter; this contention only goes to show that the deception was complete. It would be to disregard substantial facts to say that the actual intent of Nichols, because he mistook his physical payee, Warren, for his mental payee, Murphy, was not met by payment to the former. Nichols did not deal merely with the name

"Charles E. Murphy," but rather with the physical entity, the human agency indicated by that name, the one who quickened him to action. The true Charles Murphy was unknown to Nichols, and he naturally had in mind only a man with this land to sell, the person with whom he corresponded, Warren. He meant the money to be paid, and it was paid, to that identical person, and the estate of Nichols must therefore, as against the bank, bear the loss, for his actual intent was in fact carried out. Names are used as one method only of indicating identity of person, and are in no sense conclusive on this proposition. * * *

Judgment affirmed. * * *

(c) DURESS

FAIRBANKS v. SNOW.

(Supreme Judicial Court of Massachusetts, 1887. 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446.)

HOLMES, J. This is an action upon a promissory note made by the defendant and her husband to the order of the plaintiff. The defendant alleges that her signature was obtained by duress and threats on the part of her husband. The judge below found for the plaintiff, it would rather seem on the ground that, whether there was duress or not, the defendant had ratified the note, which there seems to have been evidence tending to show that she did. * * * But, as this may not be quite clear, we proceed to consider the only exception taken by the defendant,—the judge's refusal to rule that, if the defendant signed the note under duress, it was immaterial whether the plaintiff knew when he received the note that it was so signed. The exception is to this refusal. No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, the signature would not have been her act, and if the signature had not been her act, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There still is sometimes shown an inclination to put all cases of duress upon this ground. * * * But duress, like fraud, only becomes material, as such, on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that when, as usual, the so-called "duress" consists only of threats, and does not go to the height of such bodily compulsion as turns the ostensible party into a mere machine, the contract is only voidable. * * *

Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud, and is that, whether it springs from a fear or a belief, the party has been subjected to an improper motive for action. * * * But, if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant. * * *

The authorities with regard to duress, however, are not quite so clear. It is said in Thoroughgood's Case, 5 Coke, 241, that, "if a stranger menace A. to make a deed to B., A. shall avoid the deed

which he made by such threats, as well as if B. himself had threatened him, as it is adjudged, 45, E. 3, 6a." Shep. Touch. 61, is to like effect. See, also, Fowler v. Butterly, 78 N. Y. 68, 34 Am. Rep. 507. But in 43 Year Book, E. 3, 6 pl. 15, which we suppose to be the case referred to, it was alleged that the imprisonment was by the procurement of the plaintiff; and we know of no distinct adjudication of binding authority that threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them. In Keilway, 154a, pl. 3, "the defendant in debt pleaded that he made the obligation to the plaintiff by duress of imprisonment (on the part) of a stranger, and the opinion of Rede and others was that this is not a plea without making the obligee party to this duress." In Taylor v. Jaques, 106 Mass. 291, 294, it was said that the defendant had to prove that he signed the note "under a reasonable and well-grounded belief, derived from the conduct and declarations of the plaintiffs, that if he did not sign it he would be arrested." * * * Moreover, the older writers likened duress to infancy, and took a distinction between feoffments, etc., by the party's own hand, and acts done by letter of attorney, regarding the latter as wholly void. * * * It has been held in New York and some other states, as well as in England, that a power of attorney given by an infant is void. * * * And if this analogy were followed the contracts in all the New York cases which we have cited would be void by the law of that state for want of a personal delivery by the defendant to the plaintiff. There may be still other explanations of the decisions.

In the present case it does not appear who delivered the note, and does not clearly appear that the defendant did not deliver it herself. If any question of authority were open, it would have to be noticed that in Massachusetts the distinction as to power of attorney has been so limited, if not wholly done away with, with regard to infants, that it would be doubtful, at least, if it could have any application to the case at bar. * * *

However the law may stand elsewhere, we are of opinion that the ruling requested was wrong upon principle and authority. Exception overruled.

(d) THEFT OF A COMPLETED INSTRUMENT

Section 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party

whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

This section does not operate to protect a purchaser under a forged or other unauthorized indorsement of the payee or of some special indorsee, for the reason that such a party in possession of the instrument not having the title thereto would not be a holder. The section, therefore, is applicable only where the instrument is in form transferable by delivery, either because originally payable to bearer or because the last indorsement was in blank. Before the Negotiable Instruments Law this defense was, in some states, available against a holder in due course.

ANGUS v. DOWNS.

(Supreme Court of Washington, 1915. 85 Wash. 75, 147 Pac. 630, L. R. A. 1915E, 351.)

Action by Grace Angus against George A. Downs. Judgment on a directed verdict for plaintiff, and defendant appeals.

FULLERTON, J. This is an action brought by the respondent, Grace Angus, against the appellant, George A. Downs, to recover upon a promissory note. In her complaint the respondent alleged that the note had been assigned to her for value, prior to maturity, and that she was a holder thereof in due course. The appellant interposed two defenses: First, that the note was stolen from his possession prior to delivery; and, second, that the respondent was not a holder of the note in due course. * * *

Appellant first contends that a holder of commercial paper, although received by him in due course, cannot recover thereon against a maker from whose possession it has been taken before delivery by theft. His learned counsel argue that the question is not controlled by the Negotiable Instruments Act, and they cite many cases decided under the common-law rules applicable to the law merchant which sustain the principle that recovery cannot be had under such circumstances. There are, however, many cases maintaining the contrary rule, and, were we to conclude that the act cited is without application to the question, it would be an interesting inquiry to ascertain with which side lay the better reason. But we think the act itself controlling. Section 16 of the original act * * * provides in terms that, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. Language could hardly be made plainer, and is as applicable to a holder in due course of commercial paper stolen before delivery as it is to commercial paper stolen subsequent to delivery, or commercial paper the title to which is defective for any other reason.

Judgment affirmed.

(e) UNAUTHORIZED COMPLETION OF AN INSTRUMENT BY CUSTODIAN

LIBERTY TRUST CO. v. TILTON.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 462, 105 N. E. 605, L. R. A. 1915B, 144.)

See ante, p. 780, for a report of the case.

(f) THEFT OF AN INCOMPLETE INSTRUMENT ACCOMPANIED BY NEGLIGENCE IN THE CARE OF THE INSTRUMENT

N. I. L., Section 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

S. S. ALLEN GROCERY CO. v. BANK OF BUCHANAN COUNTY.

(Kansas City Court of Appeals, Missouri, 1916. 192 Mo. App. 476, 182 S. W. 777.)

JOHNSON, J. This is an action against defendant bank by the depositor of a checking account to recover a deposit of $2,938.70. * * * A jury was waived, and after hearing the evidence the court rendered judgment for defendant. Plaintiff appealed.

At the beginning of the trial the parties agreed that on August 27, 1914, plaintiff had a deposit of $2,938.70 with defendant which was payable on demand unless it should be found that defendant was justified in charging against the deposit, as it did, three checks dated August 15, 1914, which bore the signature of plaintiff, and purported to have been drawn to the order of O. J. Rose. These checks, which were for the respective amounts of $2,700.95, $395.60, and $195.15, were paid by defendant on presentation and charged to the account of plaintiff. They had been signed in blank by plaintiff, but had been stolen from its office by Rose, who, by forgery, had converted the signed blanks into checks for the respective sums stated.

Plaintiff, a corporation operating a large retail grocery in St. Joseph, has a president, secretary, general manager, six or seven chiefs of departments, and about fifty employés. * * * The president, S. S. Allen, alone has authority to sign checks on behalf of the company, and such authority never has been conferred upon any other officer. When Allen found it necessary to be absent from the city, it was his custom to sign a number of blank checks and leave the check book in the custody of the manager, with authority to fill out the blanks and issue checks for use in carrying on the business until his return. He was absent on his summer vacation when the events under consideration occurred, and, as usual, had signed plaintiff's name to a number of checks, and had left the book with Mr. Morrow, the manager. Following his usual practice, Morrow had allowed this book to re-

main on the top of his desk in the office without instructions to any one respecting its safe-keeping, and, when he had occasion to issue a check, sometimes would draw it himself, and sometimes would have the secretary or stenographer draw it.

On August 15, 1914, Rose, a traveling salesman who had been selling merchandise to plaintiff and was well acquainted with its officers and office employés, especially with the manager, visited the office during the luncheon hour, and found no one there but the stenographer. On being informed that Morrow, for whom he inquired, was out for lunch, he asked and was accorded the privilege of writing some letters, and seated himself at Morrow's desk, on which the check book was lying in full view and, of course, within easy reach. Some time while at the desk he surreptitiously cut out a sheet from the check book which contained three signed blanks and their stubs. After filling out the blanks Rose went first to defendant bank, where he was known to the paying teller, and presented the check for $395.50, which the teller paid, finding the signature genuine. Next he went to the Empire Trust Company, where he was also known, and presented the check for $2,700.95, and, at his request, was given a cashier's check, which subsequently he cashed at a bank in Atchison. Then he went to a jewelry store and passed off the third check in payment of a diamond he purchased. After this he disappeared, and thus far has eluded capture. The check for $2,700.95 came to defendant through the clearing house bearing the indorsement of the Empire Trust Company, and was honored by defendant though its payment overdrew plaintiff's account by more than $600. The third check for $195.15 also passed through the clearing house with the indorsements of the jeweler and the Tootle-Lemon National Bank, and was paid by defendant, further increasing the overdraft. * * *

The principal argument of counsel for plaintiff * * * is that the checks, never having been delivered by plaintiff, did not become valid negotiable instruments. * * * Counsel insist that their position has the support of the weight of authority as it stood at the time of the passage of the Negotiable Instruments Act, and is completely and irrefutably sustained by that act, which provides: "Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

Especially is this argument urged against the validity of the checks of $2,700.95 and $195.15, the payment of which, not being made out of funds of plaintiff on deposit, was voluntary on the part of defendant, and should be regarded as the act of a purchaser, rather than that of a debtor bound by law to honor the demand of his creditor. * * *

On the theory of plaintiff that the position of defendant is that of a mere purchaser or innocent holder for value, the questions to arise are interesting and difficult of solution. * * * As a general rule, the delivery of an incomplete negotiable instrument by the maker who signs it is indispensable to the creation of a contractual obligation on the part of such maker. Until delivery the instrument is but so much waste paper. The provisions of section 9986 are merely a legislative enactment of this rule, which had the support of the great weight of authority when the Negotiable Instruments Act was adopted in this state. We think this section was not intended to abrogate or impair

other well-recognized rules by which in certain instances delivery by the maker would be implied, either from authority actually conferred by him upon an agent, or from conduct which should estop him from claiming that he had not delivered or authorized the delivery of the signed instrument. * * *

While estoppels are odious and will not be lightly invoked, they do obtain in instances where it would be manifestly unfair and unjust to suffer a party to gain an advantage by taking inconsistent positions, and they may be based upon conduct which is so careless and grossly negligent as to amount to a willful indifference to the rights of others. * * * In the supposititious case of a man signing a check in blank and tossing it into a public street, an act evincing such an extreme and reckless departure from the field of ordinary care and prudence, and such a wanton indifference to the rights of subsequent purchasers, or others who might innocently come into possession of it, would call for the application of the rule of estoppel and preclude the actor from claiming that he had not delivered the instrument.

The opinion of Lord Bramwell in Baxendale v. Bennett, 3 Q. B. Div. 525, 65 L. J. Q. B. 593, 75 L. T. 254, 4 Eng. Rul. Cas. 637, much relied upon by plaintiff, instead of being an authority against the distinction just pointed out, is found to give it express sanction. In that case a bill of exchange which the defendant had signed in blank as an indorser had been returned to him unused, and he had put it in a drawer in his desk in his private chambers, from which a thief took it, filled out the blanks, and put it into circulation. Lord Bramwell thought defendant had been negligent in the care of the paper if judged by the standard of care a bailee should have followed, but in reaching the conclusion that not such negligence, but the crime of the thief, was the proximate cause of the loss, he distinguished the case from the earlier English cases of Young v. Grote, 4 Bing. 253, and Ingham v. Primrose, 7 C. B. (N. S.) 82, where the negligence was so gross as to amount to recklessness, on the ground that they were treated as instances where the alleged maker or acceptor was held liable as one who had voluntarily parted with the instrument. * * *

Other authorities dealing with the subject * * * do not challenge the view that the conduct of the maker or acceptor of a negotiable instrument signed in blank may be sufficient to create an estoppel, though they do agree that the mere signing and withholding from delivery of such paper is not enough to constitute negligence, and that liability as upon paper delivered by the maker or acceptor will not be imputed from a mere lack of ordinary care in the custody of the paper after it is signed. Linick v. Nutting, 140 App. Div. 265, 125 N. Y. Supp. 93. * * *

Certainly this case is an authority sustaining the conclusion that under the rules of the Negotiable Instruments Act which are considered and discussed the maker or acceptor may be guilty of conduct in the care of the paper which would estop him from disputing the title of an innocent holder on the ground that he had not delivered the paper or voluntarily put it into circulation. Was plaintiff in the instant case guilty of conduct sufficient to raise an estoppel against the claim that it did not deliver the checks nor voluntarily put them into circulation? Allen, the president and principal stockholder of the plaintiff corporation, controlled its policies and business affairs. He was an able, experienced, and careful merchant who had succeeded in

building up a large and successful business, and it is with much reluctance that we give expression to the conviction that in adopting and pursuing the course of business under consideration he and the manager, who acted under his orders, were grossly negligent in keeping the book of signed blank checks in such an exposed place without taking any precautions to guard against its spoliation. In the manager's use of the book knowledge was imparted not only to the employés, but to others who visited the office on business, that it contained signed blank checks. That fact may be said to have been publicly proclaimed, and by offering such easy opportunities for the commission of a crime plaintiff was as much a tempter of the criminally minded and morally weak to whom such opportunity might come as it would have been had it left money lying unwatched and exposed in the office, or, as in one of the English cases, had signed a blank check and tossed it into the street. Certainly plaintiff, when it signed the checks, must be held to have anticipated that in the usual course of business they would be issued, and that some of them would pass into the hands of innocent holders for value before presentation to defendant for payment, and it owed a duty to such holders, despite the fact that they were under no legal obligation to acquire title or ownership of such paper, to exercise some care in its custody during the interim between the signing and delivery thereof.

Regarding defendant merely in the light of an innocent holder for value, we think the facts of the case, upon the plainest principles of fairness and justice, estop plaintiff from taking the position that, as to such holder, it did not voluntarily part with the possession of the checks, and therefore in law deliver them.

We have gone thus extensively into this aspect of the case for the reason that we think the position of defendant with respect to the two checks of $2,700.95 and $195.15 should be regarded as that of an innocent holder for value, and not that of a debtor bank to a depositor. We are aware that in some of the cases cited by defendant, e. g., Trust Co. v. Conklin, 65 Misc. Rep. 1, 119 N. Y. Supp. 367, and Snodgrass v. Sweetser, 15 Ind. App. 682, 44 N. E. 648, no distinction appears to be observed between the status of a bank which pays a forged check signed by the depositor out of funds on deposit to his credit and of a bank which pays such check, thereby creating an overdraft.

The relation of banker and depositor is that of debtor and creditor, and as to a checking account the contractual obligation assumed by the banker is to pay on presentation the checks drawn by the customer against the deposit. But the banker is under no legal or contractual duty to allow a customer to overdraw his account, and as to checks he pays which cause an overdraft may be regarded, not as a debtor who has discharged a legal duty to a creditor, but as a voluntary purchaser or holder for value of negotiable paper.

As to the check for $395.60, which was paid when plaintiff had a larger sum than that on deposit, the relationship between the parties was purely that of depositor and banker—creditor and debtor—and plaintiff owed a duty of care to the bank greater than that which the maker of a negotiable instrument owes to subsequent holders for value. Any negligent breach of that duty which directly results in loss would charge the depositor with liability for such loss. As, for example, it is well settled in this state that, where after delivery of a completed check it is raised by forgery, the loss must fall on the mak-

er if he negligently inserted the amount in a way to admit of the easy addition by forgery of other words and figures. * * *

Considering the facts that a bank must honor the checks of its depositor, and cannot by the exercise of any degree of skillful inspection detect a forgery of a check signed and delivered in blank, we think every consideration of justice and common sense sustains the conclusion that a depositor should affix his signature to a blank check only for the purpose of directing the bank to pay out the money, and that the risk of signing and then keeping a blank check, whether the keeping be careful or negligent, should be considered a risk the maker voluntarily assumed. Trust Co. v. Conklin, supra. * * * If the exigencies of the depositor's situation create a necessity for the signing of checks in blank, and then keeping them a time before putting them into circulation, why should he not bear the risk made by his own necessities, rather than the banker, who is a stranger to them, and is under the contractual duty to honor his written orders for the payment of money? He is the one who, in the service of his own interest, has given occasion for the commission of the wrong, and, under the familiar maxim, is the one who should bear the consequences.

It follows from the foregoing considerations that, whether defendant be treated as an innocent purchaser of the checks for value or as a banker who paid them in discharge of a contractual obligation to a depositor, the loss of the forgeries should fall upon plaintiff. * * *

PHILLIPS v. A. W. JOY CO.

(Supreme Judicial Court of Maine, 1916. 114 Me. 403, 96 Atl. 727, L. R. A. 1916E, 690.)

PHILBROOK, J. The plaintiff is one of the ticket agents of the Maine Central Railroad Company at Bangor. On the evening of February 10, 1915, while attending to his duties at the office of the company, his telephone bell rang, and he answered the call. He says he was as sure as one could be that the voice coming over the wire was that of Mr. Wheaton, who, as the evidence shows, was acting manager of the defendant company at that time. The sender of the message, whoever he might have been, asked the plaintiff if he would cash one of the defendant's checks, stating that the funds of the defendant were locked up and there was a man who wanted a mileage ticket. The plaintiff consented, and in the course of 20 minutes or half an hour a man came to the window of the ticket office who presented a check for $113.75, payable to the order of Earl S. Woodbury, drawn on the Eastern Trust & Banking Company, and signed "A. W. Joy Co., by J. F. Wheaton, Treas." The name of the company in the signature was printed, but the name and designation of the signer were written. In the upper left-hand corner were printed the name and business of the defendant company, and just below this printing, made by a protectograph stamp, were the words and figures "Not over one hundred twenty 120." The plaintiff asked the man if he were Earl S. Woodbury, and if he were the man about whom Mr. Wheaton telephoned, to both of which questions affirmative answers were given. The check bore the earmarks of genuineness, and plaintiff says he recognized the signature of Mr. Wheaton. Upon request, therefore, the

mileage book was delivered, and the balance of the amount paid in cash; the check having been first indorsed by the payee. In due time the check was presented to the trust company, but payment was refused.

While denying that he ever telephoned, as claimed by plaintiff, Mr. Wheaton admitted the signature upon the check to be his own, but said this check was signed by him in blank, and that after such signature it had been stolen, the date, amount, and name of the payee having been written in, and the protectograph stamp used, after the stealing. As soon as the theft had been discovered the trust company was directed not to pay the check when presented. Mr. Wheaton testified that it was his custom to sign enough checks in blank during the morning for use during the day, and that Miss Butler, the clerk and bookkeeper, filled in the dates, amounts, and names of the various payees as occasion demanded. The testimony shows that after such signature by Mr. Wheaton the check book was kept sometimes in the office safe, sometimes in the drawer of a desk in the office, and sometimes on top of the desk. The plaintiff testified that the bookkeeper told him it would be easy for anybody to come in and abstract one of the checks while she was out making change for the men. This testimony was not contradicted by Miss Butler. Mr. Wheaton testified that there was nothing to prevent the general help from access to the office although either he or Miss Butler was supposed to be there all the time. On cross-examination he stated that the office might have been left alone, that he had been in the store when there was no one in the office, and that there was no lock on the office door. Miss Butler, the bookkeeper, stated that occasionally the office had been left alone for 10 or 15 minutes, or perhaps a little longer at times. On cross-examination she said the check book was left on the desk quite often during business hours.

It is claimed by plaintiff, practically admitted by defendant, and we haye no hesitation in finding from the record of the case, that the plaintiff is a bona fide holder of the check for value, that he took it without notice of any facts which would impeach its validity between the antecedent parties, and that he took it under an indorsement made before the same became due. * * *

Through all the cases, and those holding similarly there runs a distinction between a completed piece of commercial paper with all its blanks filled, including the name of the payee to whom delivery had not been made, either actually or constructively, and a paper signed by the maker with blanks left unfilled as in the case at bar. The element of negligence on the part of the signer also plays an important part. It is conceded that this check was signed in blank. Was there such negligence on the part of the defendant company or its agents as will permit this plaintiff to recover? The case seems to show quite clearly that the check book was left about the office in such a way that this check was, in fact, undoubtedly stolen, and, as we have already seen, according to the plaintiff's undisputed testimony, the bookkeeper admitted that "it would be easy for anybody to come in and abstract one of the checks." Under all the circumstances it seems to us, in view of the character of the paper stolen, its condition as to signature when stolen, the negligence in leaving the signed checks in such environment that theft was easy, and the apparent care of the plaintiff before cashing the check, that we should apply the rule of estoppel, * * * as well as the rule that, when one of

two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must sustain it.

Judgment for plaintiff for $113.75, with interest from date of the writ.

(g) MATERIAL ALTERATION AS REGARDS THE INSTRUMENT IN ITS ORIGINAL FORM

N. I. L., Section 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

N. I. L., Section 125. Any alteration which changes:

1. The date;

2. The sum payable, either for principal or interest;

3. The time or place of payment;

4. The number or the relations of the parties;

5. The medium or currency in which payment is to be made;

6. Or which adds a place of payment where no place of payment is specified;

7. Or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

N. I. L., Section 124. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

PUBLIC BANK OF NEW YORK CITY v. KNOX-BURCHARD MERCANTILE CO. et al.

(Supreme Court of Minnesota, 1916. 135 Minn. 171, 160 N. W. 667.)

TAYLOR, C. Plaintiff brought suit upon a promissory note for the sum of $7,500 and recovered a verdict against the defendant, * * * S. J. Burchard. * * * He appealed.

The Knox-Burchard Mercantile Company is a Minnesota corporation which was engaged in the wholesale mercantile business in the city of St. Paul until it went into the hands of a receiver. G. C. Knox, A. M. Knox and S. J. Burchard were respectively the president, vice president and secretary of the company and constituted its board of directors. G. C. Knox and S. J. Burchard were the active members of the company and conducted its business. * * *

Appellant claims that, as an accommodation maker, he joined with G. C. Knox in executing a promissory note in the sum of $10,000 for the personal debt of Knox; * * * that thereafter G. C. Knox changed the signatures upon the face of the note by inserting above his own name with a rubber stamp the words, "Knox-Burchard Mercantile Co., per," by adding after his own name the abbreviation, "Pres." and by adding after appellant's name the abbreviation, "Sec.," so that the signature as so changed reads, "Knox-Burchard Mercantile Co., per G. C. Knox, Pres., S. J. Burchard, Sec."; that Knox also changed the indorsements upon the back of the note. * * *

The evidence in support of appellant's contention is uncontradicted and persuasive, but conceding that the note was executed as the individual note of Knox and Burchard, and that it has been changed so that it now purports to be the note of the company indorsed by Knox, Burchard, and A. M. Knox, does this fact release Burchard from liability thereon? Burchard signed the note and also indorsed it. His signatures are genuine even if other signatures be forged. Plaintiff is a "holder in due course" within the Negotiable Instruments Act. * * *

By virtue of this statute, a party to a negotiable instrument must respond to "a holder in due course" upon the obligation which he in truth assumed, notwithstanding the fact that the instrument may have been changed so as to import a different obligation. * * *

N. I. L., Section 23, provides: "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

Appellant seems to contend that this is the only section which applies to cases where a signature has been forged, and that section 124 applies only to cases where an alteration has been made in the body of the instrument but not in the signature. We think the statute will not bear this construction. Where a signature is forged or made without authority, section 26 provides that no rights can be predicated upon such forged or unauthorized signature except against a party who is precluded from asserting the forgery or want of authority, but goes no further than to make such signature inoperative and to bar the enforcement of rights founded thereon. The language is carefully chosen to confine the effect of the section to the specific points covered thereby. It does not purport to declare the instrument void, nor the genuine signatures thereon inoperative. It protects the party whose signature has been forged or affixed without his authority, but contains no provisions releasing other parties from whatever liability they may have assumed.

To determine the rights of the holder of an altered instrument against such other parties we must have recourse to section 124. Under this section: "When an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

No claim is made that plaintiff was a party to the alteration in question or had any knowledge thereof. According to the original tenor of the instrument, appellant was a maker as well as an indorser, and liable unconditionally for its payment. According to the instrument as altered, he appeared to be only an indorser, and the verdict against him was rendered on the theory that his liability was that of an indorser. He was held to no greater or different liability than he in fact assumed and is not in condition to complain.

Order affirmed.

(h) MATERIAL CHANGE OF A COMPLETED INSTRUMENT EFFECTED OTHERWISE THAN BY ERASURES MADE POSSIBLE BY NEGLIGENT EXECUTION

A material change of a completed instrument effected otherwise than by erasures, when such change is made possible by negligent execution of the instrument, is a personal defense in some states. In other states a change of this sort is treated as a material alteration, and the legal effect is the same as that produced by erasures followed by alteration. We are dealing with a situation, therefore, where the physical facts bear a close resemblance to the case of material alteration, and to the filling in of blanks in an incomplete instrument. The conflict of authority is therefore easily accounted for. Those courts which protect the holder in due course to the full extent of the change do so for the same general reason that a holder in due course is protected when an incomplete instrument has been delivered and filled up in excess of authority. Those courts which refuse protection to the holder in due course as regards the instrument in its changed condition do so because they regard the change to be in legal effect a material alteration effected by erasures. But, as appears from the second case following, even these courts which refuse protection to the holder in due course will protect a drawee bank as against the claim of the negligent drawer.

NATIONAL EXCHANGE BANK OF ALBANY v. LESTER.

(Court of Appeals of New York, 1909. 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. [N. S.] 402, 16 Ann. Cas. 770.)

Action by the National Exchange Bank of Albany against William Lester. From a judgment for plaintiff, defendant appeals.

The defendant was sued as the accommodation indorser upon a note for $375 made by one Frank L. Fancher and acquired by the plaintiff bank before maturity in the regular course of its business. The defense was that the note as originally made and indorsed was for $75 only; that the maker thereafter, without the knowledge or consent of the indorser, altered the note by inserting in the body thereof the words "three hundred" immediately in front of the words "seventy-five" and the figure "3" immediately in front of the figures "75," thereby making the instrument apparently a note for $375 instead of $75; and that the maker thereafter caused the note as thus altered to be discounted by the plaintiff bank.

WILLARD BARTLETT, J. As this case went to the jury, they might well have found that the note in suit was a note for only $75 when originally prepared by the maker and indorsed at his instance by the defendant, and that it had subsequently been altered to a note for $375 when discounted by the plaintiff bank. They were instructed in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it

was transmuted from a note for $75 into a note for $375. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that in consequence of his negligence in the respect indicated it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper.

In support of the correctness of this ruling, the learned counsel for the respondent asserts the doctrine that "a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncanceled facilitating an alteration raising the amount, is liable for the face of the note as raised to an innocent holder for value"; and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska, and Pennsylvania. In considering his proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which the adjudicated cases relate: (1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such a character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the first class has been held liable to bona fide holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been filled, on the doctrine of implied authority, while in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note as increased by filling up the unoccupied spaces therein is placed upon the doctrine of negligence or estoppel by negligence. * * *

It has now, however, become in America an established rule that, if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention * * * will constitute a material alteration, and operate to discharge the maker." * * * The rule thus stated is sustained by the decisions of the courts of last resort in Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas, and South Dakota. In my judgment it rests on a sounder basis than the opposite doctrine, and accords better with such adjudications of this court as bear more or less directly on the question involved. The leading case sustaining this view is Greenfield Savings Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67. * * *

No one questions the proposition that, where a party to commercial paper intrusts it to another with a blank thereon designed to be filled up with the amount, such party is liable to a bona fide holder of the instrument for the amount filled in, though it be larger than was stipulated with the person to whom immediate delivery was made. * * * But, where there is no blank for that purpose when the note is indorsed, the insertion of an obligation to pay interest is a material alteration which invalidates the instrument as against the indorser. * * * As the law stood, he was relieved of all liability whatever as the effect of the unauthorized alteration. Now, however, under the

Negotiable Instruments Law, * * * he would be liable on the paper according to its original tenor.

To sustain the judgment in the case at bar * * * we must hold that the indorser of a promissory note, the amount of which has been fraudulently raised * * * is liable upon the instrument in the hands of a bona fide holder for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. To do this would be to create a contract through the agency of negligence. * * * An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker and who complies with such request? It is a complete instrument in all respects—as to date, name of payee, time and place of payment, and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument; in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross-lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business. That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true, and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule, or is so general as to justify the presumption that it is to be expected and that business men must govern themselves accordingly, has never yet been asserted in this state, and I am not willing to sanction any such proposition either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. * * *

I think the judgment of the Appellate Division should be reversed and a new trial granted. * * *

TRUST CO. OF AMERICA v. CONKLIN.

(Supreme Court of New York, Appellate Term, 1909. 65 Misc. Rep. 1, 119 N. Y. Supp. 367.)

Action by the Trust Company of America against Henry Conklin. From a judgment for plaintiff, defendant appeals.

LEHMAN, J. The plaintiff seeks to recover from the defendant for an overdraft of his account. It appears that the overdraft arose from the fact that the defendant left the city, and upon his departure gave his bookkeeper a number of checks, signed by him in blank, in order to provide funds for use in his business. His bookkeeper locked the checks in a drawer of the safe. One of the defendant's employés

knew where the key was hidden, abstracted a blank check, and filled in the blank so that it apparently became a complete instrument payable to bearer for the sum of $200.

If, * * * the plaintiff has shown a right to charge the account of this defendant, even though that right arises by reason of the negligence of the defendant, then the plaintiff may recover herein, although the action is, in form, based on contract.

The courts of this state have been, however, averse to allowing recoveries on the ground of negligence of a party to an instrument. * * * In the recent case of National Exchange Bank v. Lester, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402, 16 Ann. Cas. 770, the court held that the indorser of a promissory note, the amount of which had been fraudulently raised after the indorsement by means of a forgery, is not liable upon the instrument in the hands of a bona fide holder for the increased amount because of negligence in indorsing the instrument, when there were spaces thereon which rendered the forgery easy, although the note was complete in form. * * *

In the present case we have two causes intervening to produce a check which the defendant did not intend to order the plaintiff to pay. The defendant delivered the check, signed in blank, to an agent upon whose fidelity he was bound to rely, and the blanks were subsequently filled in, not by his own agent, but by one who obtained the check through a crime. I do not think that the defendant's agent can be considered negligent in his care of the instrument. It is true that it was stolen; but he kept it locked up in a drawer under circumstances that showed at least reasonable care, and he could not presume that a trusted porter would turn out to be a clever thief. If the defendant is liable at all, it is because he owed the bank a duty which he violated by signing the check in blank.

We may, for the purpose of this appeal, dismiss entirely the question whether the defendant would be liable to a bona fide holder for value. The question before us is entirely one concerning the duties of a depositor to his bank. That a depositor owes a real duty of care to the bank has been frequently decided, and this duty is greater than that which the maker of an instrument owes to subsequent holders for value. A purchaser of a negotiable instrument can take it or not, at his option, and usually, at least to some extent, relies upon the responsibility of the last holder. A bank, however, must at its peril pay out the money deposited, if the depositor directs him to do so. * * *

In this case a depositor has signed a blank check, and has made it possible for a person obtaining the check, not only to successfully tamper with it, but has facilitated, if not invited, the forgery which was actually successfully completed. In one sense he may not have been negligent. It is possible that even a careful man might be willing to assume the risk of theft; but he owed a duty to the bank to put his signature upon a blank check only for the purpose of directing it to pay out the money, and, however slight the risk, the depositor is the person who has assumed it. The bank could not discover the forgery in any possible way, because his act had rendered such discovery practically impossible, and by virtue of his contractual relation to the bank he is now bound to pay back to the bank the money which it has paid out.

The judgment should be affirmed. * * *

(1) FORGERY WHEN ACCOMPANIED BY FACTS CONSTITUTING AN ESTOPPEL

The following case arises between a drawee bank and its depositor, but in so far as the drawee is protected by estoppel, the doctrine is equally applicable to a holder in due course.

FIRST NAT. BANK OF BIRMINGHAM v. ALLEN.

(Supreme Court of Alabama, 1893. 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80.)

COLEMAN, J. The plaintiff, Allen, a depositor, sued to recover money which had been paid by the defendant bank upon checks to which plaintiff's name had been forged by his clerk, Tomlin. The forgeries covered a period extending from about the 5th of September, 1890, to March 4, 1891, at which latter point of time the forgeries were first actually known to the depositor. It was a rule of the bank about once a month to post up the depositor's pass book, and render him a statement, showing the deposits and checks and the balance. This rule was observed regularly in this case, and the forged checks, with other vouchers, were delivered to the depositor monthly from September, 1890, to March 4, 1891, with his pass book. * * * The case was tried without the intervention of a jury, and judgment rendered for the plaintiff, from which judgment the defendant appeals. * * *

As the court found for the plaintiff, it must have found that the plaintiff, under the facts, was not negligent, and was not chargeable with knowledge of the forgeries in time to have prevented loss to the defendant, in consequence of forgeries perpetrated after return of prior forged checks to the depositor with his pass book. Were the conclusions of the court authorized by the evidence? If, as matter of law, as is insisted by the plaintiff, Allen, the depositor owed no duty to the bank to examine the vouchers, then the conclusion of the court must be sustained, upon this principle, however negligent the depositor may have been in his examination of the pass book and vouchers. In the same line, but not so positive, may be cited Welsh v. Bank, 73 N. Y. 424, 29 Am. Rep. 175; Frank v. Bank, 84 N. Y. 209, 38 Am. Rep. 501; Bank v. Barnes, 65 Ill. 69, 16 Am. Rep. 576. [New York cases are here cited.] These New York cases were fully reviewed in the case of Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, in which a different rule is declared, and it is held that "a depositor in a bank, who sends his pass book to be written up, and receives it back with entries of credits and debits, and his paid checks as vouchers for the latter, is bound personally, or by an authorized agent, and with due diligence, to examine the pass book and vouchers, and report to the bank without unreasonable delay any errors which may be discovered in them; and, if he fails to do so, and if the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown by the pass book. * * * The weight of authority and the best considered cases hold that the depositor owes a duty to the bank; and when the character of the business, the relations of the depositor and bank to each other, and the purposes for which at prescribed intervals the account is stated, and pass book and

vouchers (the evidence of the bank) delivered to the depositor are taken into consideration, the conclusion of these authorities is supported by sound reason and just principles. * * *

What is the proper measure of relief to which the bank is entitled in such cases? Some of the courts have held that, if injury results to the bank by the negligence of the depositor, he will be held to have adopted and ratified the payment of the forged checks. By others, under like circumstances, the doctrine of estoppel has been applied, and the depositor held to be estopped from asserting a claim to the money paid on the forged checks. We do not think that either the doctrine of ratification or estoppel can be applied as a just and equitable principle in all cases. Ratification refers to a past act or transaction, and, as now being considered, refers to the unauthorized act of an agent, or the adoption of a past act or transaction as his own act, made or executed by another, who was not an agent. It would strain the doctrine of ratification to hold that a person had ratified or adopted as his own the unauthorized act of another, of which he had no information, or which was promptly repudiated as soon as brought to his knowledge. So, where a bank pays a forged check drawn in the name of one of its depositors, and the depositor is wholly free from neglect or fault, the bank owes the amount to the depositor. There was no act, omission to act, or silence in such a case on the part of the depositor which induced the bank to pay the forged check, or influenced the action of the bank in the payment of the check. No principle of the law of estoppel can be invoked by the bank against the depositor under such circumstances. The depositor owed the bank a duty, which was to examine the pass book and vouchers with reasonable care and diligence. If the depositor failed in his duty in this respect, and the bank was injured in consequence of such omission of duty, the depositor became liable to the bank for all such damage. The extent of the liability of the depositor is commensurate with the loss sustained in consequence of his neglect of duty; no more, no less.

It would be unjust, unfair to the depositor, not sanctioned by any correct principle of law, to permit the bank to invoke the doctrine of ratification or estoppel which would exempt the bank from all liability incurred by its own neglect in the payment of the forged check, and in many cases inflict upon the depositor a greater loss than that caused to the bank by his neglect of duty. The damages sustained by the bank as the result of neglect of duty by the depositor are as susceptible of proof and measurement as arise in any other case of breach of duty imposed by contract. * * * The evidence shows that several checks were forged by Tomlin and paid by the bank subsequent to the time that Allen, the plaintiff, was chargeable with notice that his clerk was making such unauthorized use of his name. As to all such subsequent payments of forged checks the bank is entitled to invoke the equitable doctrine of estoppel. As to these, it may be fairly said that the bank was induced to pay and did pay in consequence of the silence of the plaintiff when it was his duty to speak. The bank was misled to its injury by the fault of the depositor. A very interesting and instructive collection of leading cases on the question under consideration may be found in 26 American Law Review, 274. * * *

Reversed and remanded.

(J) DISCHARGE BEFORE MATURITY

N. I. L., Section 119. A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor. (2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation. * * * (4) By any other act which will discharge a simple contract for the payment of money.

N. I. L., Section 122. The holder may expressly renounce his rights against any party to the instrument, before, at or after maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

MANCHESTER et al. v. PARSONS.

(Supreme Court of Appeals of West Virginia, 1915. 75 W. Va. 793, 84 S. E. 885.)

WILLIAMS, J. By this writ of error defendant seeks to reverse a judgment recovered against him by Jason Manchester and L. M. Elliott. * * * The recovery was upon a negotiable note made by defendant, payable to Burton & Co., a partnership composed of L. A. Burton and D. J. Grindell, and indorsed to plaintiffs. Defendant filed three pleas on which issues were joined. The substance of the pleas are: (1) That defendant had discharged the note by payment to the legal owner and holder, before the suit was brought. * * *

After the evidence had all been introduced, the court, on motion of plaintiffs, excluded defendant's evidence, and directed the jury to return a verdict for plaintiffs. A motion to set aside the verdict was overruled, exceptions taken, and judgment entered.

Burton & Co. was a Kenton, Ohio, firm, engaged in importing and selling horses for breeding purposes. Defendant lived at Parsons, W. Va., and was engaged in breeding horses. The note is for $800, payable 18 months after date, to the order of Burton & Co., at the First National Bank of Parsons, with 6 per cent. interest, and bears date September 22, 1910. It is proven that the note was negotiated to plaintiffs by one Lee Whorton, about the 1st of November, 1910. Whorton was then employed in selling horses for Burton & Co.

Defendant's pleas set up affirmative matters entailing on him the burden of proof. Any one of them, if sustained, would defeat recovery. But there is no evidence to support any of them. To sustain his first plea, defendant proved that on the 3d of June, 1911, he sold and delivered to Burton & Co. some Percheron colts for $1,675, with the understanding and agreement that it was to pay his note, and that they were to execute to him their note for the balance. He produced a letter from D. J. Grindell, then a member of the firm, but now deceased, dated June 15, 1911, acknowledging receipt of the colts in good condition, and promising defendant to send him his note and the firm's

note for the balance, soon. Counsel contends that defendant's note was thus discharged. But the uncontradicted testimony of L. A. Burton, the surviving partner, and of Lee Whorton, is that it had been indorsed to plaintiffs, for value, about the 1st of November, 1910, and therefore payment to the original holders did not discharge it.

Counsel invokes subsection 4 of section 119 of the Negotiable Instruments Act as authority for his contention. Section 119 describes how a note may be discharged, and subsection 4 reads: "By any other act which will discharge a simple contract for the payment of money." This subsection must be interpreted with reference to the general purpose of the Negotiable Instruments Act. It must be read in connection with its other provisions, and made to harmonize with the general scheme and plan of the act. Thus viewing subsection 4, it is apparent that it was never the legislative intent to make so radical a change in the general law respecting negotiable instruments, as would be wrought by the literal interpretation contended for. It is clear, from other provisions of the act, as well as from the preamble thereto, that the Legislature did not contemplate making so vital and radical a change in the law, as to permit equities between the original parties to a negotiable instrument to defeat the title of an innocent holder for value in due course. That would counteract the purpose of the statute, which was not to revolutionize the law, but to amend, enlarge, and re-enact certain sections of the statute law respecting negotiable instruments, and consolidate and arrange in one act the general laws on that subject, so as to make them uniform with the laws of other states. The acts which will discharge a simple contract for payment of money, in order to effect a discharge of negotiable paper, within the contemplation of subsection 4, must therefore necessarily be limited to such acts as relate to and affect the holder of the paper demanding payment of it. It does not include a holder for value in due course. Negotiable paper, in the hands of such holder, is not discharged by payment made to his transferror, either before or after the transfer.

Such was the rule of the common law respecting negotiable paper, and it was clearly not the legislative purpose to change the rule. It would injuriously affect the value of commercial paper, by putting it on a plane with simple contracts for the payment of money. We cannot conceive that the Legislature intended any such thing, although a literal interpretation of the subsection in question might indicate otherwise. Other provisions of the statute expressly preserve the rights of holders in due course. Section 52 (sec. 4223) defines a holder in due course to be one who takes the paper in good faith for value, without notice of any infirmities in it or defect in the title of the person negotiating it. And section 57 (sec. 4228) says that such an one holds it "free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." To construe subsection 4 of section 119, as contended for by counsel, would defeat section 57 and other provisions contained in the act. * * *

Judgment affirmed.

(k) CLAIMS OF OWNERSHIP

The next case illustrates the rule that a holder in due course takes free from equities of ownership. A holder in due course takes free from both equities of defense and equities of ownership. The most common illustration of an outstanding equity of ownership arises where the instrument was in form payable to bearer, and therefore transferable by delivery, and the same is put in circulation by a thief or finder of the instrument. In the following case, however, the actual question raised is not whether a holder in due course takes free from the equity of ownership, but whether an innocent purchaser after maturity, who was not a holder in due course, takes free from such equity. A contrary result would be reached in England and in some states in this country. No case in this country has yet gone so far as definitely to hold that an innocent purchaser of an instrument stolen and negotiated after maturity takes free from the equity of ownership, but it has been strongly argued that such a purchaser should be protected, for the reason that while a purchase after maturity does in a sense put one on notice of the possibility of a defense, arising from the fact that it is still outstanding, but that a purchase after maturity in no real sense puts one on notice of anything other than defenses. In no way does it indicate the possibility of an outstanding equity of ownership. Moreover, there would be no way of ascertaining who it was who held such equity of ownership. Such person's name may not appear on the instrument or it may have been that he never was in the chain of title, as would be the case where the holder of the equity furnished the money for the purchase of the instrument. Of course, if the purchaser after maturity bought from a holder in due course such purchaser would be protected for other reasons.

GARDNER v. BEACON TRUST CO. et al.

(Supreme Judicial Court of Massachusetts, 1906. 190 Mass. 27, 76 N. E. 455, 2 L. R. A. [N. S.] 767, 112 Am. St. Rep. 303, 5 Ann. Cas. 581.)

MORTON, J. This is a bill in equity brought by the plaintiff, a minor, by her next friend and guardian, to compel the defendant the Beacon Trust Company to assign and deliver to her a mortgage and the note thereby secured, alleged to have been fraudulently obtained from the plaintiff's guardian by one Edwin M. Thayer, since deceased, and fraudulently assigned by him to the trust company. As to certain of the defendants the bill was dismissed, and a decree was entered in favor of the plaintiff against the trust company and other defendants. The case is here on appeal by the trust company. All of the evidence is reported.

Briefly stated the facts are as follows: In January, 1903, the plaintiff was the owner of a mortgage and the note thereby secured for $1,500, on land in Quincy, given by the defendant Brown to one Hattie E. Carr and transferred by successive assignments to the plaintiff.

Her mother, Mary E. Gardner, now Mary E. Wales, was her guardian. The note and mortgage had been long overdue. By means of fraudulent misrepresentations that the owner of the equity wished to pay off the mortgage, Thayer obtained from the plaintiff's guardian an assignment of the note and mortgage to himself, and subsequently assigned them to the trust company as security for a note of $2,000 for money borrowed by him of the company. The trust company took the assignment in good faith, for value, and without any notice of Thayer's fraud, or of any defect in his title, unless the fact that it took them when overdue constituted such notice. * * *

The question is whether, assuming for the moment the validity of the transfer by the plaintiff's guardian to Thayer, which will be considered later, the fact that the note and mortgage were overdue when the trust company took them so affected their title as to postpone their right to that of the defrauded owner. The general rule is thus stated by Lord Herschel in London Joint Stock Bank v. Simmons [1892] A. C. 201, 215: "The general rule of law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner." He then goes on to say that there is an exception in the case of negotiable instruments, manifestly meaning those not yet due, and that as to them any person in possession of them can convey a good title, even if acting in fraud of the true owner. This is the only exception mentioned by him to the general rule which he lays down, and which would seem, therefore, to have been regarded by him as applying to overdue negotiable notes as well as to other property when circumstances brought them within it. Applying the rule thus laid down, or the rule that, where one of two innocent persons must suffer in consequence of the fraud of another, the loss must fall upon the one who, by his trust and confidence, has enabled the perpetrator of the fraud to commit it, * * * it would seem plain that the loss in this case should fall upon the plaintiff, unless the fact that the note and mortgage were overdue makes a difference. * * *

The purchaser of an overdue negotiable note takes it subject to all the equities, if any, that are attached to it at the time of the transfer in favor of the maker, the owner, or of third parties. * * * If there are no equities attached to the note the purchaser gets as good a title after as before maturity. * * * And it makes no difference that the note is dishonored. If there are equities attached to it, he takes it subject to them. This is what is meant when it is said that the purchaser has no better title, legal or equitable, than his transferror had, and that the note is subject in his hands to the same infirmities of title as against the true owner, and to the same defenses as against the maker, that it was subject to in the hands of his transferror. * * * If, for instance, an overdue note is stolen from the owner, a subsequent purchaser acquires no title as against the true owner, * * * or if an overdue note has been paid by the maker, and is fraudulently put in circulation by the payee, a purchaser, though for

value and in good faith, takes it subject to the defense of payment by the maker. In such a case the very fact that the note is dishonored is sufficient to put the purchaser upon inquiry as against the maker. * * *

But the case is very different where the owner of an overdue note transfers it, under circumstances which enable his transferee to deal with it, though obtained by fraud, as if he were the true owner, and when an innocent purchaser for value takes it from such transferee before the transfer has been avoided. In such a case no equity attaches to the note in favor of the true owner as against the innocent purchaser for value, since it was by his own act that the perpetrator of the fraud was enabled to commit it. The true owner of an overdue note may deal with it as with any other property, and the mere fact that the note is overdue does not, in such a case, in the absence of anything in the transaction to suggest suspicion, put a purchaser upon inquiry any more than a purchaser is bound in any other case to inquire into the title of his vendor. * * * The possibility that the title may have been obtained by fraud exists in all cases; but that is not enough to put a purchaser upon inquiry. Any other view would put upon the innocent purchaser for value of overdue negotiable paper the onus of a defective title, no matter how much he may have been misled by the conduct of the true owner. We do not think that such is the law. * * * The above principle was recognized, though it was held that the facts did not bring the case within it. So far, therefore, as the plaintiff relies upon the fact that the note and mortgage were overdue when taken by the trust company, her contention must fail. * * *

The result is that so much of the decree as adjudges that the mortgage remains and still is the property of the plaintiff, and orders the trust company to assign and convey its interest in the same to her, is reversed.[1] * * *

SECTION 3.—DEFENSES AND CLAIMS OF OWNERSHIP AVAILABLE AGAINST HOLDER IN DUE COURSE

(a) FORGERY

It is obvious that a person whose name has been forged to a negotiable instrument should not be held liable thereon to any one. The necessities of business do not require that such a risk of loss should be borne by the party whose name was forged. It is more just to throw the loss on the holder in due course, because he will always have a remedy against the party from whom he acquired the instrument. Eventually either the liability will be thrown back upon the forger, or the loss will fall upon the person who dealt with the forger. Of course, where it is not a case of technical forgery, as, for example, where an agent signs his principal's name in the absence of power to do so, there is more reason for throwing the loss on the principal; but the reasons have not

[1] See the exhaustive discussion of this and related questions by Professor Zechariah Chafee, Jr., in his article on Rights in Overdue Paper, 31 Harvard Law Review, 1104.

been deemed strong enough to impose such a liability upon him. The established rules of agency govern. The section involved is as follows:

Section 23. Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

MAURMAIR v. NATIONAL BANK OF COMMERCE OF TULSA.

(Supreme Court of Oklahoma, 1916. 158 Pac. 349.)

RITTENHOUSE, C. This action was brought by Louis Maurmair to recover $1,170.30 of and from the National Bank of Commerce of Tulsa, Okl., wherein it was alleged that plaintiff deposited such sum in the bank, and the bank refused to pay the same upon demand. An answer was filed, alleging payment, except the sum of $130.30, which it was alleged is on deposit subject to plaintiff's check. A general denial was filed to the answer.

The question presented at the trial related to the payment of three checks, of $90, $440, and $510, which were paid by the bank, and which plaintiff claimed were signed, either: (1) By affixing his signature thereto without his knowledge or consent, by means of deception practiced upon him by a third party placing a carbon paper under some papers to which he knowingly affixed his signature and the checks placed thereunder with such carbon paper, thereby obtaining carbon copies of his original signature written by himself; or (2) that the signatures to such checks were not his original signatures, but were affixed to said checks by some third party without the knowledge of plaintiff, by obtaining an original copy of the signature of plaintiff and undertaking to duplicate the same, making an original so similar to that of plaintiff's as to pass undetected; or (3) by means of tracing the same on carbon copies.

Instruction No. 6 told the jury that if, from a preponderance of the evidence, they found that the two checks, Exhibits 11 and 12, were signed by plaintiff either by directly affixing his signature, or affixing his signature thereto without his knowledge or consent, but by means of deception practiced upon him by a third party, by placing carbon papers between some paper on which he knowingly affixed his original signature and the checks thereunder, and thereby obtained carbon copies of his original signature written by himself, in either event the law considers such signature as his original signature binding upon him, and, if the bank paid such checks, believing the signature to such checks to be genuine, the plaintiff would not be entitled to recover.

The Negotiable Instruments Law of this state * * * defines the effect of forgery of a negotiable instrument as follows: [Section 23 quoted.] The instruction allowed the bank to recover if the jury found the checks were obtained through deception practiced upon plaintiff by third parties by placing carbon papers between some papers on which he knowingly affixed his signature and the checks thereunder

without his knowledge or consent. In this there was error. The procurement of the signature, as contended by plaintiff, was without his knowledge or consent. The instruments would therefore be wholly inoperative, and no one would have a right to enforce payment thereof unless plaintiff be precluded from setting up the forgery by his negligence; and under the pleadings and instructions in this case no issue was made that the plaintiff was so precluded. The test as to whether an artifice or trick of this character constitutes forgery is whether the signature is procured in such a manner as to be the voluntary act of the signer. If it is procured in such a manner that it is without the assent of the signer, and not a voluntary act on his part, then no liability attaches.

The error in this instruction, as we see it, is that the jury was told that, if the signatures were procured by deception, no recovery could be had. The law is that, if the signatures were procured by deception without negligence on the part of the signer, then a recovery could be had. The question of whether or not plaintiff was precluded from setting up the forgery on account of his own negligence was not submitted to the jury and in order to have properly instructed the jury on the question of the deception in procuring the signature it would have been necessary to have told them that plaintiff could have recovered under such conditions unless he was precluded from setting up the forgery as provided in section 23, supra.

The judgment should be reversed, and the cause remanded for a new trial.

ROBB v. PENNSYLVANIA CO. FOR INSURANCE ON LIVES & GRANTING ANNUITIES.

(Supreme Court of Pennsylvania, 1898. 186 Pa. 456, 40 Atl. 969, 41 L. R. A. 695, 65 Am. St. Rep. 868.)

Action by Thomas Robb against the Pennsylvania Company for Insurance on Lives & Granting Annuities. Judgment for plaintiff was affirmed by the Superior Court, and defendant again appeals.

The opinion of the Superior Court is as follows (RICE, P. J.):

"This was an action to recover the amount of a bank deposit. The defense was that the money had been paid out on checks purporting to be drawn by the plaintiff. The jury have determined by their verdict that the signatures were forged, and no question is raised as to the correctness of this finding. But there was evidence that the signatures were made by a third person, by the unauthorized and criminal use of a rubber stamp which the plaintiff owned and kept in his safe. Upon this evidence a novel and interesting question is raised. The defendant's first proposition is that if a depositor, without the knowledge of his bank, has a rubber stamp made, which is a substantial fac simile of his bank signature, he cannot hold the bank responsible for a loss which occurs by reason of the unauthorized signing by a third person of the depositor's signature to a check by means of this stamp. It will be observed that this proposition assumes that the depositor is responsible for the loss, although there is no negligence on his part in the manner of keeping the stamp. * * *

"A bank is bound to know the signature of its depositor; and, if it pays out the money on a forged check, it cannot charge the depositor with the amount, but, as against him, must bear the loss. It may be conceded that the relation of the depositor to the bank implies a duty

on his part to subject it to no extraordinary risks with regard to payment of his checks, which he may avoid by the exercise of ordinary care and prudence. But we cannot assent to the proposition that it is negligence per se for him to have in his possession a harmless and useful thing, and one lawful for him to have, but which, in the hands of a thief breaking into his house or his safe, may be used to forge his signature. If he commits the use of it to an agent, selected by himself, or leave it in such a place as to invite the use of it for illegitimate purposes, there would be plausibility in the contention that he should be deemed to contemplate such use as one of the natural and probable consequences of his act. But, where he has used due care in securing it against unlawful use by others, it cannot be said that his mere possession of the thing was the proximate cause of the mispayment of the money to one who unlawfully possessed himself of it, and used it to commit a forgery.

"The defendant's second proposition is that, even if the court did not err in leaving the question of negligence to the jury, the instructions given by the court were insufficient and erroneous, and laid down a wrong standard of negligence. In order to discuss this proposition properly, it will be necessary to state some of the undisputed facts: In 1893 the plaintiff, as president of a corporation, had occasion to send out a large number of invitations to a banquet, and, in order to save himself the labor of writing his name so often, had a rubber stamp made which would make a fac simile of his signature. For a time the stamp was kept in the company's office, but after he resigned the presidency it was sent to his private office, which he rented from a gentleman who had the adjoining office. With this office, he was entitled to the services of an office boy of about sixteen years of age. For about nine months he employed this boy for errands and messages, including the sending of him to bank to draw money on checks. He never had occasion to doubt the boy's honesty. When the rubber stamp was returned to the plaintiff from the corporation office, he placed it in a compartment inside of a fireproof safe. He locked this compartment, and put the key in a drawer in the safe, behind some papers, and covered it up. He then locked the drawer, and put the key in another unlocked drawer in the safe. He then locked the safe, and put the key in a little box, which he put in a wooden drawer or box, and this was kept on top of another safe. The plaintiff's surmise was that the office boy had watched his moves, found where he kept the safe key, opened the safe, and rummaged around until he found the stamp, and with it signed the two checks Assuming this theory to be correct, it turned out that, notwithstanding the plaintiff's precautions to guard the stamp, it was not kept where it would be absolutely inaccessible to others. It follows that an unqualified affirmance of the defendant's second point would have been equivalent to binding instructions to find for the defendant.

"But, for the reasons given in our discussion of the first proposition, the defendant was not entitled to such instructions. The practical effect would be to hold the owner of a rubber stamp up to the same standard of responsibility as the owner of a vicious animal; in other words, to hold that he is bound to keep the stamp, at all hazards, where a trespasser or a thief cannot possibly get possession of it and use it. This is not the standard of his responsibility to the bank in which he is a depositor, or to the public. He is not an insurer against its un-

lawful use, but it may be conceded that he is responsible for the consequences of his negligence in keeping it. He is bound to exercise the care of an ordinarily prudent man. To adopt the language of the learned trial judge, was it put away in such a manner as was, in view of all the probabilities of the case, sufficient to protect the stamp from being improperly used? This was a question of fact for the jury, and was fairly submitted. There are cases in which the court can determine that omissions constitute negligence, but they are exceptional, —those in which the precise measure of duty is determinate; the same under all circumstances. What constitutes negligence when the standard shifts, not according to any certain rule, depends upon the facts and circumstances developed at the trial, and cannot be determined by the court, but must be submitted to the jury. * * * The defendant has no just cause to complain of the submission, or of the manner of the submission, of that question to the jury. Judgment affirmed." * * *

[Judgment also affirmed in Supreme Court.]

(b) FRAUD

In these cases the obligor either knowingly has signed his name but has not knowingly signed a negotiable instrument, or has not knowingly signed his name, or it may be that he has knowingly signed his name but has done so under circumstances where it was impossible for him to do otherwise. These situations in legal effect are forgeries and section 23 above quoted may be regarded as the statutory basis for the defense.

GREEN v. WILKIE.

(Supreme Court of Iowa, 1896. 98 Iowa, 74, 66 N. W. 1046, 36 L. R. A. 434, 60 Am. St. Rep. 184.)

GRANGER, J. This action is on a promissory note for $1,000, and to foreclose a mortgage given to secure the same. The note and mortgage were given to one Lena Fuerth, April 1, 1893. The note was assigned by Lena Fuerth to plaintiff, who resides in Massachusetts, about May 5, 1893, for a consideration of $950. The defendant does not deny that he signed the note and mortgage, but he bases his defense thereto on substantially the following facts: That Joe Fuerth is the husband of Lena Fuerth, and a real-estate agent at Marshalltown, Iowa; that he (defendant) was about to sell a piece of land given him by his father, and purchase another piece; that he went to the office of Joe Fuerth, who was acting for the man to whom he was selling, and the sale and the purchase were completed; that, as to the land given him by his father, his father had a lease or contract by which defendant was to pay a certain rent therefor while he remained single: that, to enable defendant to sell the land, the lease or contract was released; that afterwards Fuerth suggested that defendant give his father a lease of the land purchased, and a note in lieu of the one released, which defendant agreed to do; that defendant is illiterate, and cannot read writing or printing, and can only write his name; that Fuerth, instead of making the note and lease, wrote the note and mort-

gage in suit, which defendant signed, thinking them to be the note and lease agreed upon; that he never received anything from Lena Fuerth for said note, and never agreed to make any such note. The purchase of the note in suit was made by William Andrews as agent for the plaintiff, and it appears that the plaintiff knew nothing of the note till after it was purchased. The facts as to the fraudulent execution of the note are not in dispute. It may be stated as a fact that, when defendant signed the note and mortgage, he supposed he was signing a lease to his father and a note for $100.

There is something of a hopeless conflict of authorities touching the liability of persons whose names appear to negotiable paper, through fraudulent means, and the paper is in the hands of innocent holders. It would be useless to attempt a reconciliation of them. There are numerous cases in which parties, intending to sign a contract, have, through fraudulent misrepresentation, placed their signatures to negotiable instruments, which have fallen into the hands of innocent purchasers. There is a very respectable line of authorities holding that, in the absence of negligence, the maker of such an instrument is protected. Whitney v. Snyder, 2 Lans. (N. Y.) 477; Walker v. Ebert, 29 Wis. 196, 9 Am. Rep. 548; Anderson v. Walter, 34 Mich. 113; Bank v. Lierman, 5 Neb. 247; Puffer v. Smith, 57 Ill. 527. * * * See, as bearing somewhat on the question, Bank v. Zeims (Iowa) 61 N. W. 483. This case is thought to be distinguishable from those because of the fact that in this there was an intent to give a promissory note. In this respect, also, there is something of a conflict of authority, but it is not so marked. The rule is many times stated that there is a distinction between cases in which a party, through fraudulent misrepresentations, signs an instrument which he intends to be a negotiable promissory note, and where, through such misrepresentation, he signs what he does not intend to be such an instrument; and much is claimed in this case because defendant intended to give a note. See Whitney v. Snyder, supra.

The case of Douglass v. Matting, 29 Iowa, 498, 4 Am. Rep. 238, is cited by appellee as explanatory of Chapman v. Rose, 56 N. Y. 137, 15 Am. Rep. 401. The latter case announces the rule that before one whose name is fraudulently obtained to a note, upon misrepresentations that the instrument is something else, can be held, it must appear that it was not the result of negligence on the part of the signer. It will be well to notice in this connection that in Douglass v. Matting the rule of the case is announced on the theory of the culpable carelessness of the maker of the instrument. It is there said: "Now, it would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note, on the ground that, through his own culpable carelessness while dealing with a stranger, he signed the note without reading it, or attempting to ascertain its true contents." * * * In Bank v. Steffes, 54 Iowa, 214, 6 N. W. 267, a note was given for a greater amount than agreed upon, through a fraud of the payee, and it was assigned before maturity. The issues did not involve the question of negligence in its execution. It is there said that it was incumbent on the maker to show freedom from negligence. It is then said that it is not certain that he could be allowed to set up fraud as against the plaintiff (an innocent holder) even by showing that he was free from negligence. It cites Whitney v. Snyder, supra, and later cites Griffiths v. Kellogg, 39 Wis. 290, 20 Am. Rep.

48, in which a note intended to be given for $47.50 was, by fraud, made to read $76.25. The note passed into the hands of an innocent indorsee. It is said in the opinion that the note "was as little hers as if the transaction between her and the lightning rod man had not taken place, and he had forged the note. If not forgery, it was akin to forgery." The liability of the maker was made to turn, when the fraud was established, on the fact of her negligence in placing her name to the paper. The case copies from Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1, as follows: "The inquiry in such cases goes back to the questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity, and without notice, challenges the origin or existence of the paper itself, and the proposition to show that it is not in fact or in law what it purports to be, namely, the promissory note of the proposed maker."

The facts of this case come within the rule of the Wisconsin cases, and do not contravene any rule announced in our own state. The defendant was an illiterate man, who could not read nor write, except that he could barely write his own name. He had no contractual relations whatever with Fuerth or his wife. There was nothing to put him on his guard against fraud being practiced upon him. The note and mortgage that he gave he had never contemplated in any way, and the doing of such a thing was as foreign to his purpose as if he had merely intended to lease or contract to his father without any note. It seems that the papers were prepared in the absence of defendant. In his testimony he says, speaking of Fuerth: "I met him on the street one day, and he said to me, 'The lease is already drawn up, and all you have to do is to sign it.' I went into the office with him, and asked him to read it. He said he was in a hurry, and wanted to go to dinner, and had some other business to attend to after dinner. I asked him if it was just a straight lease to my father for so much rent, and he said: 'Yes, it is. You can rely on my honor and word for it.' I then asked him to read it, and he said it was no need. I signed what he called a note and lease." This is in no way contradicted, and we are warranted in accepting it as truth. It is not denied in argument.

There was nothing at that time to awaken suspicion as to Fuerth, and the case is peculiar in this: that, as the business was between defendant and his father, there could be no motive for Fuerth to make the papers in any way except as agreed upon. In most of the cases where negligence is considered, the party relieved has had an adverse interest, because of which one might the more readily anticipate that advantage would be taken. This was a case remarkably free from reason or grounds of suspicion. What was really done would not have been anticipated by any discreet person. In fact, the situation was such as to disarm one of suspicion, because of Fuerth's absolute want of interest in the business to be done. We think the case is free from negligence on the part of defendant. This being so, he comes within the rule by which a party may be protected. It is to be remembered that the rule we apply is not the usual one in which innocent holders of negotiable paper are protected against fraud. * * * In such cases there is a note, but the bona fides of it is questioned. In this case the note has never existed in the sense of the minds of the parties meeting to give it validity, and there is no negligence to render the defendant liable on other grounds. * * * Under these author-

ities—and they have strong support—we think the defendant is not liable on the note, because he was never a party to such a contract, and he has been guilty of no negligence by which the plaintiff has been misled. He has violated no legal obligation because of which another is injured.

The plaintiff's petition should be dismissed. Reversed.

GREEN et al. v. GUNSTEN et al.

(Supreme Court of Wisconsin, 1913. 154 Wis. 69, 142 N. W. 261, 46 L. R. A. [N. S.] 212.)

VINJE, J. (after stating the facts). It is admitted that defendant Gunsten was an accommodation maker of the note if it was executed under such circumstances as to constitute him a maker in any sense. Plaintiffs claim they were holders in due course, which claim the defendant Gunsten disputes. The trial court, in the disposition of the case, evidently treated plaintiffs as such holders, and we shall assume that they were. That raises the question whether or not total or complete drunkenness on the part of the accommodation maker of a note at the time of the execution and delivery thereof is a defense as against a holder in due course.

On the grounds of public policy and the necessities of commerce, some courts have held that complete drunkenness on the part of the maker of a note at the time of its execution and delivery is no defense against a holder in due course. * * * The basis for the rule is thus stated by Joyce, Defenses to Com. Paper, § 69: "The reasons underlying this rule are that, when a man has voluntarily put himself in such a condition and a loss must fall on one of two innocent persons, it should fall on him who occasioned it. It is also founded on principles of public policy and the necessities of commerce. The circulation and currency of negotiable paper should not be unnecessarily impeded, and, if drunkenness of the maker were a defense to a note in the hands of an indorsee, it would clog and embarrass the circulation of commercial paper, and no man could safely take it without ascertaining the condition of the maker or drawer when it was given, though there be nothing unusual or suspicious about the appearance of the note." That this rule is founded, at least in part, upon substantial grounds of public policy cannot be denied. Though it should be observed that drunkenness alone, without the fraud or fault of another, does not lead to the signing of notes. In every case, as in the case at bar, the drunken maker has been taken advantage of by a designing payee or third party, and it is not strictly correct to say that the fault is that of the drunken maker alone. Were that so, there would be more reason for applying the rule that, where loss must fall upon one of two innocent persons, it should fall on him who occasioned it. Nor can a holder in due course always rest upon the assumption that the maker of a note is competent to execute it. Insanity of the maker is a good defense against a bona fide holder, for the latter takes it charged with constructive notice of the legal disability of the maker. * * *

It is no greater hardship to charge a holder in due course with constructive notice of the incapacity of the maker resulting from complete drunkenness than from insanity. It is deemed that a doctrine

more in consonance with the spirit of our decisions is stated by Daniel as follows: "If the drunkenness were so complete as to suspend all rational thought, the better opinion is that any instrument signed by the party would be utterly void, even in the hands of a bona fide holder wihout notice, for, although it may have been the party's own fault that such an aberration of mind was produced, when produced, it suspended for the time being his capacity to consent, which is the first essential of a contract." 1 Daniel, Neg. Inst. (5th Ed.) § 214; * * * But the drunkenness must be so complete as to deprive the maker of the use of his faculties. * * * Intoxication merely to the extent that he cannot give the attention to it that a reasonably prudent man would be able to give is not sufficient.

The reason for the rule is that there can be no valid contract where there is no mind capable of contracting. That drunkenness may be so complete as to render a person utterly incapable of comprehending the nature of his acts or that he is acting at all is a fact as sad as it is true. * * *

If complete drunkenness, by which is meant drunkenness to such an extent as to wholly destroy for the time being the rational faculties of the mind, renders a note absolutely void as between maker and payee, then, under the provisions of our Negotiable Instrument Law it is void in the hands of a holder in due course.

Section 1676—25 provides: **"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud, duress, or force or fear, or other unlawful means or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud** and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."[2] * * *

By the provisions of this law it will be seen that a holder in due course takes no title where the note was absolutely void in its inception, as where there was no maker capable of executing the instrument. This result follows for the obvious reason that no life, or validity, can be given by transfer to that which is absolutely void. It is the same as if it had no existence at all. And it is but the expression of the rule embodied in the decisions of this court. * * *

Plaintiffs argue that the rule of ordinary care, as applied in negligence cases, obtains under the provisions of section 57 of the Negotiable Instruments Law. It is not necessary to decide the question in this case. The jury found that at the time Gunsten signed the note he was so completely intoxicated that he was temporarily deprived of his reason and understanding. Manifestly, while in such condition, the rule of ordinary care does not apply. He was incapable of exercising any care whatever. Nor can it be held that he should have exercised care not to get drunk, for, as before observed, the signing of notes is not the usual or probable result of drunkenness. It is otherwise as to a personal injury. A man may well reasonably anticipate that if he gets drunk and becomes unable to care for himself he may, without the fault of another, sustain bodily harm, or even death itself.

[2] The portion in antique type is section 55 of the uniform act; the rest is a Wisconsin amendment.

But a drunken man, if left alone and not taken advantage of by others, is not, as a mere result of the drunkenness, likely to sign notes or execute any other contracts. The law does not favor drunkenness; nor does it place in the hands of a drunkard any shield against his conscious or rational acts. It simply says that when, through drunkenness or any other means, a man is temporarily or permanently wholly incapacitated from exercising his rational faculties, then he shall not be liable upon what purports to be a contract entered into while in such state, because a mind bereft of reason or conscious rational action is incapable of consenting or contracting. In speaking of the early English doctrine holding that a man should not be allowed to stultify himself by alleging his own lunacy or imbecility, Daniel says: "Such doctrine sounds more like the gibberish of a lunatic than like the decree of a humane and enlightened lawyer. * * *"

Judgment affirmed.

(c) THEFT OF AN INCOMPLETE INSTRUMENT

N. I. L., Section 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

LINICK v. A. J. NUTTING & CO.

(Supreme Court of New York, Appellate Division, 1910. 140 App. Div. 265, 125 N. Y. Supp. 93.)

Action by Louis Linick against A. J. Nutting & Co. From a judgment dismissing the complaint, plaintiff appeals.

BURR, J. On July 20, 1909, plaintiff signed his name to a blank check. Thereafter David Ryckoff and Benjamin Silberman stole the check, filled in the name of F. A. Mann as payee and the sum of $147.87 as the amount thereof, and presented it to the State Bank, where plaintiff kept his account, and procured it to be certified. Thereafter they indorsed said check with the name of F. A. Mann and passed it to defendant for value, who collected the amount thereof from the said bank. Plaintiff, having taken up said check from the bank, now sues defendant as for money had and received for the amount of the check.

The question submitted, and which we are called upon to decide, is whether defendant obtained any title to the check which, as against the plaintiff, was a valid obligation for $147.87. As a general rule, one can only part with title to personal property by his voluntary act or by conduct sufficient to create an estoppel. In the case of commercial paper it was long ago held that, when by voluntary act a party intrusts another with such paper with a blank thereon designed to be filled up with a stipulated amount, such party is liable to a bona fide holder of the instrument, although the amount inserted was larger than that agreed upon. So, if the place of payment is left blank when the maker delivers it, the insertion of a different place of payment than that agreed upon will not avoid such paper in the hands of an innocent holder for value. * * * The authorities are not harmonious as to the basis of this liability. Some deem that is rests upon an im-

plied authority conferred by the maker upon the person to whom it was delivered to fill in the blanks, and others upon estoppel by reason of negligence. Nat. Exchange Bank v. Lester, 194 N. Y. 461–465, 87 N. E. 779, 21 L. R. A. (N. S.) 402, 16 Ann. Cas. 770. Upon neither of these grounds can the plaintiff be charged in this case. Certainly not upon the ground of implied authority, for that doctrine grows out of the relation of principal and agent, and there is no such relation between a thief and his victim. There is a vast difference in the rule of liability upon negotiable instruments between a case where the possession has been parted with by the affirmative act of the maker in an incomplete state, and one where his parting with such possession is the result of a crime. The rule that the bona fide holder of an incomplete instrument, negotiable but for some lack capable of being supplied, has an implied authority to supply the omission, and to hold the maker thereon, only applies where the latter has by his own act, or the act of another, authorized, confided in, or invested with apparent authority by him, put the instrument in circulation as negotiable paper. * * *

None of the circumstances connected with the theft of this paper appear, except that it was stolen, and that the persons guilty of the crime have been tried, convicted, and sentenced for the same. Plaintiff, therefore, cannot be charged with negligence giving rise to an estoppel, unless a man is guilty of negligence in writing his name upon a piece of paper which by some possibility may afterwards be stolen from him, which paper afterwards comes into the hands of a third person who is an entire stranger to the transaction, with words written over the signature which are sufficient in form to make it a check or note. Actionable negligence involves, first, the existence of a duty; second, the omission to exercise ordinary and reasonable care in connection therewith; and, third, injury resulting in consequence thereof. In view of the contractual relation existing between the bank and its depositor, some duty of care may be owing to it. The bank, by the terms of its contract with him, is bound to pay on his account to the holder of paper bearing his genuine signature the amount called for, if such amount is to his credit. But a third person is under no obligation to honor his paper. He can take it or not as he pleases, and as a rule such paper is accepted in reliance upon the immediate transferrer thereof. Trust Co. of America v. Conklin, 65 Misc. Rep. 1, 119 N. Y. Supp. 367. What duty, therefore, is owing to him? Again, at the risk of being charged with lack of ordinary care and prudence, must one guard against the possibility of a crime being committed? It has been held that where the maker of a completed negotiable instrument has parted with its possession, but it is in such form that it is possible to make alterations in it, he is not guilty of negligence in thus delivering it, for the reason that he is not bound to assume that the person to whom he delivers it will be likely to commit a crime because it is apparently easy to do so. Nat. Exchange Bank v. Lester, supra. The drawer of a check is not bound so to prepare it that nobody else can successfully tamper with it. * * * Much less can a party be held liable for negligence because it is possible that he may be deprived of the possession of an incomplete negotiable instrument by a crime. He is not bound to anticipate nor guard against such an act.

No case has been cited holding a maker liable under such circumstances. We have found two well-considered cases to the contrary.

Burson v. Huntington, 21 Mich. 416, 4 Am. Rep. 497; Baxendale v. Bennett, L. R. 3 Q. B. Div. 525. * * * The rule of law laid down in Baxendale v. Bennett has now passed into the statute. [Section 15.] * * *

We conclude, therefore, that the delivery of a promissory note by the maker is necessary to a valid inception of the contract. The possession of such a note by the payee or indorsee is prima facie evidence of delivery; but if it appear that the note has never been actually delivered, and that without any confidence, or negligence, or fault of the maker, but by force or fraud, it was put in circulation, there can be no recovery upon it, even when in the hands of an innocent holder.

Defendant contends that, as against the plaintiff, the bank was justified in paying out the plaintiff's money on the check, and cites in support of his contention, Trust Co. of America v. Conklin, supra. If so, it was not because the check was a valid check in the hands of a third person, but because of the peculiar contract relation between the bank and its depositor. We are not called upon to decide this, since it seems to be conceded that, if the check was not a valid obligation in the hands of the defendant, this action will lie as for money had and received.

The judgment appealed from must be reversed, and a new trial ordered; costs to abide the event. * * *

(d) CONTRACTS DECLARED VOID BY STATUTE

If a statute declares a particular kind of contract void the usual interpretation of the statute is that the contract is void even in the hands of a holder in due course. Such statutes are common with respect to gambling and usurious contracts. The Negotiable Instruments Law contains no provision with respect to contracts illegal by reason of statutory denunciation, but the general rule is that the Negotiable Instruments Law does not require any interpretation different from that theretofore adopted with respect to such statutes.

SABINE v. PAINE.

(Court of Appeals of New York, 1918. 223 N. Y. 401, 119 N. E. 849, 5 A. L. R. 1444.)

Action by C. Olivia Sabine against Maggie S. Paine. From a judgment for defendant, plaintiff appeals.

COLLIN, J. The action is upon a promissory note in the sum of $2,100, made by the defendant and owned by the plaintiff. The note was payable, four months after its date, to the order of Eugene F. Vacheron. It was delivered to him as the agent of the defendant for the purpose of having it discounted for her. He, after indorsing it, transferred it to the plaintiff for the sum of $1,850. Under the evidence and the decision of the Appellate Division, this appeal presents the single question, Is a usurious promissory note enforceable by a holder in due course? * * *

When the Negotiable Instruments Law was enacted, it was an established rule of law in this state and many other jurisdictions that a

holder of a note void by virtue of a statutory declaration because of usury, who became such before the maturity of the note for value and without notice of the usury, could not enforce the note. The rule is an exception to the general principle that a negotiable instrument, in the hands of an innocent holder, who had received it in good faith in the ordinary course of business, for value, and without notice of a defense, is not invalid and is enforceable by the holder. The general principle has been stated: "The bona fide holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed mala in se and those founded in positive statutory prohibition which are termed mala prohibita. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect." 1 Daniel on Negotiable Instruments (6th Ed.) § 197.

The rule, constituting an exception to it, rests upon the legislative intention and enactment. An instrument which a statute, expressly or through necessary implication, declares void, strictly speaking, is a simulacrum only. It is without legal efficacy. It cannot obligate a party or support a right. In Claflin v. Boorum, 122 N. Y. 385, 388, 25 N. E. 360, 361, we said: "A note void in its inception for usury continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given to it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade."

The rule has general recognition in judicial opinion. * * * The fact that the holder when he took the paper did not know that it had had no inception—that no prior party could sue upon it, and that he was loaning money upon it—does not affect the rule. He is bound to know the character of the paper he is dealing in. * * * The statute is peremptory and unequivocal in enacting that a usurious obligation is absolutely void.

The Legislature did not by enacting * * * the Negotiable Instruments Law intend to abrogate the rule we have stated. The statute declaring the usurious instrument void is not repealed expressly or through implication. * * * Our conclusion is in harmony with judicial decisions of other states. * * *

The judgment should be affirmed, with costs. * * *

(e) INCAPACITY

MURRAY v. THOMPSON et al.

(Supreme Court of Tennessee, 1916. 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917B, 1172.)

WILLIAMS, J. This is a suit by complainant, a minor, to disaffirm a contract of indorsement of a note of which he was payee, and to recover the note from Thompson, indorsee.

Complainant while in the employ of a brick company received personal injuries, and the company executed to him a note of $1,750 in satisfaction of his claim to damages. The note was made payable June 1, 1915, which was the date on which complainant would arrive of age. On October 16, 1914, W. A. Murray, the father of complainant, with the knowledge and authority of the latter, sold the note to Thompson, indorsing the name of the son without apprising Thompson of the fact that he himself was not the payee. The proceeds of the note were deposited to complainant's account in bank, and later were invested in a saloon business in the name of the father and son, and in a short time lost. There was no actual fraud on the part of complainant in the transaction with Thompson.

The chancellor decreed that complainant was entitled to disaffirm and recover; but the Court of Civil Appeals reversed the ruling. The last-named court was of opinion that complainant would have been entitled to the relief awarded by the chancellor under the rules of law in force before the passage of the Negotiable Instruments Law; but that said act, by its section 22, so changed the law as to deny complainant the remedy sought. The section thus relied on is as follows: "The indorsement or assignment of the instrument by a corporation, or by an infant, passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

It was to make certain and uniform the law on this point that section 22 was embodied in the Negotiable Instruments Act. In stipulating that the indorsement of the instrument by an infant "passes property therein," it was meant to provide that the contract of indorsement is not void, and that his indorsee has the right to enforce payment from all parties prior to the infant indorser. The incapacity of the minor cannot be availed of by prior parties.

It was not intended to provide that the indorsee should become the owner of the instrument by title indefeasible as against the infant, or to make the act of indorsement an irrevocable one.

The act does not concern the right of such an indorser to disaffirm under the rules of the law of infancy. The words "passes the property therein," if given a meaning that would deny that right in respect of a contract of indorsement, would deprive the infant of the right to reinvest in himself the title to the instrument against a holder who had knowledge of the indorser's infancy. The quoted words are not qualified so as to save his rights in such assumed case. It must be admitted that the Legislature did not intend any such radical and grossly inequitable departure from a settled and salutary rule of law.

The common-law rule is that the purchaser and indorsee of such a note is not a bona fide holder as against an infant indorser, and that the latter may disaffirm and recover the note from the possession of the former, who takes with constructive notice of the incapacity. * * *

The chancellor made a proper disposition of the case in his decree. The decree of the Court of Civil Appeals is therefore reversed, and that of the chancellor affirmed.

(f) NO TITLE TO THE INSTRUMENT

If the party suing has no title to the instrument upon which action is brought, the party sued may successfully defend. In such case the party in possession of the instrument is not even a holder. Clearly the party in possession who in all other respects is a holder in due course cannot recover if he has no title to the instrument.[8]

SECTION 4.—RIGHT OF THE DRAWEE TO RECOVER MONEY PAID TO THE HOLDER UNDER MISTAKE

The preceding sections dealt with the special rights of the holder in due course against parties primarily liable on the instrument, free from personal defenses and equities of ownership. The rights of the holder in due course against parties conditionally liable on the instrument—the drawer of a bill of exchange and indorsers—is the subject of the next chapter. The following sections, just as the preceding sections, are devoted to the consideration of a series of special problems growing out of the relation of the holder in due course, and the acceptor, and the drawee after payment of the bill. Stated broadly, the question is: Upon whom must the loss fall—the holder, or the acceptor, or drawee, who has paid—of an instrument bearing the forged name of the drawer or the forged name of a special indorsee?

The execution and delivery of a bill of exchange creates no legal rights in the holder against the drawee. The effect of the transaction is to confer a legal power upon the holder, either to create a legal duty in the drawee to the drawer to honor the instrument or to create a legal right of reimbursement in the drawee against the drawer, if the bill is honored. The holder possesses no rights of his own against the drawee. Before the adoption of the Negotiable Instruments Law some courts held that the delivery of a bill of exchange operated as an assignment of the amount specified therein, but the majority of courts held that such transaction was not to be interpreted as an assignment. The majority rule was adopted in the Negotiable Instruments Law.

N. I. L., Section 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

N. I. L., Section 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank and the bank is not liable to the holder unless and until it accepts or certifies the check.

[8] See chapter II, section 3, as to the circumstances under which a party in possession will be deemed not to possess the title.

These sections merely provide that the drawing and delivery of a bill or check does not "of itself" operate as an assignment. It is still possible for the drawer to execute an assignment of his right against the drawee, but appropriate words, in addition to those which usually appear on the bill, must be employed to produce this effect.

If the name of the drawer has been forged, and the instrument negotiated to a holder in due course, we have already seen that in a suit against the drawer the defense of forgery is available against the innocent holder. Moreover, we have seen that if the instrument is accepted or paid, the drawee, in the absence of an estoppel does not have the right to charge the drawer's account. While the drawer of a check, in certain situations, does owe a greater duty to the drawee than to holders of the instrument, this duty is not so extensive as to include the obligation to prevent forgery. The drawee having accepted or paid an instrument bearing the forged signature of the apparent drawer must bear the loss unless there is a right in the drawee to recover the money paid to the innocent holder, or to successfully defend a suit brought by such holder against the drawee upon its acceptance. May the drawee recover the money so paid, and may an acceptor successfully resist payment? These are the questions raised in the cases presented in this section.

Certain analogous situations are also to be considered: First, where the check or other bill of exchange bears the genuine signature of the drawer, but is accompanied by a negotiable document of title bearing the forged signature of the carrier or other bailee; second, where the bill of exchange bears the genuine signature of the drawer, but the face of the bill has been materially altered, as, for example, by raising the amount; third, where the signature of the drawer is genuine, but the drawer accepted or paid under mistake as to the existence of funds or credit of the drawer with the drawee. As far as the right of the drawee to charge the drawer's account is concerned, that depends upon whether the bill bears the genuine signature of the drawer. If the signature is genuine, the drawee may charge the drawer's account; and this would be true, even though the drawer had no credit with the drawee at the time of the payment. If a genuine bill has been altered, the drawee may charge the drawer, as a rule, only for the amount of the bill as originally issued. * * * The question involved in the following cases narrows down, therefore, to the inquiry: May the drawee recover money paid to an innocent holder of a bill of exchange: (1) When the drawer's name was forged; (2) where the drawer's name was genuine but a negotiable document of title to goods accompanying the same was forged; (3) where the drawer's signature was genuine but the face of the bill had been altered prior to acceptance or payment; and (4) where the drawer's name was genuine, but at the time of the acceptance or payment the drawer had no credit with the drawee?

The section of the Negotiable Instruments Law, which is involved is as follows:

Section 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and (2) the existence of the payee and his then capacity to indorse.

NATIONAL BANK OF ROLLA v. FIRST NAT. BANK OF SALEM.

(Springfield Court of Appeals, Missouri, 1910, 141 Mo. App. 719, 125 S. W. 513.)

Action by the National Bank of Rolla against the First National Bank of Salem. Defendant had judgment, and plaintiff appeals.

GRAY, J. * * * The plaintiff's petition alleges that both parties, at the dates mentioned in the petition, were banking corporations, and on the 26th day of September, 1907, defendant, through its correspondent, presented to plaintiff for payment a check for the sum of $42, purporting to be drawn on the plaintiff by one H. W. Lenox, in favor of one J. B. Ragan, and purporting to be indorsed by the said Ragan, and which said check had been duly indorsed by the defendant, and previous indorsements thereon in writing, guaranteed by the defendant, and relying upon the indorsement of said check by the defendant and defendant's said guaranty, and believing that by reason thereof it was genuine cashed said check and paid the amount thereof to the defendant; that after it had cashed said check and paid the proceeds to defendant it discovered that the said check was forged, and thereupon it caused due notice to be given to defendant in writing, and demanded of it the payment of the amount of said check, and that defendant refused to pay the same, and asked for judgment for the amount of $42. It will be noticed that no allegation of negligence on the part of the defendant in cashing the check for Ragan is made in the petition, and the instruction asked by the plaintiff and refused by the court presented the issue as alleged in the petition. In other words, the question of the negligence of the defendant in cashing the check for Ragan was not submitted either in the petition or the instruction. There are but two reasons alleged for a reversal of the judgment, and they are: Because the court erred in refusing an instruction asked by the plaintiff; and, because under all the evidence in the case, the judgment should have been for the plaintiff.

The question presented here may be submitted in the following language: If B. representing himself to be A. presents to C.'s bank a check purporting to be signed by D., payable to A., and drawn on E.'s bank, of which D. is a customer, and C.'s bank cashes the check and sends it for collection to E., who, when it is presented, pays the same and charges it to D.'s account, and at the time of said payment E. has reason to believe that the signature to the check is not D.'s, can E. sue C. for the amount of the check, upon learning that D.'s name was forged to the check, and showing that C. had sent the check for collection, and that the money paid by E. at the time it cashed the check

had been received by C.? The question has been answered in the negative many times in the courts of this country. Since the case of Price v. Neal, 3 Burrows, 1355, decided by Lord Mansfield in 1762, the general rule has been that when the drawee of a check or bill pays the same to a bona fide holder, such drawee cannot recover the money back upon discovering such check or bill to be a forgery. Many of the text-writers on negotiable instruments declare that when a bank, upon which a check is drawn, pays it upon the forged signature of the drawer, the money can be recovered as paid under mistake of fact. Story on Promissory Notes, §§ 379–529; 2 Parsons on Notes and Bills, 80. Others, while recognizing a different rule, incline to the opinion that the one just cited is the most equitable. 2 Daniel on Negotiable Instruments, c. 48, § 13. Whatever the text-writers may think and declare the law to be, a long line of cases sustain the proposition that as between the drawee and the holder of a check the drawee bank is to be deemed the place of final settlement where all prior mistakes and forgeries can be corrected and settled at once, henceforth and forever more; and, if overlooked and payment is made, the chapter is closed and there can be no recovery over. Price v. Neal, 3 Burrows, 1355. * * *

Judge Allen, in Bank v. Bank, 46 N. Y. loc. cit. 80, 7 Am. Rep. 310, states the rule in the following clear language: "For more than a century it has been held and decided, without question, that it is incumbent upon the drawee of the bill to be satisfied that the signature of the drawer is genuine; that he is presumed to know the handwriting of his correspondent; and, if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid." In Price v. Neal, which was a similar action, Lord Mansfield stopped the counsel for the defendant, saying that it was one of those cases that never could be made plainer by argument; that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted and paid it. In the case of Ellis v. Trust Co., supra, 4 Ohio St. 628, 64 Am. Dec. 610, the doctrine as announced in Price v. Neal, is reviewed, approved, and a long list of authorities cited in support thereof, and among these authorities will be found the case of the Northwestern National Bank v. Bank of Commerce, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102. This doctrine is founded by many courts, upon the thought that the drawee bank is conclusively presumed to know the signatures of its depositors. Upon examination of the authorities, this, however, is too narrow a basis. The courts that declare the rule as above stated put it upon the theory that the rule is demanded by the necessities of business in these times when the currency of the commercial world is composed so largely of checks and drafts. There is another line of decisions that state the rule as follows: 'The drawee of a forged check, who has paid the same, may, upon discovery of the forgery, recover the money paid from the party who received the money, even though the latter was a good faith holder, provided the latter has not been misled or prejudiced by the drawee's failure to detect the forgery, and the burden of showing that he has been misled or prejudiced by the drawee's mistake rests upon him who claims the right to retain the money. First National Bank of Lisbon v. Bank of Wyndmere, 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588. * * *

The latter doctrine is well stated in Ford v. People's Bank, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744, as follows: "We think the true rule is found stated in the case of National Bank v. Bangs, 106 Mass. 441, 8 Am. Rep. 349, and National Bank v. Bank, 151 Mass. 280, 24 N. E. 44 [21 Am. St. Rep. 450]. The language of the court in the last-cited case, after stating that the presumption is that the drawee bank knows the signatures of his own customers, is as follows: 'This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud or the mistake of fact under which the payment has been made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee, or induce him to pay the check without the usual inquiry against fraud. Where a loss which must be borne by one of two parties alike innocent of the forgery can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud through whose means it has succeeded.'"

The different doctrines are well stated by the different opinions of the judges of the Supreme Court of Minnesota, in the case of Germania Bank v. Boutell, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519, and for further information upon these points, reference is made to that case. In nearly all of the authorities where opinions are cited to sustain the different theories, the case of the Northwestern National Bank v. Bank of Commerce, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102, is cited in support of the doctrine, that it is the absolute duty of the payee to ascertain at his peril when a check is presented for payment, purporting to be drawn by a customer of his bank, whether or not it is the genuine signature of the customer, and if he cashes the check all rights against any person except the forger are forever barred. But upon reading the case of Bank v. Bank, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102, supra, it will be found that the question of negligence on the part of the purchaser of the check is made a material issue in the case. * * *

In Bank v. Bank, 109 Mo. App. 665, 83 S. W. 537, the Kansas City Court of Appeals, in an opinion by Judge Broaddus, declares the rule to be that when the drawee pays a check purporting to be drawn upon its bank by one of its customers its right of action against any other parties to the check is gone, unless it can be shown that the purchaser was guilty of gross negligence, and that a purchaser is not guilty of such negligence as to authorize a recovery against him from the fact that he has knowledge of circumstances sufficient to put a prudent man on inquiry. This authority goes much further in regard to the notice necessary to make the purchaser guilty of negligence than most any other case recognizing the negligence doctrine. * * *

In addition to the authorities, the Negotiable Instrument Act of 1905 contains the following section: "Sec. 62. The acceptor, by accepting the instrument engages that he will pay it according to the tenor of its acceptance; and admits: The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and the existence of the payee and his capacity to endorse." * * * After a careful examination of the new law, we

are inclined to believe that it was intended to adopt the law as declared in Price v. Neal, supra. * * *

The appellant, however, contends that because the check was indorsed, "Endorsement guaranteed. Pay any National or State Bank or Order. The First National Bank of Salem. W. J. Bennett, Cashier," that it had the right to rely upon this guaranty, and that its suit is maintained thereon. Such an indorsement is only an indorsement for collection, and does not transfer the title to the indorsee. Bank v. Bank, 109 Mo. App. 673, 83 S. W. 537. And the guaranty only applies to the indorsers, and does not protect the payee against the risk of cashing a check to which the maker's name is forged. See authorities cited on other points in this opinion. * * *

After a thorough examination of the law as it existed prior to our negotiable instrument act, and as changed by that act, we are satisfied that the court committed no error in refusing plaintiff's instruction, and that upon the allegations of the petition the plaintiff was not entitled to recover, and the judgment of the trial court will be affirmed. * * *

SPRINGS et al. v. HANOVER NAT. BANK OF CITY OF NEW YORK.

(Court of Appeals of New York, 1913. 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. [N. S.] 241.)

HISCOCK, J. This case directly presents to this court for the first time the question whether the drawee of a draft who has paid the same to a bona fide holder for value relying in part upon purported bills of lading attached by the drawer to the draft, but not mentioned therein, can, on discovery that the bills of lading are forgeries, recover back the moneys so paid from the payee or indorsee who has neither guaranteed the genuineness of said instruments nor been aware of their fraudulent character.

In this case the plaintiffs, who as such drawees paid the defendant as indorsee from another bank a draft for $39,000 drawn by a firm of cotton dealers in the south with forged bills of lading attached, urge four theories as justifying a recovery back. They say that defendant represented that the bills of lading were genuine and truthful both as to signatures and contents; that the draft contained such reference to the bills of lading as to make it conditional on the genuineness of the bills of lading; that plaintiffs relied on an examination of signatures by the bank and its transferror which had not in fact been made, and therefore the payment was made under a mistake of fact; that the defendant or its transferror departed from the usual course of business in discounting the draft, and thereby caused a mistake of fact; and that even if both parties were equally innocent the defendant must suffer. These theories are not sustained. * * *

We think there was no evidence which showed legal fault upon the part of the Decatur bank in originally discounting the draft, and certainly there is no evidence which affects the defendant in that respect. The contention of the plaintiffs is that defendant became the owner and holder of the draft and was not a mere collecting agent for the Decatur bank. Accepting this theory, there is no question that defendant became the owner and holder of the draft in the regular course of business for value and without notice of any fact or circumstance which made it chargeable with knowledge or of responsibility for the forgery of the bills of lading.

Therefore in the end plaintiffs confront the general question as first stated. While, as I have said, this question has not been directly decided by this court, it has been a subject of discussion and decision in many other courts.

In these cases the argument had been made on which plaintiffs in this case must finally rely, that a party accepting or discounting drafts accompanied by purported bills of lading upon the faith and security of which he more or less relies and which prove to be forgeries has acted under a material mistake of fact which entitles him to be relieved from his acceptance of payment. To this argument, however, the answer in substance has been made by the courts with almost unvarying uniformity, that the mere attachment of bills of lading to a draft does not make the former a part of the latter; that one who accepts or pays such a draft must be assumed in the absence of special circumstances to do so on the faith of the draft itself, and that reliance upon the bills of lading is not a fact which enters into the substance of the real transaction in accepting or paying the draft, but is an extrinsic fact; that, if the rule were established that relief should be afforded against the acceptance or payment of a draft because of mistaken belief in the genuineness of attached bills of lading, such rule logically would apply to other cases, as that the drawee had entertained a mistaken notion as to the financial standing and responsibility of the drawers or as to the value of security for the draft and thus lead to an instability and confusion in transactions involving negotiable paper which would be intolerable; that as between the innocent holder for value of a draft and the drawee who has accepted or paid the same in reliance upon forged bills of lading there is no reason why the drawee should be permitted to shift the burden of loss to the holder.

While, as stated, none of these decisions are by this court, and therefore controlling, nevertheless they have such weight and have so widely established a rule of negotiable paper that we should feel reluctant to disagree with them even if we doubted the wisdom of the principles upon which they are based. We do not, however, have any such difference with other courts in respect of the principles which are involved, and have no hesitation in adopting the rule which has been established by them. * * *

Hoffman & Co. v. Bank of Milwaukee, 79 U. S. (12 Wall.) 181, at page 189 (20 L. Ed. 366), was an action brought by plaintiffs as drawees to recover the amount of three drafts paid by them to the defendant on the ground that such moneys were paid under a mistake of fact. * * * The Supreme Court affirmed the action of the lower courts in directing judgment for the defendant, and in so doing wrote as follows: "Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration; but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange, to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument. * * *

Beyond doubt the bills of lading gave some credit to the bills of

exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments, nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange. * * * Failure of consideration, as between the drawer and acceptor of a bill of exchange, is no defense to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument. * * *. Forgery of the bills of lading would be a good defense to an action on the bills if the defendants in this case had been the drawers, but they were payees and holders for value in the regular course of business, and the case last referred to, which was decided in the Exchequer Chamber, shows that such an acceptance binds the acceptor conclusively as between them and every bona fide holder for value." * * *

Judgment [for defendants] affirmed.

The following case applies the rule as it existed before the Negotiable Instrument Law as regards the right of the drawee to recover money paid out on an altered instrument. While the court quotes certain portions of section 62, no consideration was given to the effect of the clause in section 62 which provides that the "acceptor by accepting the instrument engages that he will pay it according to its tenor." There is considerable force to the argument that this clause changed the common-law rule and would therefore prevent the drawee from recovering money paid out on altered instruments.

McCLENDON et al. v. BANK OF ADVANCE.

(St. Louis Court of Appeals, Missouri, 1915. 188 Mo. App. 417, 174 S. W. 203.)

NORTONI, J. This is a suit for a balance of deposits made by plaintiffs with defendant bank. Plaintiffs recovered, and defendant prosecutes the appeal.

Plaintiffs, Ella McClendon and William McClendon, are copartners and as such conduct a mercantile business or store under the firm name of Ella McClendon & Co. at Sturdivant, while defendant is an incorporated banking institution doing business in Advance, a place not far distant from Sturdivant. * * * The facts relevant to the matter for present consideration are substantially as follows:

Plaintiffs conducted a store at Sturdivant and maintain a checking account with defendant bank at Advance, with which they made frequent deposits, while James Kinder & Son, copartners, conducted a sawmill near by at Eaglette. James Kinder & Son also maintained a checking account with defendant bank, made deposits therein, and drew checks thereon. In conducting the sawmill business, James Kinder & Son paid their workmen by issuing checks to them on defend-

ant bank, and such checks were usually presented to plaintiffs, Ella McClendon & Co., at their store at Sturdivant and cashed by them. After having cashed the checks, it appears plaintiffs forwarded them by mail to defendant bank for deposit. Upon receipt of the checks thus forwarded by plaintiffs, the bank would deposit them to the credit of plaintiffs, Ella McClendon & Co., and charge the account of James Kinder & Son with the amount so credited. During the summer of 1910 James Kinder & Son were informed by the bank that their account was overdrawn, and went about investigating the matter, for it is said there should have been a balance to their credit at that time. The investigation revealed that some five checks, issued by James Kinder & Son to as many different men in their employ, had been altered or raised in the amount after issue, and were cashed by plaintiffs at their store and deposited in defendant bank by plaintiffs, for which they received credit. Moreover, two checks appeared to have been forged —that is, the signature of James Kinder & Son forged thereto—and those checks were likewise cashed by plaintiffs at their store and forwarded to the bank and deposited to their account. All of those checks either raised or forged were charged at the time for the amounts appearing on their face to the account of James Kinder & Son in the bank. * * * Defendant bank continuing in its refusal to pay plaintiffs the balance represented by the respective amounts, the several checks were raised and those of the forged checks as well, * * * plaintiffs instituted this suit to recover the same.

From what has been said, it appears that there are two classes of checks to be considered here: First, five separate checks which bore the genuine signature of the drawer and the genuine indorsement of the payee, but were altered by some one through being raised in amount after they were issued; and, second, two separate checks which are said to be forgeries, in that they bore a spurious signature. Two separate and distinct rules of law obtain with respect to the different subject-matters, for as to the altered and raised checks defendant bank is not concluded by the mere act of acceptance, while such may be true, in a proper case, in so far as the forged signature of its customer is concerned, for the bank is presumed to know the signature of its depositors. But the court treated both subjects on the same plane—that is, as if defendant bank was concluded by its acceptance of the raised checks from a holder in due course and in good faith precisely as if they were forgeries, in that they bore the forged signature of its customer, the drawer, and such is not the law. It is entirely true that the acceptor, by accepting the instrument—and a bank who pays the check of its customer is such—admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and the existence of the payee and his capacity to indorse. See section 10032, R. S. 1909. In so far as the two alleged forged checks are concerned—that is, those which bore the alleged spurious signature of James Kinder & Son—the bank is concluded by its acceptance and payment of them from disputing the signature of its customer, provided, of course, that Ella McClendon & Co. received such checks in due course and good faith. * * *

But such is not true with respect to the five checks, above described, which bore the genuine signature of James Kinder & Son, the drawer, and were altered or raised after their issue. Touching these, the mere acceptance as by receiving and cashing them—that

is, charging them to the account of Kinder & Son and passing the amount they represented to the account of plaintiffs—in no wise concludes the bank if it was without fault, for such a matter is reckoned with in the law on the ground of mistake, where it appears both the bank and the depositor are innocent; that is, act in good faith. In such circumstances, both the Supreme Court of the United States and our own Supreme Court thus state the law on the subject: "The principle that money so paid under a mistake of the facts of the case can be recovered back is well settled, and in the case of raised or altered checks so paid by banks on which they were drawn there are numerous well-considered cases, where the right to recover has been established, when neither the party receiving nor the party paying has been in any fault or blame in the matter." * * *

The instruction authorizes a recovery on account of both the raised checks and the forged checks as if they were under the rule of law which obtains with respect to the forgeries of the signature of the depositor and is erroneous in so far as the raised checks are concerned. The error seems to run throughout the case, for it appears in other instructions as well and is manifestly prejudicial. * * *

The judgment should be reversed and the cause remanded. * * *

RIVERSIDE BANK v. FIRST NAT. BANK OF SHENANDOAH.

(United States Circuit Court of Appeals, 1896. 74 Fed. 276, 20 C. C. A. 181.)

WALLACE, Circuit Judge. We are unable to discover any ground upon which the plaintiff was entitled to recover. The certification of the note by the plaintiff was an agreement to pay the amount, and the contract can no more be rescinded than could any other contract because one of the parties in making it was under a misapprehension of fact. * * * Money paid under a mistake of fact is recoverable of the party receiving it, because good conscience forbids him to retain that which justly belongs to the other party; but the principle has no application to the case where the recipient has a right to retain the money because it has been paid pursuant to a contract which he was entitled to enforce. Assuming that the certification of the note, and its payment through the clearing house, was equivalent to a payment by the plaintiff over its counter to the defendant, the case falls within one of those exceptions to the general right to recover back money paid by mistake which are found in the law of negotiable paper. One of these exceptions is that the drawee of a bill of exchange is presumed to know the signature of the drawer, and payment by the drawee of the bill is ordinarily an admission of the genuineness of the signature, which he is not afterwards, in a controversy between himself and the holder, at liberty to dispute.

Another exception, recognized by the decided weight of authority, is that the payment of a check or of a note by the bank at which it is made payable, although made under misapprehension of the state of the maker's account with the bank, concludes the bank as against the holder of the paper. * * * Of such a case the supreme court used this language: "When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no

room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit, and received as a deposit, there being no fraud, and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned." Bank v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766.

To permit a bank which has paid a note or check of a customer to rescind the transaction because it discovers that it was mistaken in the state of the customer's account, would, as is pointed out by Judge Cooley in Bank v. Burkham, supra, 32 Mich. 328, reverse the rule of commercial law, and transfer from the acceptor to the payee the responsibility which the former assumes by the acceptance and the loss, which should be left where it fell. * * *

The trial judge properly directed a verdict for the defendant, and the judgment should be affirmed.

The following case contains a further discussion of the principle which denies to the drawee the right to recover money paid out on paper bearing the forged name of the drawer, and shows that the rule does not apply where the drawee is seeking to recover money paid to a holder under a forged indorsement. There is no provision in the Negotiable Instruments Law which confers upon the drawee this right, so that the general rule of the law of quasi contract, that money paid out under mistake of fact may be recovered, applies to payments to holders under forged indorsements.

FARMERS' NAT. BANK OF AUGUSTA v. FARMERS' & TRADERS' BANK OF MAYSVILLE.

(Court of Appeals of Kentucky, 1914. 159 Ky. 141, 166 S. W. 986, L. R. A. 1915A, 77.)

Action by the Farmers' National Bank of Augusta against the Farmers' & Traders' Bank of Maysville. From a judgment on demurrer for defendant, plaintiff appeals.

MILLER, J. The appellant does a banking business at Augusta, Ky.; the appellee does a like business at Maysville, Ky. For brevity, they will be called the Augusta Bank and the Maysville Bank, respectively.

On February 5, 1913, an unknown man, representing himself to be Fred. Schatzman, presented to the Maysville Bank, at its place of business in Maysville, a check drawn on the Augusta Bank, bearing the signature of "James Ware," as drawer, and payable to the order of Fred. Schatzman, for $375. Without inquiry or question, and without any identification of the holder, the Maysville Bank paid the check and forwarded it to its collecting bank, the Fifty-Third National Bank of Cincinnati, Ohio, which, in turn, forwarded it to the Augusta Bank, where it was received and paid on February 10th.

James Ware was a regular customer and depositor of the Augusta Bank. * * * On March 14th when Ware went over his checks, he at once discovered the check was a forgery; and it afterwards appeared that the indorsement of Fred. Schatzman was likewise a forgery, and that the man who received the money was not Fred. Schatz-

man. These facts are alleged in the petition and are conceded to be true.

The Maysville Bank having refused to repay to the Augusta Bank the money thus obtained upon the forged check, the Augusta Bank brought this action on August 21, 1913, to recover the money so paid; and, the circuit court having sustained a demurrer to the petition setting up the facts as above stated, the Augusta Bank appeals. * * *

It is a well-settled rule that a bank is bound to know the signature of its depositor; and if it pays the check of a depositor it thereby admits the genuineness of his signature, and is estopped to afterwards deny it to the detriment of an innocent third party. The reason for the rule is that the paying bank has in its records the genuine signature of its customer, or knows it, while the collecting bank is a stranger to the signature of the drawer.

Appellant insists, however, that, while the general rule is as above stated, it does not apply to the acts of indorsers; and furthermore that the holder is bound to know that all previous indorsements, including that of the payee, are the genuine handwriting of the parties whose names appear upon the check.

The rule that money paid under a mistake of fact may be recovered is too well established to need any discussion. And the exception to the rule that money paid by the drawee of a forged check cannot be recovered is equally well settled. * * *

The exceptional rule which does not permit the drawee to recover money which it has paid upon the forged check of its customer * * * was first announced by Lord Mansfield in 1762, in Price v. Neal, 3 Burr. 1357, where it is said: "It was incumbent upon the plaintiff to be satisfied, 'that the bill drawn upon him was the drawer's hand,' before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it."

In the opinion in Deposit Bank of Georgetown v. Fayette National Bank, supra, this court, speaking through Judge Pryor, recognized the fact that, while the decided weight of authority is with Lord Mansfield, it nevertheless criticised the rule laid down by him in Price v. Neal as being possibly too sweeping in its character, and that it could not be said that the rule which required a bank to know the signature of its depositor was without an exception, since it is undoubtedly true that the neglect or knowledge of intervening parties, who come into the possession of the check and receive the money on it from the bank where it is payable, would in some instances be of such a character as to enable the bank to recover back the money. In support of that qualification of the rule, Judge Pryor quotes from Daniel on Negotiable Instruments, vol. 2, p. 669, where it is said "that when one knows that it is a forgery or takes it under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the bank," the money may be recovered back. * * *

As was well said by Judge Pryor, the exceptional rule which does not permit the drawee to recover money paid by mistake is a harsh rule and should be kept strictly within its bounds and not extended. If the indorser or holder has been guilty of the first negligence, there is no good reason why he should not bear the loss, under the general rule which permits the recovery of money paid under a mistake. This view is supported by the great weight of authority, although there are a few cases to the contrary. * * *

In First National Bank of Lisbon v. Bank of Wyndmere, 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588, * * * the North Dakota Supreme Court repudiated the rule announced in Price v. Neal, and held that the drawee of a forged check, who has paid the same without detecting the forgery, may, upon the discovery of the forgery, recover the money from the party who received the money, even though the latter was a good-faith holder, provided the latter had not been misled or prejudiced by the drawee's failure to detect the forgery, and that the burden of showing that he had been misled or prejudiced by the drawee's mistake rested upon him who claims the right to retain the money, for that reason. * * *

We are not, however, required in the decision of this case to disapprove the rule of Price v. Neal, since the facts here bring this case within the scope of the rule in cases of forged indorsement. According to the weight of authority, under the exceptional rule a bank which cashes a check drawn upon another bank, without requiring proof as to the identity of the person presenting the same, or making inquiry in regard to him, the amount of which check is afterwards paid to it by the drawee, is liable to the drawee for the amount so paid, where the check proves to be a forgery; it having been guilty of the first fault. * * *

The case at bar is even stronger for the drawee than many of the cases above referred to, since here both the indorsement and the maker's name are forgeries. In this case the Maysville Bank first parted with its money upon the forged indorsement. * * * Clearly, the Maysville Bank would have received nothing from a forged indorsement, even though the check had been genuine. In such a case it would have been liable to the real holder. When, therefore it collected the money on the check in question from the Augusta Bank, it collected something to which it was not entitled under the indorsement through which it claimed. Neither can it be said that the Maysville Bank will be put in a worse condition, if it be required to pay this money to the Augusta Bank, for the good reason that the Maysville Bank was never entitled to the money. When it paid the check upon the forged indorsement, it lost its money, and, by subsequently inducing the Augusta Bank to pay it, it received money to which it was in no way entitled; and, that being true, it has no right to withhold it. * * *

In an unusually interesting and instructive article in 4 Harvard Law Review, 297, entitled "The Doctrine of Price v. Neal," Prof. Ames takes the ground that the true principle upon which cases like Price v. Neal are to be supported is that far-reaching principle of natural justice that, as between two persons having equal equities, one of whom must suffer, the legal title must prevail. And he would sustain the rule which allows the drawee to recover from a holder under a forged indorsement as follows: "Upon whom finally should the loss fall, when a party to a bill or note pays it to a holder, who could maintain no action against the payor, because one of the indorsements in his chain of title is a forgery? Here, too, it may be urged the equities are equal, and the holder, having obtained the money, should keep it. But this case differs in an important particular from all the cases hitherto considered, and another principle comes into play, which overrides the rule as to equal equities. In all the other cases the bill or note, however valueless it may have been, belonged to the holder. In the case

of the forged indorsement, on the other hand, the bill or note belongs, not to the holder, but to him whose name was forged as indorser. The holder, who bought the bill, was therefore guilty of a conversion, however honestly he may have acted. When he collected the bill, inasmuch as he obtained the money by means of the true owner's property, he became a constructive trustee of the money for the benefit of the latter. The true owner may therefore recover the money as money had and received to his use. If he recovers in his action, the property in the bill would pass to the holder; but the bill would be of no value to him, for, if he should seek to collect it, he would be met with the defense that it had been paid to him once already. If, on the other hand, the true owner prefers to proceed on the bill against the maker or acceptor, he may do so, and the prior payment to the holder, being made to one without title, will be no bar to the action. The maker or acceptor, however, who pays to the true owner, is entitled to the bill, and should be subrogated to the owner's right to enforce the constructive trust against the holder, and could thereby make himself whole. Consequently, whatever course the true owner elects to pursue, the loss must ultimately fall on the holder. As a matter of positive law, the maker or acceptor, who pays the holder claiming under a forged indorsement, is allowed to proceed against the latter directly, without first paying the true owner. This, as a matter of legal reasoning, is believed to be unwarranted. But as, in the result, the loss comes where upon the legal principle of subrogation it ought to come, it is not worth while to be too critical."

Prof. Keener, in his work on Quasi Contracts, considers the rule announced in Price v. Neal, as wholly anomalous, and treats it in a note on page 154 to the chapter upon the recovery of money paid under a mistake for the avowed reason that it is impossible to reconcile it with many of the legal principles announced in his text. After saying it is impossible to reconcile the exceptional rule which denies a recovery of money paid under a mistake as to the genuineness of negotiable instruments with the principles applicable to the general rule which permits a recovery of money paid under mistake, Prof. Keener points out that the exceptional rule cannot logically be sustained upon any of the different grounds usually relied upon, that the drawee is guilty of negligence, that between equal equities the law leaves the money where it finds it, or of subrogation in the case of money mistakenly paid under a forged indorsement, thus differing radically from Prof. Ames, who maintains the later view in his article theretofore referred to. In criticising the theory of allowing a recovery upon the principle of subrogation, Prof. Keener says: "The fact that the action is brought at law in the name of the party who made the payment is fatal to allowing a recovery on the theory of subrogation, since the result is to be regarded as anomalous in point of procedure. Equally fatal to this theory is the fact that the plaintiff is allowed to recover without first paying the true owner. The theory of subrogation, however, is open to the further objection that a recovery would undoubtedly be allowed in cases on the line of reasoning adopted by the courts, where the theory of subrogation would have to be denied. Subrogation of course implies a right in another which a party seeks to acquire against the defendant. A party claiming through subrogation claims by virtue of a derivative right necessarily presupposes an original right. If, therefore, for any reason, the true owner of the bill could not

maintain an action against the holder thereof for a conversion of the bill, or could not sue at law in a court for money had and received to recover the proceeds received in payment thereof, then a drawee dependent upon the doctrine of subrogation could not, on the theory of subrogation, recover the money paid by him under mistake as to the genuineness of an indorsement. In conclusion it is submitted that on no theory of quasi contract can the decisions reached in the cases considered in this note be reconciled, or the results reached in many of the cases be justified."

These two articles by masters of the subject strongly tend to support the contention that the exceptional rule is unsound. But if it be treated as sound, both under the great weight of authority and the reason for it, the case at bar does not come within it, since the defendant claims under a forged indorsement. We are of opinion, therefore, that the appellant was entitled to recover under the general rule which permits a recovery of money paid under a mistake, and that the demurrer to the petition should have been overruled.

Judgment reversed for further proceedings consistent with this opinion.

SECTION 5.—RIGHT OF THE DRAWEE WITH RESPECT TO INSTRUMENTS PAYABLE TO THE ORDER OF A FICTITIOUS PAYEE

Reference was made to the subject of fictitious payees in Chapter I, where we were considering the circumstances under which an instrument was to be deemed payable to bearer, and it was there stated that this matter could be taken up more profitably in connection with our study of the various legal aspects of forgery.

In order to pave the way for our study of the legal effect of making an instrument payable to the order of a fictitious payee, let us take the following illustrations:

(1) Suppose that F. forges M.'s name as the drawer of a check drawn upon the D. bank and payable to **bearer**, or to P. or bearer, and negotiates the instrument to A., a holder in due course. Upon presentment to the drawee, D., A. obtains payment. What is the result? D. cannot charge M.'s account, because M. did not draw the instrument. If the instrument were drawn payable to P. or bearer, and either F. or A. indorsed P.'s name, such indorsement would not be a forged indorsement within the meaning of the rule which allows a drawee having paid to a holder under a forged indorsement to recover the money so paid, for the reason that the genuine indorsement of P. is not necessary to pass title to the instrument. Therefore the drawee, D., cannot recover the money paid to A. because of the rule discussed in section 4 of this chapter.

(2) Suppose, then, that F. forged M.'s name as the drawer of a check drawn upon the D. bank payable to P. or order and delivers the instrument to P. Suppose further that T. steals the instrument from P., forges P.'s indorsement and negotiates to A., a holder in due course. Notice the important distinction between

this case and that put in the first illustration. In this case the check is payable to P. or order, therefore the genuine indorsement of P. is necessary to pass title; while in the first case, the instrument being payable to P. or bearer, the indorsement of P. was not necessary to pass title. Upon payment by D. to A., what are the rights of D.? M.'s name being forged, D. cannot charge M.'s account just as in the first case. But D. may recover from A., in spite of the rule developed in section 5 of this chapter, because the drawee has also paid to a holder under the forged indorsement of P., whose genuine indorsement was necessary to pass title to the paper. Money paid under a forged indorsement may be recovered. It may seem somewhat strange to be speaking of having title to an instrument which is void as far as the drawer is concerned, but it is nevertheless true. A person may own something that has little or no value, as well as he may own something possessing value.

(3) We are now ready for the case of the fictitious payee. F. forges M.'s name to a check payable to P. or order, drawn upon the D. bank. F. indorses P.'s name and negotiates to A., and A. obtains payment from the drawee, D. What are D.'s rights? Is case (3) in legal effect like case (1) or case (2)? If it is like case (1), then D. cannot recover from A. If case (3) is like case (2), then D. may recover from A. The answer depends upon the legal effect to be given to the signature by F. of P.'s name, as an apparent indorser of the check. Apparently, case (3) is like case (2), because both instruments were payable to order and in both cases P.'s name was placed upon the instrument as an indorser by some one other than P. If the appearance of things governed, D. could recover from A. But as a matter of law the appearance of things does not govern, for the law is that, in legal effect, case (3) is like case (1), and D. accordingly cannot recover from A. We have the rather novel situation of an instrument expressly payable to a named payee or order being treated as though it were payable to bearer. The words "or order" have the same meaning as the words "bearer" whenever the instrument is payable to a fictitious payee or order, and case (3) is a case where P. was a fictitious payee; that is, P. was fictitious in the sense that F. intended that P. should never have any interest in the check.

What reason is there for the rule that an instrument payable to the order of a fictitious payee is deemed payable to bearer? This may best be shown by a case involving a fictitious payee where no fraud is intended. Suppose that M. draws his check in the D. bank payable to P. or order, intending then to deliver the check to P. in payment of a debt. Suppose further that M. thereafter changes his mind about delivering the instrument to P. and decides to pay a debt of the same amount which he owes A. Of course, the normal thing for M. to do would be to destroy the first check and draw a new one payable directly to A.; but suppose M. decides to make use of the check which he has drawn payable

to P. or order, M. then indorses P.'s name and delivers the same to A., or authorizes A. to indorse P.'s name. Certainly P.'s name was not forged either in the criminal law sense nor in any other sense. P. sustained no damage whatsoever because until delivery P. could have no interest in the check. Is it not perfectly reasonable to say, therefore, that in this case the indorsement of P. by M. or A. shall be treated as a genuine indorsement of P. and as a result that title to the check passed to A.? This result is not only possible, but virtually necessary, because M. intended that P. should not have any interest in the check, but that A. should obtain title. The result is the same where F., the person who physically drew the instrument, forged the name of the apparent drawer, for he likewise intended that P. should have no interest in the check, but that the transferee, A., should have the interest in the instrument. It would have been somewhat more logical for the law to have said that where the instrument is made payable to the order of a fictitious payee, and such fictitious payee's name is signed as an indorser, such indorsement should have the same effect as though in all respects such indorsement were genuine. The law, however, did not say quite this, but instead the rule became fixed that an instrument so drawn became payable to bearer. In the majority of cases the same result is reached, but the way in which the rule is phrased makes the underlying reason for its existence appear less distinct.

From a practical standpoint the typical case calling for the application of the rule relating to fictitious payees arises where a fraudulent party, commonly an agent of the person whose name is signed as drawer, adopts this scheme to defraud the bank in which his employer maintains an account. The success of the scheme to defraud is made more certain if the paper is made payable to the order of some one with whom the apparent drawer is known to have business dealings. The scheme is only one of many forced constantly upon the attention of the business and banking world, where the negotiable instrument is made to do the work of the crowbar or of nitroglycerine.

The section of the Negotiable Instruments Law involved is as follows:

Section 9, subsection 3. The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.

The case following illustrates the application of the rule. Then follow a few cases bearing a close resemblance to the fictitious payee case but upon closer examination are found to be governed by other rules. (1) Suppose that F., the fraudulent party, induces M. to draw the instrument payable to P. or order, and F. indorses P.'s name; is this instrument payable to bearer? (2) F., by fraud, induces M. to believe that he, F., is P., and obtains an instrument payable to P. or order; is this instrument to be deemed payable to bearer?

TRUST CO. OF AMERICA v. HAMILTON BANK OF NEW YORK CITY.
(Supreme Court of New York, Appellate Division, 1908. 127 App. Div. 515, 112 N. Y. Supp. 84.)

McLAUGHLIN, J. This is a controversy submitted to the court upon an agreed statement of facts. * * * The controversy relates to four checks for $500 each, drawn upon the plaintiff, a trust company doing a banking business, and signed: "Estate of Kate M. Wallace. Arthur B. Wallace, Adm'r." At the time the checks were presented to the plaintiff for payment, the estate of Kate M. Wallace was one of its depositors, having to its credit an amount in excess of all the checks, which could be drawn out on checks signed by Arthur B. Wallace, administrator, when countersigned by the United States Fidelity & Guaranty Company. The Wallace estate had then been practically settled, and the amount on deposit was ready for distribution among the next of kin of the decedent. The four checks in question were drawn without the knowledge or authority of the administrator, his signature being forged, and in each there was inserted as payee the name of some one of the next of kin whose distributable share of the amount on deposit with the plaintiff was greater than the amount of the check or checks thus apparently payable to such person. The first check was dated September 25, 1905, and was presented on that day to the United States Fidelity & Guaranty Company by a person unnamed, without the knowledge of plaintiff or defendant. The United States Fidelity & Guaranty Company, relying upon the apparent genuineness of the check, countersigned the same, and it was then, by some person unknown, presented to the plaintiff for acceptance and by it accepted, in writing. The name of the payee was then forged upon the back of the check as first indorser, and it was subsequently deposited with the defendant, by one M. F. Kerby, one of its depositors, who was given credit for the same. It then bore the following additional indorsements: "Harvey J. Conkey. M. F. Kerby. A. Edward Fisher." Thereafter, the defendant, through the New York Clearing House, presented the check to the plaintiff for payment, guaranteeing the indorsements, and it, relying upon the genuineness of the check, with the guarantee of the defendant thereon, not knowing that the indorsement of the payee was forged, paid the same in good faith. Substantially the same facts are true in regard to the second check, which was dated in November, 1905. The other two checks, dated in December, 1905, and January, 1906, were not presented to plaintiff for acceptance before payment and were deposited with defendant by Harvey J. Conkey, one of its depositors, to the credit of his account; otherwise, the same course was pursued with regard to them. They were indorsed "Harvey J. Conkey" below the forged indorsement of the payee.

Upon discovering the forgeries, the plaintiff at once notified the defendant, tendered back the checks, and demanded repayment. In the meantime both Kerby and Conkey had withdrawn the proceeds of the checks, and the defendant, relying on plaintiff's acceptance and payment of them, had paid out the same in good faith. The defendant has refused to repay plaintiff the amount of the checks, or any of them, and the question presented is whether plaintiff is entitled thereto.

The general rule is that payments made under a mistake of fact may be recovered, although negligently made; but it is also settled that,

if the drawee of a bill of exchange to which the drawer's name has been forged accepts or pays the same, he can neither repudiate the acceptance nor recover the money paid, since he is bound to know the drawer's signature. * * * It is also settled that, where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one who holds under such forged indorsements may be recovered. * * *

Therefore, if all the indorsements on the checks in question had been genuine, the plaintiff could not recover; but if the maker's signatures had been genuine, and only the indorsements or any of them forged, it could recover. * * * A leading authority on the subject is Bank of England v. Vagliano Bros., L. R. 1891 App. Cas. 107. * * *

Under the negotiable instruments law and the cases cited, I am of the opinion the checks in question, as between plaintiff and defendant, were payable to bearer. It does not appear who forged the maker's signatures, but the subsequent history of the checks does not leave it open to doubt that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the Bank of England and the Phillips Cases, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, in order to accomplish the fraud more easily, the names inserted as payees were those of persons to whom checks might naturally be made. Whether indorsing the names of the payees upon the checks was technically forgery or not it is unnecessary to consider. It has been convenient to thus describe them. Despite these forged indorsements, then, the defendant acquired good title, since in legal effect the checks were payable to bearer. Plaintiff, having paid them to a holder in due course, cannot recover upon the ground that the payees' signatures were forged. * * *

[Quoting from Shipman v. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, the court said:] "The maker's intention is the controlling consideration which determines the character of such paper." * * *

I am of the opinion that the plaintiff has no legal claim against the defendant, and for that reason the latter is entitled to judgment upon the merits, with costs.

SEABOARD NAT. BANK v. BANK OF AMERICA.

(Court of Appeals of New York, 1908. 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. [N. S.] 499.)

Action by the Seaboard National Bank against the Bank of America. From a judgment of the Appellate Division, affirming a judgment for plaintiff, defendant appeals.

Three persons doing business under the firm name of E. V. Babcock & Co., at Pittsburg, Pa., were depositors in the Federal National Bank of that city. One Pennock was the auditor and chief bookkeeper, and known by said bank to be in the employ of said firm. On September 17, 1904, said Pennock went to said bank, and presented a check purporting to be signed by said firm, drawn upon said bank, payable to the order of "N. Y. Draft," for $2,000, and requested said bank to give him a New York draft for $2,000, payable to the order of "Carroll Bros." A draft was drawn by said bank upon the plaintiff, a bank-

ing institution in the city of New York, and delivered to said Pennock. Said Pennock thereupon went to the Mellon National Bank of Pittsburg, Pa., in which bank he had a personal account, and he thereupon signed the name of "Carroll Bros." on the back of said draft, and deposited the same to his account in said Mellon National Bank. The draft was indorsed by the Mellon National Bank, and forwarded to its correspondent, the defendant, in the city of New York. The defendant collected said draft of the plaintiff, through the clearing house in the city of New York in the usual course of business. The check upon the Federal National Bank, which purported to be signed by E. V. Babcock & Co., was a forgery. "Carroll Bros." is a partnership, composed of two members, doing business in Pennsylvania, and it had dealings, from time to time, with said E. V. Babcock & Co., but in the dealings with said E. V. Babcock & Co., Carroll Bros. were always indebted to E. V. Babcock & Co. The indorsement of the name "Carroll Bros." upon said draft was without the knowledge or authority of said Carroll Bros., said E. V. Babcock & Co. or of said Federal National Bank.

This action was brought to recover the amount of said draft, and judgment was entered in favor of the plaintiff, from which judgment an appeal was taken to the Appellate Division of the Supreme Court, where the judgment was unanimously affirmed, and from such judgment of affirmance an appeal is taken to this court.

CHASE, J. The Federal National Bank was a depositor with the plaintiff. The relation existing between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor. * * * It is provided by the Negotiable Instruments Law that: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." * * * If it was necessary for Carroll Bros. to indorse the draft before it could be paid by the plaintiff to the account of the Federal National Bank, then it was never so indorsed, because Pennock's act was a forgery, and wholly inoperative. The defendant cannot retain the money paid to it by the plaintiff upon such unindorsed draft, for the very excellent reason that it had no title to the instrument upon which the money was paid. It is further provided by the Negotiable Instruments Law (section 28) as follows: "The instrument is payable to bearer: * * * When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable. * * *"

It is claimed by the defendant that the draft was payable to a fictitious or nonexisting person, and consequently writing the signature of Carroll Bros. on the back of the draft was not in legal effect a forgery, and not necessary to protect the plaintiff in its payment. * * * We * * * think that the defendant is wrong in its contention that the draft was payable to bearer as defined in the Negotiable Instruments Law. It is only when a person making an instrument knows that he is making it payable to a fictitious or nonexisting person that it can be treated as payable to bearer.

The appellant asserts that a person to whom a draft, made payable to a third person, is issued can, while he remains the owner thereof, divert it from the purpose for which it was intended, and that, for the purpose of such diversion, or of returning the amount of the draft to his account in the bank, he can indorse the payee's name thereon without being liable for the crime of forgery. Assuming that, in cases where the draft has never been delivered to the payee, or the payee has not in some way obtained a vested interest therein, the appellant is right in its claim, the assumed authority to so indorse the payee's name thereon does not arise because the draft is payable in legal effect to bearer, but because of the fact that such an act of the owner is harmless. Such means of recalling a proposed transaction, or of changing the use to be made of a draft, is sustained upon the right that a person has to do as he pleases with his own, and for that reason, until the rights of others in the draft have become vested, the acts of the owner therewith are innocent and colorless. * * * There is no presumption arising from the facts proven that the name "Carroll Bros." was intended as a fictitious or nonexisting payee. Such intention, to be effective, must necessarily arise from knowledge, and exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery. * * *.

Selover in his work on Negotiable Instruments Law (page 70) says: "The doctrine that a check or bill made payable to a fictitious person is payable to bearer, and negotiable without indorsement if the fictitious character of the payee was known to the parties, originated in England, and in each of the cases holding the doctrine the decision was based on the fact that the acceptor knew, at the time of his acceptance, that the instrument was payable to a fictitious person. If the drawer or maker of an instrument did not know that the payee was a fictitious or nonexistent person, and did not intend to make the paper payable to such person, paper payable to the order of such person cannot be treated as payable to bearer, for the intention of the maker or drawer is the test." * * *

It does not appear that the Federal National Bank knew Carroll Bros. was a fictitious or nonexisting person, or intended that the instrument should be payable to bearer.

The judgment should be affirmed, with costs. * * *

MERCANTILE NAT. BANK OF CITY OF NEW YORK v. SILVERMAN.

(Supreme Court of New York, Appellate Division, 1911. 148 App. Div. 1, 132 N. Y. Supp. 1017.)

Action by the Mercantile National Bank of New York against Louis Silverman. Judgment for plaintiff, and defendant appeals.

LAUGHLIN, J. This is an action on a promissory note, upon which the defendant admitted his liability, but pleaded facts on which he demanded that the amount of two checks paid by the plaintiff and charged to his account be set off. This defense was overruled. * * *

The appellant was a private banker, conducting business in the city of New York, and for a long time he had been accustomed to purchase claims of officers of the United States army for their salaries to grow due in the future, and to take assignments of their vouch-

ers therefor. He had a drawing account with the plaintiff, and the checks which were charged to his account and the amount of which he seeks to offset herein were drawn and dated on the 16th day of September, 1907. One was for $900, payable to the order of "Lieut. Col. Frederick Marsh," and the other was for $526.50, payable to the order of "Capt. J. A. Shipton." * * *

The appellant was not personally acquainted with either Lieut. Col. Marsh or Capt. Shipton, and had had no business transactions with either of them; but in due course of mail he received a letter under date of September 11, 1907, written on the stationery of the New Willard Hotel at Washington, D. C., purporting to be signed by "Frederick Marsh, Lieut. Col. Coast Artillery Corps," and stating, in substance, that the writer observed by an advertisement in the Army and Navy Register that appellant discounted monthly pay vouchers for army officers, and stating his monthly salary; that he desired to have appellant cash his vouchers for October, November, and December of that year. * * * On the receipt of these letters and vouchers, appellant inclosed the checks, either in one envelope addressed to Marsh by his official title, or in separate envelopes, the one payable to the order of Marsh addressed to him, and the other addressed to Shipton by his official title, at the New Willard Hotel at Washington, D. C., but as to which the testimony of the appellant is uncertain. The appellant knew, by an examination of the Army and Navy Register before answering the first letter, that there were such officers, and where they were regularly stationed, which corresponded in that regard with the information contained in the letter; but he made no inquiry to ascertain whether or not they were then at the New Willard Hotel or in Washington, or to ascertain whether or not the writer of the letter was Lieut. Col. Marsh.

The primary question to be considered is whether Lieut. Col. Marsh and Capt. Shipton of the United States army were the respective payees of the checks, or whether the appellant intended to make the individual with whom he had the correspondence the payee thereof. I am of opinion that only one inference may be drawn from these uncontroverted facts, and that is that, while the appellant erroneously believed that his correspondent was Lieut. Col. Marsh, he did not determine that question, and reasonable care did not require that he determine it. * * * The appellant did not personally deliver the checks, and thus pass on the identity of the payee. He transmitted them by mail, so addressed that without violating the law they could not be received and opened by any one other than the army officers, and made the checks out in such form that they could not be collected by any one other than the army officers, without the commission of the crime of forgery, and failure on the part of the person or corporation cashing them in the first instance to require proper identification. In these circumstances, I think no title to the checks passed to the impostor. * * *

With respect to the sale and delivery of property to an impostor, where the vendor passes on the question of his identity, it has been held that the title passes, although the transaction may be rescinded for fraud. * * * It is unnecessary to decide whether a different result would be required if the appellant had delivered the checks personally, and had determined for himself the identity of the payee which would present the question as to who was intended as the payee in a

somewhat different aspect and might give rise to a question of estoppel. * * *

It follows, therefore, that the judgment and order should be reversed, * * * and the complaint * * * dismissed, with costs.

SECTION 6.—RELATION OF A DRAWEE BANK TO THE DRAWER

While a bank which has certified or paid a check drawn upon it is not a holder, the relation of the bank to its depositor is sufficiently analogous to the situations discussed in the preceding sections as to warrant a special inquiry into the nature of this contract. In many respects this is no part of the law of negotiable instruments, but is part of the law of contracts generally. The problem, in its broad outlines, is: What are the terms in the contract between a bank and its depositors? These terms are usually not expressly agreed upon, but are implied either in fact or law. No attempt is here made to present a complete analysis of the contract of deposit. A few only of its important aspects are involved in the cases following.

BLAKE v. HAMILTON DIME SAVINGS BANK CO.

(Supreme Court of Ohio, 1908. 79 Ohio St. 189, 87 N. E. 73, 20 L. R. A. [N. S.] 290, 128 Am. St. Rep. 684, 16 Ann. Cas. 210.)

SUMMERS, J. The action was brought by the defendant in error, the Hamilton Dime Savings Bank Company, of Hamilton, Ohio, against the Franklin Bank of Cincinnati, Ohio, upon a check drawn by C. G. Blake & Co. upon the Franklin Bank for $275, payable to the order of C. G. Blake, and certified by the Franklin Bank to be good, and indorsed by C. G. Blake and Charles Werbel.

On Friday, October 16, 1903, Blake bought a horse from Werbel and indorsed the check to the order of Werbel and delivered it to him in payment for the horse. The indorsement of certification was as follows: "Good for $275.00 when properly indorsed. The Franklin Bank, H. Sachteleben, Teller." Werbel indorsed the check, and on the following Monday, October the 20th, deposited it to his account with the Hamilton Dime Savings Bank Company, and was given credit therefor on the books of the bank. The Hamilton Dime Savings Bank Company sent the check to the Atlas National Bank, of Cincinnati, for collection, and it was protested for nonpayment for the reason "payment stopped." Thereupon, on November 19, 1903, the defendant in error sued the Franklin Bank on the check, and the Franklin Bank filed a motion for an order of interpleader, which was granted, the amount of the check with interest was paid into court, and C. G. Blake was substituted as defendant. Blake filed an answer averring that he had been induced to purchase the horse and to deliver the check in payment therefor by the false and fraudulent representations of Werbel, that Werbel is the owner of the check, that the plaintiff, The Hamilton Dime Savings Bank Company, received the check only as collecting agent for Werbel and with knowledge that Werbel had been notified that payment on the check would be stopped.

A jury was waived, and the court stated its findings of fact separately from its conclusions of law. Judgment was given for the bank for the amount paid into court, less costs to the date of that payment. The court found that the Hamilton Dime Savings Bank Company was the purchaser of the check for value and before notice and without knowledge of Blake's claim. * * *

In this state a bank check for part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn, * * * and the holder cannot maintain an action against the bank for the amount of the check, although it has funds to the credit of the drawer sufficient to meet it. * * * This is now made the law by statute. * * * [N. I. L. § 189] is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

But this is a certified check. Mr. Daniel says that the certification of modern commerce is quite recent in its origin, but now of daily and extensive occurrence. And in Merchants' National Bank of Boston v. State National Bank of Boston, 10 Wall. 604, 19 L. Ed. 1008, decided in 1871, Mr. Justice Swayne says in the opinion that "it is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than $100,000,000," and that "we could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity." And, speaking of their legal effect, he says: "By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion. A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in 'certified check account,' and, when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process. The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money." Daniel (section 1603) says that, when

the check is certified, the bank becomes at once the principal debtor, and that, when the holder procures the bank to certify the check "in contemplation and by operation of law, it is the same as if the funds had been actually paid out by the bank to the holder, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. In other words, a certified check is a shorthand certificate of deposit in favor of the holder, and payable to him, or to him or order, or to bearer, according to its terms." Again, he says: "It will be too late after the bank has certified the check for the drawer to revoke it, and the bank will be bound to pay it though notified by the drawer not to do so." And again he says, in section 1605, that "the check when certified circulates as the representative of so much cash in bank, payable, whenever demanded, to the holder. It is then like cash, but still it is not the same as cash. * * *

The drawer by delivery of a certified check in the absence of special agreement, is not discharged from liability, the only effect of the certification being to add the credit of the bank to that of the drawer. * * * And the same is true as to a holder who procures the check to be certified before delivery. He is a new drawer and will be held liable as will the bank. If, after delivery, the holder procures a check to be certified, the drawers and indorsers are thereby discharged. * * * In this case the payee, Blake, procured the certification of the check after delivery to him and before delivery by him to Werbel, thereby discharging Blake & Co., the drawers, and making himself as well as the bank liable on the check. * * * The certification operates as an assignment of the funds to meet the check and makes the bank liable to the holder.

What, then, are the rights of the parties? If Blake had given Werbel money, instead of the check, and Werbel had deposited the money to his credit in the Hamilton Bank, the relation of debtor and creditor between the bank and Werbel would thereby have been created. In C., H. & D. R. R. Co. v. Bank, 54 Ohio St. 60, 71, 42 N. E. 700, 702, 31 L. R. A. 653, 56 Am. St. Rep. 700, it is said by Spear, J.: "The relation of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee and cestui que trust." And again: "The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous." The money would belong to the bank, and Blake could not acquire any interest in it or impose any liability on the bank merely by notifying it that Werbel had obtained the money from him by defrauding him in a horse trade. * * *

Now, while it is true, as has been pointed out, that the delivery of the check was not payment for the horse, and that Blake was liable on the check, still, if certified checks are to circulate as money and to perform the useful purpose in trade they have heretofore, the deposit of them in bank to the credit of the holder must be, so far as the rights of the indorser are concerned, treated as a deposit of money. The transaction under consideration may serve in some slight measure to illustrate their use. Blake may have supposed that Werbel would want cash for the horse and would not accept his check, and, not wishing to carry the money from Cincinnati to Hamilton, he procured the certification of the check, and Blake accepted it as readily as he would have accepted cash; but, if he could not accept it with the

same security that he could cash, then, under such circumstances, a certified check could not be used at all, or the indorsee of such a check, if he wishes to avoid embarrassment and delays, such as have resulted in this case, must at once present the check for payment and deposit the money, instead of the check, in bank. This being so, then the obligation of the Franklin Bank to pay the check was not affected by the notice to it by Blake not to pay, and the right of the Hamilton Bank to enforce payment was not affected by notice of Blake's claim.
* * *

The judgment is affirmed.

GLENNAN v. ROCHESTER TRUST & SAFE DEPOSIT CO.

(Court of Appeals of New York, 1913. 209 N. Y. 12, 102 N. E. 537, 52 L. R. A. [N. S.] 302, Ann. Cas. 1915A, 441.)

Action by John W. Glennan against the Rochester Trust & Safe Deposit Company. From a judgment of the Appellate Division in favor of the defendant, plaintiff appeals.

CULLEN, C. J. The action is brought by the plaintiff as administrator of a depositor in the defendant trust company to recover the amount of a deposit made by the intestate. The defense was payment and an assignment of the deposit by the intestate to a third party. The payment proved was that of a check drawn by the intestate, but not presented to or paid by the defendant until after the death of the former, of which the defendant claimed to be ignorant. While the case was submitted to the jury on both issues, the jury was directed to answer specific questions of fact, one of which was: "Did the bank pay the money without knowledge of the death of John Callahan (plaintiff's intestate) and in the due course of business?" This question the jury answered in the affirmative. If the finding required a verdict in the defendant's favor, as the trial court charged, it is not necessary to consider the other rulings on the trial of which the appellant complained, as they do not affect this issue.

It is singular that there should be such a paucity of judicial decisions on this question, as seems to be the case. In my search through the reports I have been able to find only one on the precise point, Rogerson, Executor, v. Ladbroke, decided by the English Common Pleas in 1822 (1 Bing. 93), in which it was held that the payment or rather the charge of a check to a depositor's account made by the banker after the death of the depositor, but before the bank had received knowledge of that fact, was a valid payment, and that the banker was not liable for the amount. There is another case often cited to the same effect (Tate v. Hilbert, 2 Vesey, Jun. 112) where the Lord Chancellor expressed the opinion that if the holder of a check had collected the money from the banker after the death of the drawer, but before the banker had knowledge of death, no court would take the money away from her. This was purely obiter, simply the chancellor's opinion, for, as a matter of fact, the suit in which the opinion was expressed was dismissed and the complainant remitted to her action at law. On the other hand, none of the cases cited by the learned counsel for the appellant is authority for the contrary proposition.

The greatest reliance is upon Davis, Adm'r, v. Windsor Savings Bank, 46 Vt. 728. There a woman from time to time deposited cer-

tain sums of money in a savings bank to the credit of her brother, in whose name the pass-book was issued. The jury found that these moneys were the property of the brother and had been collected by the woman on his account. After the death of the brother, but before notice of that death had reached it, the defendant paid the amount of the account to the woman who presented the pass-book. It was held that death revoked the agency of the plaintiff, and that the payment was bad. No question of the payment of a check was involved in this case, for there was none. * * * In Pullen v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, the check was paid, not only after the death of the drawer, but after the defendant had been informed of the death, as is stated in the opinion of the court. But, while there is this paucity of judicial decisions on the subject, there seems to be absolute unanimity in the rule as declared by the leading text-writers. Chitty on Bills, *429, Byles on Bills (Sharswood Ed.) p. 22, 2 Parsons on Notes and Bills, p. 81, Story on Promissory Notes, § 498a, Edwards on Bills and Notes, § 739, Morse on Banks and Banking, § 400, and Daniels on Negotiable Instruments, § 1618b, all declare that, while a bank should not pay a check after the death of the drawer, still a payment made in good faith, without knowledge of the death, or of facts sufficient to cause inquiry, is a valid payment, though the only authority usually cited is that of Tate v. Hilbert (supra).

For the appellant it is argued, first, that a check of itself is a mere order for the payment of money, not operating as an assignment of any part of the fund, the authority of the drawee or the banker to pay which may be revoked or countermanded by the drawer. This is the rule of law prevailing in England and in this country, with the exception of a very few states in which a check is considered as an assignment of the fund. The rule stated is unquestionably the law of this state as well as the law of the federal courts. * * * That the death of the principal revokes the authority of the agent to collect the check in those jurisdictions where the check is considered a mere order must also be conceded. * * * It is further true that the common-law doctrine that death revokes an agent's power, even as to third parties dealing with the agent in good faith without notice, is the general rule in this state. * * *

At this point we reach the very crux of this case, and the question is whether payment of checks by banks or bankers is an exception to the rule stated. I think it is. It must be first borne in mind that the rule itself is an exception to the still broader rule that revocation of the power of an agent does not affect third parties dealing with him in good faith without notice. This is the rule of the civil law even where the agency is revoked by death. The common-law rule in some states has been changed by statute, in others repudiated, * * * while in still others greatly limited. * * * There are differences between the liability of banks to their depositors and that of ordinary debtors to their creditors which justify excepting the payment of checks from the rule. If an ordinary debtor refuses to pay his debt to the agent of his creditor, his liability is in no respect increased. It is not so with a bank. Its contract with the depositor is to pay his checks as long as his deposit is sufficient for the purpose, and for a failure to pay the checks the bank is liable for any injury to the credit of the drawer occasioned thereby. In the ordinary conduct of a bank but a minute

fraction of its payments is made directly to its depositors. The others are made on checks in favor of third parties, usually, at least in large cities, presented through other banks or the clearing house. The number of depositors is often very great, many of them living at other places than where the bank is located. Of the death of those prominent, either by their public position, their business activities or great wealth, the bank might be apprised; but of the great mass their deaths would pass unknown by the bank unless notice of the fact was given. It would be utterly impracticable for business to be done if, before the bank could safely pay checks, it must delay to find out whether the drawer is still living.

But the dominant and controlling reason for holding that the usual rule that a debtor is not protected in payment to an agent after the death of his principal, though without knowledge of that fact, is not applicable to the payment of checks by banks, is that such has almost universally been accepted as the law. As already said, all the text-books so state the law (in England it has been so settled by section 75 of the Bills of Exchange Act of 1882), and apparently the whole country has assumed the text-books to be right. The rule thus adopted, if not strictly a rule of property, is a rule of conduct affecting property interests that very closely approximates to a rule of property. I think the fact that the rule has been adopted by the community is reasonably clear. The use of banks as depositories of money and the practice of making payment by checks prevails in this country to an extent far beyond that existing in any other, so that the situation presented in this case must have frequently arisen. True, where the estate of the depositor is solvent and the check is given for value, it is of no practical moment whether the bank is liable for the payment of a check after the death of the drawer or not. Very many, however, must have been the cases where either the estate was insolvent or the check was given without value and the bank has paid it after death, in ignorance of that fact. Yet, in my research, I have not been able to find in the reports in this country or in England a case where it was sought, under such circumstances, to hold the bank liable except the Rogerson Case, supra, in which the attempt failed.

The rule that denies protection to persons dealing with an agent after the death of the principal, though in good faith and without knowledge of that fact, is an inherited one. In the Wilson Case, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696, it was declared by this court to be a harsh one, but the court felt that it had been too firmly established in this state to be disturbed by judicial decision, though it recommended a change by the Legislature, to place the law in harmony with the more enlightened views of the present time and to promote the interests of justice. The same reason which there constrained the court to give effect to the rule, despite its disapproval of it, should also impel us to hold the rule inapplicable to bank checks. If there it appeared that the doctrine of the common law had prevailed too long to be disregarded, it also appears almost equally clearly that the common-law doctrine has never prevailed as to checks; for a legal proposition may be nearly as well established by its general acceptance and the failure of any one to question it as it can be by a series of judicial decisions. Even if it should be assumed that the distinction sought to be drawn between the relation of a bank to its depositors and that between ordinary debtors and their creditors would not justify a

distinction in the principle of law applicable to the respective cases, nevertheless a rule of conduct of a whole people long prevailing and acted upon should not be subordinated to mere consistency of legal principles. The law presents anomalies. They are to be regretted; but no one would maintain that merely to avoid inconsistency courts would be justified in disregarding rules of action long established by judicial decisions, especially when the exception is more just than the general rule.

The judgment appealed from should be affirmed, with costs. * * *

THIRD NAT. BANK OF ST. LOUIS v. OBER.

(United States Circuit Court of Appeals, Eighth Circuit, 1910. 178 Fed. 678. 102 C. C. A. 178.)

HOOK, Circuit Judge. This was an action by William A. Ober to recover damages of the Third National Bank of St. Louis for its failure to pay a check drawn by him on his account. He obtained a judgment, and this writ of error was prosecuted.

Ober, who lived in Natchez, Miss., had a small account with the defendant bank at St. Louis, Mo., and, wishing to transfer a part of it to his home bank, he drew a check in its favor for $50. At the time his account with defendant had a credit balance of $122.14. When in due banking course the check was presented, defendant refused payment on the ground that Ober's account had been withdrawn. The check was protested for nonpayment. There was no malice or ill will in the action of defendant. It was due solely to a clerical error of a bookkeeper. Ober was not a merchant or trader. He sued for protest fees, and for general damages to his honor, truth, and business standing. Aside from the protest fees, no special damages were alleged in his petition, and the evidence at the trial disclosed none. He received a verdict and judgment for $500.

The trial court refused defendant's request that the jury be instructed to confine their verdict to the protest fees and interest. It then instructed them substantially as follows:

There is no evidence that defendant acted maliciously in refusing payment of the check, nor that plaintiff sustained special damage. If there was evidence of this character, you would be justified in awarding substantial damages. As there was no malice, but only a bookkeeper's mistake, and as special damages are not shown, the question is: What is the measure of damage? The plaintiff is entitled to recover the protest fees "and such other damages as under all the evidence in the case you may believe he is entitled to . * * * You are all business men, and I am disposed to leave the question entirely to your decision and judgment, without any special comment, only saying to you, however, that you ought not limit your verdict to nominal damages, but to give the plaintiff such temperate damages as you, in your judgment, may deem to be reasonable compensation for the injury he sustained by dishonoring his check. As to this you are the sole and exclusive judges."

The jury retired, and returned into court for further explanation of the instructions, saying: "We want to know whether we are required to give plaintiff some substantial damages."

The court responded that the instructions meant: "There should be no excessive damages, and not mere nominal damages; that the jury

should award such damages as they believe from all the circumstances plaintiff is entitled to." Appropriate exceptions were taken by defendant. As already observed, there was verdict for $500.

With some exceptions the underlying principle of the law of damages is compensation for the injury done. In cases of malice, willful wrongdoing, a conscious disregard of the rights of others, and the like, an additional award may be given by way of punishment. Again, every invasion of a legal right is presumed in law to cause an injury, and, though none is shown, there may nevertheless be a recovery of nominal damages, with costs of the action. Such a recovery is a judicial recognition of the right and an admonition that it cannot be invaded with impunity. The relation between banker and depositor is one of contract. The right of the latter is that, to the extent of his credit balance subject thereto, his checks drawn and presented according to the customs and usages of the business shall be promptly honored. For a breach of this right an action for damages will lie. If the depositor is a merchant or trader, it will be presumed, without further proof, that substantial damages have been sustained. * * *

This rule proceeds upon the fact, commonly recognized, that the credit of a person engaged in such a calling is essential to the prosperity of his business, and the dishonoring of his checks is plainly calculated to impair it and inflict a most serious injury. In common opinion, substantial damage is the natural and probable consequence of the act, and therefore a substantial recovery may be had, without pleading or proof of special injury. A leading case upon this subject is Rolin v. Steward, 14 C. B. 595, 23 L. J. C. P. 148. * * *

On the other hand, if the depositor is not a merchant or trader, there is no such presumption of substantial injury, and this recovery should be a nominal one, unless he pleads and proves some special damage. * * * Upon this latter proposition there is confusion and conflict in the decisions of the courts, due in large part to the undiscriminating application of Rolin v. Steward to cases wholly unlike it in the important particular mentioned. But we think the rule stated is more in accord with the fundamental principles of the law of damages.

Counsel contend that the presumption arising in the case of a merchant or trader is merely that he possesses credit, and that when the depositor is not a merchant or trader the fact not presumed may be established by proof, and same right to substantial damages would then follow. The character of the presumption is misconceived. It is not so much the possession of credit, as it is that substantial injury thereto has been inflicted by the dishonoring of the check. The very reason for allowing general substantial damages to a merchant or trader, without a showing of special injury, implies a contrary rule, generally, as to those not of that class. A mere technical violation of a right is no just basis for a recovery of general and substantial damages, where no actual injury is shown, and none appears to follow as the natural and probable consequences of the act. In the case before us there was no averment of particular circumstances or special injury, aside from the protest fees, and none was proved. On the contrary, witnesses of plaintiff, who knew of the dishonoring of his check, testified that his credit was not injured. We think the court erred in instructing the jury that the verdict should be for more than the protest fees and nominal damages.

The judgment is reversed, and the cause remanded for a new trial.
* * *

CALIFORNIA VEGETABLE UNION v. CROCKER NAT. BANK.

(District Court of Appeal, First District, California, 1918. 37 Cal. App. 743, 174 Pac. 920.)

Action by the California Vegetable Union, a corporation, against the Crocker National Bank of San Francisco, a national banking association. From a judgment in its favor granting only a part of the relief demanded, plaintiff appeals.

BEASLY, Judge pro tem. The California Vegetable Union is a Los Angeles concern having a branch house in San Francisco. Of this branch house during the period in which we are interested H. F. Ardery was the manager and Fred B. Weeks the cashier. During the years 1911 and 1912 and until the end of the year 1913 the plaintiff's branch house in San Francisco was a depositor of the defendant bank. The bank was instructed to pay checks of the plaintiff when signed by Fred B. Weeks, its cashier, and H. F. Ardery, its manager. Weeks became an employé of the plaintiff about the 1st of May, 1912, and continued in that employment until about September 1, 1913, when he "departed these quarters for parts unknown, leaving behind him a trail of forged checks." Between September 18, 1912, and August 28, 1913, Weeks forged the name of Ardery to 136 separate checks, all drawn upon the plaintiff's account in the defendant bank, and aggregating $3,972.65. The bank cashed these checks, and charged their amount to plaintiff's account. The checks went through the bank during the various months of this period, and at the end of each month the forged checks paid during that month, together with all the valid checks of the plaintiff, were returned to it, with a list of all checks paid by the bank during that month. * * * These returned checks and these accounts for all of the months from August, 1912, to August, 1913, although regularly received in the course of business at the end of each month during that period, were never examined by the plaintiff, nor by its manager, Ardery, until some time in September, 1913, after Weeks had absconded. * * *

The principal problem in this case may be stated in the language of the Supreme Court in the case of Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529, and is as follows: "The claim made by the" appellant "was that * * * the evidence presented the simple case of a forgery * * * to which is to be applied the well-settled rule that as between the bank and its customers the payment of forged or altered checks by such bank is made at its peril, and cannot be charged against the depositor's account. This, of course, is the general rule, and it is applied stringently in cases of simple forgery which involve no other elements than that the purported check of the depositor which was paid was a forged one. But this rule is not applied unqualifiedly. It has its limitations and exceptions, as general rules usually have, and is modified to the extent that when some negligent act * * * of the customer has contributed to the payment by the bank, or the facts in a particular case surrounding the forgery of a check and its presentation and payment are of such character as call for the application thereto of some general principle of law or equity, they may be relied on by the bank as an estoppel against the customer, precluding him from denying the correctness of the payment." * * *

The principle embodied in the case of Otis Elevator Co. v. First Nat. Bank, supra, and the general rule above stated, find emphatic approval

and application in the leading case of Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, in which the court, treating the presentation of a bank book written up accompanied by the canceled checks of the depositor to him as an account stated, says: "Where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself, or to have it made, in good faith, by another for him, by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given," the depositor is estopped by his conduct, to question the conclusiveness of the account stated which arises out of the presentation to him of the account and his failure to examine it and detect the frauds contained therein, and give the bank notice thereof in order that it may protect itself against future frauds of a similar character." * * *

Without quoting further, it may be said that the great weight of authority in the United States supports the conclusions arrived at in the cases above cited. It is true that those cases were based upon bank books written up, but there is no distinction in principle between the old-fashioned bank book and the modern statements furnished by a bank to its depositors from time to time upon the balancing of their accounts and the return of the canceled checks to them. Improved methods of bookkeeping in banks do not render inapplicable the rule of law here invoked and applied. To lay down any other rule than that hereinabove stated would be to add an unjust burden to the duties of paying officers of banks. The greatly increased volume of business consequent upon the development of modern commerce, and the almost universal use of checks in settlement of every conceivable obligation, make the post of paying teller of a bank—compelled as he is to know the signature of every depositor of a bank—an exceedingly difficult one. If depositors may regularly at frequent intervals receive their vouchers and be notified, as was the appellant here, of reduced balances of their accounts in banks consequent upon the unfaithfulness of trusted employés during a period of nearly a year, and by neglecting to exercise reasonable supervision over their own business fail to discover fraud which has been perpetrated upon them and the bank, and may thus leave the bank in ignorance of the frauds thus committed, and charge the bank with the losses thus occasioned, then banks and their paying tellers face hard conditions indeed. We do not feel justified in establishing any such rule in this state. * * *

For the foregoing reasons, the judgment is affirmed.

SECTION 7.—RIGHTS AND LIABILITIES OF PARTIES WITH RESPECT TO ACCEPTANCES AND PAYMENTS FOR HONOR

(a) WHEN ACCEPTANCE OR PAYMENT PERMITTED

Section 161. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable there-

on may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

Section 171. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Section 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

(b) WHAT CONSTITUTES ACCEPTANCE AND PAYMENT

Section 162. An acceptance for honor supra protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

Section 172. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

Section 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

(c) PRESENTMENT FOR ACCEPTANCE TO ACCEPTOR FOR HONOR. DISHONOR BY ACCEPTOR FOR HONOR, AND EXCUSES FOR NON-PRESENTMENT

Section 166. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

Section 168. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.

Section 170. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

Section 169. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

(d) RIGHTS AND LIABILITIES OF THE PARTIES

Section 165. The acceptor for honor, by such acceptance engages that he will, on due presentment, pay the bill according to

the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

Section 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Section 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Section 176. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

Section 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

SECTION 8.—BILLS IN A SET

N. I. L., Section 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

N. I. L., Section 179. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

N. I. L., Section 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

N. I. L., Section 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

N. I. L., Section 182. When the acceptor of a bill drawn in a set, pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

N. I. L., Section 183. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

CHAPTER V

RIGHTS OF THE HOLDER AGAINST INDORSERS AND THE DRAWER

Section
1. Introduction.
2. Rights of the Holder Against the Unqualified Indorser.
3. Rights of the Holder Against the Qualified Indorser and the Transferor by Delivery.
4. Rights of the Holder Against the Accommodation Indorser.
5. Rights of the Holder Against the Restrictive Indorser.
6. Rights of the Holder Against the Drawer.

SECTION 1.—INTRODUCTION

In this chapter we are dealing with the rights of the holder, both holders in due course and holders not in due course, against parties secondarily liable on the instrument. There are five situations to be taken into consideration: (1) What are the rights of the holder against the unqualified indorser; that is, one who has negotiated either by special or blank indorsement? (2) What are the rights of the holder against the qualified indorser, the transferor by delivery; that is, one who has indorsed "without recourse," or has transferred an instrument merely by delivery. (3) What are the rights of the holder against the accommodation indorser; that is, one who is a surety for a principal debtor? (4) What are the rights of the holder against the restrictive indorser? (5) What are the rights of the holder against the drawer?

It should be borne in mind that the whole matter of real and personal defenses is applicable to suits between the holder and secondary parties just as it is between the holder and parties primarily liable; that is, if B. induces A., by fraud, to indorse an instrument to him, or if it is negotiated by A. to B. as a gift, C., a holder below B. who fulfills all the requirements of a holder in due course as regards A. may hold A. free from all personal defenses which A. had against B., the party with whom he dealt. On the other hand, all real defenses which A. had against B., may be set up against C. This phase of the liability of indorsers is not again presented in this chapter; that is, this chapter, except incidentally, is not concerned with the similarities of liability between primary and secondary parties, but to the differences in the nature and extent of the liability between these two sets of parties.

SECTION 2.—RIGHTS OF THE HOLDER AGAINST THE UNQUALIFIED INDORSER

The liability of an unqualified indorser is a double liability—the one, conditional; the other, unconditional. The conditional liability is to pay the holder if the instrument be dishonored after due presentment and due notice of dishonor. This liability is on the instrument itself. The unconditional liability is not upon the instrument, but is an extrinsic liability. This liability arises from the fact that the indorser, in addition to his contract of indorsement, is a vendor of personal property, and as such impliedly warrants the truth of certain facts. The following section of the act defines the conditional liability of the unqualified indorser:

N. I. L. Section 66. (2) Every indorser who indorses without qualification * * * engages that on due presentment, the instrument shall be accepted or paid or both as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

The fact of indorsement, either in blank or special, is an offer to each subsequent holder of the instrument, which offer is automatically accepted by each successive holder. The above section prescribes the terms and legal effect of this contract. The parties may enter into any kind of contract which they agree upon, but unless they manifest their intention by appropriate words on the instrument the contract of indorsement as defined in the above section governs. The liability of the indorser is a contractual liability on the instrument. While the indorser's liability is on the instrument, his obligation may be, and frequently is, much broader than the obligation of the party primarily liable thereon, for the reason that the indorser contracts to pay the amount called for by the instrument to the holder. The indorser is liable to subsequent holders, whatever the reason may be for non-payment by the party primarily liable thereon. Even where such primary party possesses a real defense, the holder has a right to demand payment from any prior unqualified indorser. The liability of the unqualified indorser is, however, a conditional liability. The duty of the indorser to pay does not arise until the conditions precedent specified in the above section occur. His duty to pay arises when and only when the holder has made a due presentment for payment, and has given due notice of dishonor, and in some cases, has duly protested the instrument. What constitutes a due presentment for payment, due notice of dishonor and protest, is the subject of the next chapter. The principles of the preceding chapters which determine who are holders in due course, and which define the defenses which are and which are not available against holders in due course, are likewise applicable to suits between an indorser and a subsequent indorsee. The immediate indorsee from an in-

dorser may or may not be a holder in due course as regards his indorser. Usually an indorsee will not be a holder in due course as regards his indorser, though he will usually be a holder in due course as regards all indorsers prior to his indorser, as regards the drawer and the parties primarily liable on the instrument—the maker or acceptor. An indorser, whose liability has become fixed by due presentment, due notice of dishonor, and due protest, may avail himself of all personal defenses as against any subsequent holder who is not a holder in due course as regards himself. As regards all subsequent holders, who are holders in due course as regards the indorser, such indorser may defeat liability only by establishing a real defense of his own. To be available, the defense must be real as to him. The indorser cannot set up defenses, either real or personal, which belong to the maker, drawer, acceptor, or to any other party prior to him.

The unconditional liability of the indorser, which arises, not from his contract of indorsement, but from the fact that he is a seller of property, is defined in the following section:

N. I. L. Section 66. Every indorser, who indorses without qualification, warrants to all subsequent holders in due course: (1) That the instrument is genuine and in all respects what it purports to be; (2) that he has good title to it; (3) that all prior parties had capacity to contract; (4) that the instrument is at the time of his indorsement valid and subsisting.

Subsection (4) probably includes everything specified in subsections (1) and (3), and, re-phrased, subsections (1), (3), and (4) mean that the unqualified indorser warrants to subsequent holders in due course that the party or parties primarily liable on the instrument possess no defenses, either real or personal, that would be available as against such holder. Subsection (2) is a warranty that the chain of title has not been broken by the forged indorsement of the payee or any special indorsee. The indorser, therefore, is not promising to pay the amount called for by the instrument, in the event that the holder is unable to obtain payment from the primary party. He assumed this liability by his conditional engagement. The indorser as a vendor is merely promising that, if there is no legal liability on the party primarily liable to the holder, then and only then will the indorser be liable on his warranty; that is, the indorser, as a vendor of property, warrants that the holder is legally entitled to a judgment against the primary party. He does not warrant that the judgment will be paid. It is important to notice that these warranties against real and personal defenses are imposed upon the indorser, irrespective of his knowledge as to their existence.

To summarize: The unqualified indorser finds himself in this position: (1) If any subsequent holder fails to obtain payment because of the insolvency or wrongful refusal of the primary party to discharge his legal duty to the holder, the indorser will be under a legal duty to pay the holder, if there has been a due pre-

sentment for payment, and if due notice of dishonor were given to the indorser. (2) If the holder fails to obtain payment because the primary party possessed a defense, either real or personal, which under the circumstances, was available as against the holder, then the indorser will be under a legal duty to pay the holder, even though there has been no due presentment and due notice of dishonor. A holder's right to sue a former owner of the instrument on his warranties is not conditioned upon his making a due presentment for payment and giving due notice of dishonor, as is the right of the holder against an indorser upon his contract of indorsement. Neither is it necessary for the holder to wait until maturity of the instrument in order to sue former owners upon warranties. The warranty, if broken at all, is broken at the time of delivery. Suit may then be brought, although the date of maturity of the instrument has not yet arrived.

SECTION 3.—RIGHTS OF THE HOLDER AGAINST THE QUALIFIED INDORSER AND THE TRANSFEROR BY DELIVERY

Two questions are here presented: (1) What is the form of a qualified indorsement? (2) What is its legal effect? The qualified indorsement is defined as follows:

N. I. L. Section 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

In form, therefore, the qualified indorsement is a blank or special indorsement, with the added words "without recourse" or words of similar import. The legal effect of the indorsement is stated in part in section 38, by the declaration that such an indorser is "a mere assignor of the title to the instrument"; that is, such an indorser is not liable upon any contract of indorsement because he expressly negatives the special engagement of the unqualified indorser, by the use of the words "without recourse." He is but a vendor of property, or rather he is a vendor of a bundle of legal rights which he possessed against prior parties. Section 38 imposes no liability upon the qualified indorser.

The qualified indorser is, however, under some liability, just as the vendor of any property is under a liability to his vendee. The following cases represent the state of the common law with reference to the nature and extent of the liability of the indorser "without recourse" and of the transferor by delivery.

CHALLISS v. McCRUM.

(Supreme Court of Kansas, 1879. 22 Kan. 157, 31 Am. Rep. 181.)

BREWER, J. On December 4, 1871, plaintiff in error loaned one Edward A. Ege $250, and took his note therefor in the sum of $265, payable to Richard Probasco or bearer, and secured by mortgage. Long after its maturity, and in 1876, several payments having been made thereon in the meantime, plaintiff in error sold the note for its then face value to defendant in error. At the time of such sale he indorsed it: "Without recourse. W. L. Challiss." McCrum sued on the note. Ege plead usury. The plea was sustained and McCrum recovered $229.90, less than the face value of the note, for which sum he brought this action. A demurrer to the petition was overruled, and this ruling is now presented for review. Can the action be sustained? Of course no action will lie on the indorsement, for by his written contract Challiss expressly declines to assume the liabilities of an indorser. If sustainable at all, it must be as against him as a vendor, and not as an indorser, and upon the doctrine of an implied warranty. The theory of the defendant in error is that every vendor of a bill, bond, or note impliedly warrants that it is what it purports on its face to be, the legal obligation of the parties whose names appear on the instrument, and that the character of the indorsement, or the lack of an indorsement, in no manner affects this implied warranty. * * * It is clear that the character of the indorsement cuts no figure in the question; as stated, no action will lie on it. But, further, the restriction is only as to his liability as indorser, and in no manner affects his relation to the paper as vendor. An unqualified indorsement is the assumption of a conditional liability. The indorser becomes a new drawer, and is liable on the default of the drawee. "Without recourse" does away with this conditional liability. It leaves the indorsement simply as a transfer of title, and the indorser liable only as vendor; yet it leaves him a vendor and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer, and transferable by delivery. * * * Independent, therefore, of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: First, that there is an implied warranty of the genuineness of the signatures; and, second, that there is no warranty of the solvency of the parties. * * * But in the case at bar the signature of the maker was genuine. The objection is that it was never his legal obligation to the full amount for which it purported to be. How far is there any implied warranty in this respect? A reference to some of the leading cases will throw light upon this question. * * *

In Lobdell v. Baker, 3 Metc. (Mass.) 469, it appeared that the owner of a note procured the indorsement of a minor and then put the paper in circulation. He was held liable to a subsequent holder. Chief Justice Shaw, delivering the opinion of the court, says: "Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties, but he has a right to believe without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained, the purchaser of such a note has a right to believe, upon the faith of the security itself, that it

is indorsed by one capable of binding himself by the contract which an indorsement by law imports."

In Hannum v. Richardson, 48 Vt. 508, 21 Am. Rep. 152, a note was given for liquor sold in violation of law, and was by statute void. Defendant knew its invalidity, transferred it by an indorsement without recourse, and he was held liable to his vendee.

In Delaware Bank v. Jarvis, 20 N. Y. 226, a usurious note was sold, and the vendor was adjudged liable, not merely for the money received by him, but also the costs paid by his vendee in a suit against the makers of the note. In the opinion Mr. Justice Comstock uses this language: "The authorities state the doctrine in general terms that the vendor of a chose in action in the absence of express stipulation, impliedly warrants its legal soundness and validity. In peculiar circumstances and relations, the law may not impute to him an engagement of this sort. But if there are exceptions, they certainly do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it. In this case, the defendant held a promissory note which was void, because he had himself taken it in violation of the statutes of usury. When he sold the note to the plaintiffs and received the cash therefor, by that very act he affirmed in judgment of law that the instrument was unattainted so far at least as he had been connected with its origin." * * *

In Snyder v. Reno, 38 Iowa, 329, it was held that there is an implied warranty that there has been no material alteration in the paper since its execution. The court says: "We have no doubt that there is an implied warranty of the transferrer that there is no defect in the instrument, as well as that the signature of the maker is genuine." * * * See, also, 1 Dan. on Neg. Inst. 670. In this the author thus states the law: "When the indorsement is without recourse, the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse, but who is nevertheless liable if he draws upon a fictitious party, or one without funds. And therefore the holder may recover against the indorser without recourse: (1) If any of the prior signatures were not genuine; or (2) if the note was invalid between the original parties, because of the want or illegality of the consideration; or (3) if any prior party was incompetent; or (4) the indorser was without title."

These authorities fully sustain the ruling of the district court. The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as if it were no note. This was a defect in the very inception of the note. It was known to the vendor and arose out of his own dealings in the matter. By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof. * * *

The judgment will be affirmed.

LITTAUER v. GOLDMAN.

(Court of Appeals of New York, 1878. 72 N. Y. 506, 28 Am. Rep. 171.)

MILLER, J. The right of the plaintiff to maintain this action rests upon the ground that the note in question which was sold and transferred by the defendant to the plaintiff was invalid and void, by reason of its original usurious consideration. It is alleged that, being in violation of the statute against usury, it was no note, and by implication of law the defendant did warrant and undertake that the same was not usurious or illegal, but a valid and legal note. The complaint does not allege that the defendant had any knowledge of the usury or was a party to the same, but states that the seller, by the act of transfer for a valuable consideration, impliedly warranted that the paper was genuine and all that it purports to be upon its face, and incurred an obligation by the sale to make the paper good, although he did not indorse or guaranty the same. The question whether an action will lie for the loss sustained by the plaintiff by reason of the note being usurious, and the recovery of the amount thereof thereby defeated, has never arisen under the precise circumstances presented in this case, and demands an examination of the principle applicable to the contract entered into upon the sale of paper of this description, and of the authorities bearing upon the subject.

The rule is well settled that generally one who transfers paper by delivery only incurs none of the liabilities which attach to an indorser, for the reason that the irresistible inference is that if he transfers it, and it is received without his indorsement, such liabilities did not enter into the bargain or the intention of the parties. This rule, however, is not without exception, and the transferor of notes or bills by delivery warrants the genuineness of the signatures, and that the title is what it purports to be. If the paper is forged, the transferor is liable upon the original consideration which has never been extinguished by the sale. 2 Parsons on Contracts, 37, 38. So also, it is laid down by the same author that the vendor without indorsement warrants that the paper is of the kind and description that it purports to be, and there is an implied warranty that the parties to the paper are under no incapacity to contract, as from infancy or marriage or other disability, and the assignment of a bill or note for a valuable consideration raises an implied warranty that the assignor has done nothing, and will do nothing, to prevent the assignee from collecting it. The reason given as to forged paper is that it is nothing, and the one who has transferred it has transferred nothing, and is therefore liable. Id. 39, 40. The question whether paper tainted with usury, which is transferred by the holder without knowledge of this defect, can be regarded as within the principle of the exceptions stated, is not free from difficulty, and at first view there appears to be some ground for claiming that a note made in violation of a statute which declares usury to be a misdemeanor, and that all paper of this kind shall be void, should stand on the same footing as forged or other paper, which is excepted from the general rule. * * *

It is of grave importance whether a scienter is material for the purpose of upholding an implied warranty in a case of this kind. In Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163, Selden, J., lays down the rule "that whenever an article sold has some latent defect, which

is known to the seller, and not to the purchaser, the former is liable for this defect if he fails to discover his knowledge on the subject at the time of the sale." He proceeds to state that, where knowledge is proved by direct evidence, the responsibility rests upon the ground of fraud; but where the probability of knowledge is so strong that courts will presume its existence without proof, the vendor is held responsible upon an implied warranty; and the difference between the two cases is that in the one the scienter is actually proved; in the other, it is presumed. A scienter is, therefore, essential to establish an implied warranty; and as we have seen, the cases to which we have referred all show knowledge on the part of the vendor. The cases which are cited to sustain the doctrine that the scienter is immaterial where there is a warranty, either express or implied, do not go to that extent. * * *

There is no reported case which holds that, where such purchase is made without actual knowledge by the defendant, an implied warranty is established. It is true that some of the cases to which we have referred hold that express representations are not necessary to establish a case and fix a liability, but in all of those where the notes were affected by usury the evidence showed that such fact was known to the defendant. The case of a forged instrument, as we have seen, rests upon a different principle, viz.: That the note is no note, and hence none of the cases cited aid the plaintiff. * * *

In Chitty on Bills, p. 245, it is laid down that where a person obtains money on a note, and it turns out to be forged, he is liable to refund the money to the party from whom he received it, on the ground that there is, in general, an implied warranty that the instrument is genuine. Again, at page 247, it is said: "If a man assign a bill for any sufficient consideration, knowing it to be of no value, and the assignee be not aware of the fact, the former would, in all cases, be compellable to repay the money he had received." It is knowledge of the defect which renders the party liable for a note which is of no value, and this rule applies to a note which is tainted with usury. * * *

The examination we have made of the question shows that the law in regard to the transfer of negotiable bills of exchange and promissory notes, as laid down for a century or more, only excepts two cases as coming within the doctrine of an implied warranty, viz. a warranty of title, and that the instrument is genuine and not forged. There is no precedent and not a single reported case in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, that is an implied warranty of the validity of the note. To uphold such a doctrine would be an innovation upon a settled principle of law, and the establishing of a new and different rule from that which has governed the sale and transfer of this species of property for a long period of time. * * * The doctrine of caveat emptor applies, and the fault is with the person who fails to exact a warranty, if it turns out that he has been mistaken, or has unfortunately made an unprofitable or a bad bargain. * * *

The result is that the judgment was wrong and must be reversed. * * *

MEYER v. RICHARDS.

(Supreme Court of the United States, 1896. 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199.)

Plaintiffs below (plaintiffs in error here) commenced their action to recover the sum of $8,283.75, with interest from judicial demand; the facts averred in the petition being substantially as follows: In February, 1889, the defendant sold to plaintiffs thirteen bonds of the state of Louisiana. Petitioners aver that the said Richard delivered to them the above described bonds as good and legal bonds of the state of Louisiana. The petition then averred that after the sale and delivery of the bonds in September, 1889, it was discovered that they were not valid, that they had never been lawfully issued by the state, and were at the time of the sale declared by the Constitution of the state of Louisiana to be null and void, and that the state through its officials treated them as wholly invalid. The prayer was, as already stated, for a judgment for the amount which had been paid as the purchase price of the bonds.

The answer of the defendant averred that on the day of the sale, the 27th of February, 1889, the defendant was the owner of the bonds described in the petition; that they were payable to bearer, and were on the face thereof bonds and obligations of the state of Louisiana, and purporting to be issued under valid acts of the Legislature. The answer, moreover, averred that the defendant acquired the bonds long prior to the date of the sale to the plaintiffs, "by purchase in open market, for a full and valuable consideration in money, before the maturity thereof, in full and exact good faith, and with no knowledge, suspicion of belief of any defect in the title or obligation of said bonds.

There was judgment for defendant, * * * and the present writ of error was prosecuted.

WHITE, J. * * * It is obvious from the facts just detailed that the thirteen bonds which were sold by the defendant in error to the plaintiff in error were at the time of the sale absolutely void. The twelve which originally belonged to the two college funds were in express terms declared by the constitution of the state to be "null and void," and the general assembly was forbidden to make any provision "for their payment," and they were ordered to be "destroyed in such manner as the general assembly may direct." This provision of the constitution was in existence while the bonds were in the hands of the state, and before they were fraudulently and surreptitiously sold. Indeed, these bonds were never lawfully put into circulation, because, having been originally issued to represent trust funds belonging to the state, they were held by officers of the state for its account. The remaining bond was also void under the Constitution of the state, since it had been, under the express terms of that instrument, surrendered to the state treasurer for cancellation and another bond issued in its stead.

The bonds were undoubtedly sold by the defendant in error as lawful obligations of the state. Both parties to the contract of sale so considered. The pleadings and the statement of facts leave no question on this subject. The controversy here presented is wholly between the vendor and vendee as to the nature and extent of the obligation of warranty resulting from the sale. * * *

Both in England and in the United States the doctrine is universal-

ly recognized that, where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law, relating to the sale of goods and chattels. So, also, the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery vel non, but depends upon whether he has delivered that which he contracted to sell, this rule being designated, in England, as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold. * * *

Many of the controversies covered by the cases arose in consequence of the sale of a forged note, but the principles upon which all the authorities proceed do not confine the right of recovery to such a case, but rest upon the general doctrine to which we have already referred. In fact, no case is reported wherein the obligation, as between vendor and vendee, in the sale of negotiable paper, is claimed to be controlled other than by the general principles of the common law, though in three cases, Baxter v. Duren, 29 Me. 434, 50 Am. Dec. 602; Fisher v. Rieman, 12 Md. 497, and Ellis v. Wild, 6 Mass. 321, the deduction was made from the law respecting the sale of goods that on a sale of negotiable paper there was under the principle of caveat emptor no implied warranty even that the signatures to the paper were not forged. Ellis v. Wild was, however, expressly overruled in Merriam v. Wolcott, 3 Allen (Mass.) 258, 260, 80 Am. Dec. 69; and from the allusions to Baxter v. Duren, contained in the later Maine decisions previously noted in the margin, it is doubtful whether the early ruling in Maine would now be followed there. The three cases referred to, it is needless to say, are practically disregarded by the entire current of American and English authority, and stand alone. They are disavowed by the defendant in error here, since his argument admits that there is a warranty of the genuineness of the signatures, to an apparent negotiable instrument, thereby conceding the subsistence of the obligation to warrant the existence or identity of the thing sold, and yet seeking to avoid its consequences by limiting it to non-existence resulting from a particular nullity.

There is an exceptional case, Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171 (1878), which holds that the common-law obligation, as to the implied warranty of identity in the thing sold, in the case of commercial paper, extends only to the genuineness of the instrument. The case was one involving the nullity of a usurious note, and, if correctly decided, would be authority for the proposition that there was a peculiar species of warranty in the sale of commercial paper, differing from all others; in other words, that there was a law merchant of warranty where there was no commercial contract. The opinion in this case illustrates the same contradictory position presented here by the argument of the defendant in error, to which we have just called attention, that is, that it admits the common law rule and then denies its essential result by eliminating conditions of non-existence which are necessarily embraced by it. It follows that this New York decision leads logically to the view expressed in the Maine and Maryland cases just referred to, for either the principle of warranty of identity must be accepted or rejected; it cannot be accepted and its legitimate.

and inevitable results be denied. The rule there announced was in conflict with previous decisions in New York, and the decision is strongly criticised by the Court of Errors and Appeals of New Jersey in Wood v. Sheldon, 42 N. J. Law, 421, 425, 36 Am. Rep. 523. * * * It follows that the judgment of the Circuit Court must be reversed, and the case be remanded with directions to enter judgment for plaintiffs for $8,383.75, with interest from judicial demand and costs.

Under the Negotiable Instruments Law, the liability of the qualified indorser and the transferor by delivery is as follows:

N. I. L. Section 65. Every person negotiating an instrument by delivery or by qualified indorsement, warrants—(1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract. The provisions of subdivision three of this section do not apply to persons negotiating public or corporations securities, other than bills and notes; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

There would seem to be no substantial reason why the unconditional liability on warranties of the transferor by delivery and that of the qualified indorser should differ from that of the unqualified indorser. Both are vendors of negotiable instruments. The liability arising from the warranties spoken of in sections 65 and 66 is imposed upon the parties because they are vendors. Nevertheless the vendor who has indorsed without qualification under section 66 is under a broader liability than is a vendor by delivery only or by qualified indorsement. It must be noticed that the warranty of genuineness of the instrument, that the vendor has title and that all prior parties had capacity to contract are the same in both cases. But as regards the remaining warranty there is a marked difference. The unqualified indorser, by section 66, subsection 2, warrants "that the instrument is at the time of his indorsement valid and subsisting." The qualified indorser, and the transferor by delivery, by section 65, subsection 4, warrants "that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." The unqualified indorser, therefore, warrants that there are no real or personal defenses which may be successfully interposed against the claim of the holder even though he may have no knowledge that such defenses exist. With the exception of the warranty of genuineness of title and that all prior parties had capacity to contract, the qualified indorser and transferor by delivery warrants merely, he has no knowledge of existing defenses possessed by primary parties. The Negotiable Instruments Law has therefore codified the principle of Littauer v. Goldman.

There is one difference between the liability of a transferor by delivery and that of the qualified indorser. The warranty of the transferor by delivery extends only to his immediate transferee, while that of the qualified indorser, by implication, extends to all subsequent holders in due course. As a general rule, warranties which accompany sales of tangible personal property do not run to sub-vendees. It is, therefore, somewhat difficult to explain the theory on which such warranties run to subsequent holders in due course; perhaps this result follows from the notion that each successive holder under the qualified indorsement, by his transfer of the instrument, assigns his right on the warranties to his indorsee and that indorsee in turn assigns to his indorsee and so on. In the law of real property there is an analogy for the view that warranties should run to subsequent holders. Some of the covenants which a grantor of land in a warranty deed enters into with his grantee, will pass to the subsequent purchasers of the law. Such covenants are called covenants running with the land.

Where a holder of a negotiable instrument, in such form that it may be negotiated by delivery, does in fact indorse unqualifiedly, it would follow that his liability would be that of the unqualified indorser and not that of the transferor by delivery. This result is recognized in the following section:

N. I. L. Section 67. Where a person places his indorsement on an instrument negotiable by delivery, he incurs all the liabilities of an indorser.

Where the transferor by delivery is an agent for the owner on principles of the law of agency, he will incur a personal liability unless he discloses his principal.

N. I. L. Section 69. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

SECTION 4.—RIGHTS OF THE HOLDER AGAINST THE ACCOMMODATION INDORSER

We have already discussed some features of the liability of an accommodation party. Section 29 defines an accommodation party as **one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.** The liability of an accommodation party is then declared to be **on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.** An accommodation party is a surety for some principal debtor. Either party may occupy any position on the instrument. The present section deals with certain special aspects of the liability of one kind of an accommodation party—i. e., an accommo-

dation indorser. Such an indorser is sometimes called an irregular indorser or an anomalous indorser. The indorsement is said to be irregular or anomalous because the indorser was never in the chain of title. He was never the owner of the instrument. The same indorsement is spoken of as an accommodation indorsement because the indorser is accommodating a debtor by loaning his credit to the debtor.

The sections following, in the main, deal with two features of the liability of an accommodation indorser: (1) The nature of the liability; (2) the parties to whom the liability runs. The nature of the rights and liabilities of the contract of the accommodation indorser, in their broadest aspect, constitute the subject matter of that branch of the law known as the law of suretyship. To some of the more important principles there applied some reference was made in Chapter XI of Contracts. Those principles, of course, apply to accommodation indorsers the same as to all other sureties. In determining the rights and liabilities of sureties on negotiable paper several sections of the Negotiable Instruments Law must be taken into consideration. In the chapter on Discharge other sections will be referred to. Here we are interested in the four sections following:

N. I. L. Section 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

N. I. L. Section 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

N. I. L. Section 68. As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

N. I. L. Section 66. Every indorser who indorses without qualification warrants to all subsequent holders in due course * * * and engages that on due presentment, it shall be accepted or paid. * * *

In its broadest outline the problem involved in the interpretation of the above sections is: For what purposes may parol testimony be admitted in a suit against a person whose signature appears on the instrument otherwise than as maker, drawer, or acceptor. From a bare inspection of the instrument it may be determined whether the name appears on the instrument as maker,

drawer, or acceptor. No parol testimony is necessary. This is simply a question of interpretation of the words on the instrument. Section 63 then asserts that the party whose name appears on the instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser. This section is, therefore, a sweeping declaration, apparently, of the total legal effect of such signature—such party is given the rights of an indorser and is made subject to the liabilities of an indorser. In the absence of this section it is not conclusive that such party is an indorser. A signature on an instrument, wherever placed, may have been placed there by one who intended to sign as maker, acceptor, or drawer, although he did not place his name in the position where the names of such parties usually appear. Such party may have intended to assume the position of a guarantor of payment or of collectibility.

Before the Negotiable Instruments Law, there was considerable conflict of authority as to the nature of the liability of one who had never had title to the instrument and signed other than as maker, drawer, or acceptor. Many courts held that such a signer was an indorser and this view was adopted by section 63. This section therefore, would seem to render inadmissible any evidence tending to change the nature of the liability of the accommodation indorser from that of an unqualified indorser to that of a joint maker, a guarantor, or other party. The last clause of the section, permitting the accommodation indorser to vary the nature of his liability if he "clearly indicates by appropriate words his intention to be bound in some other capacity," should be interpreted as though it read "clearly indicates by appropriate words **on the instrument** his intention to be bound in some other capacity." Several courts have held, however, that parol evidence is admissible to change the liability of the accommodation indorser. The conflict which the section was intended to silence still continues.

Section 64 specifies in detail the parties to whom the liability, whatever the nature, of the accommodation indorser runs. The principle behind these detailed rules is that the accommodation indorser is liable to the creditor and is not liable to the debtor, the party accommodated. The section is phrased in language which seems to exhaust all the possibilities. There is one situation not provided for—where the indorser signed for the accommodation of the acceptor on a bill payable to the order of the drawer. Since the drawer payee is the creditor the accommodation indorser should be liable to him, but the section does not provide for this liability, for subsection 2 provides that he shall be liable only to parties subsequent to the drawer. The desire to bring about a just result has led the New York Court of Appeals, in Haddock, Blanchard & Co. v. Haddock, a case following, to allow parol testimony to be introduced to render the accommodation indorser liable to the drawer. Here again we have the difficulty which it was thought was eliminated by the act. If parol testimony may freely be admitted to establish the liability of the accommodation in-

dorser, uniformity of decision as regards the nature of his liability is improbable, and this result is not desirable. Section 64 should permit the introduction of parol testimony for the one purpose only: That the person whose signature appears on the instrument did in fact sign the same in blank before delivery.

Section 68 applies to a case where there are two or more accommodation indorsers for the same debtor, and expressly permits parol testimony to be introduced to show an agreement between them as to the proportion in which they should bear their common liability. Being co-sureties, they would share the loss equally. In the absence of this section it would be possible that the surety whose name appeared last could recover from his co-surety the full amount of the debt, a result which, obviously, should be avoided.

Section 66, dealing with the liability of indorsers, in express terms, applies to "every indorser, who indorses without qualification." This includes the accommodation indorser. The accommodation indorser therefore enters into the same special engagement to pay upon due presentment and due notice of dishonor that is imposed by the unqualified indorsement. In many states, before the act, the accommodation indorser, not being regarded as an indorser, was not entitled to due presentment and due notice of dishonor.

Section 66, also, it would seem, imposes upon the accommodation indorser the liability of a warrantor. Since the accommodation indorser is not a vendor, it is difficult to see upon what theory he should be made liable as a warrantor.

The following cases illustrate some features of the general problem involved in the application of the above sections: For what purposes may parol testimony be admitted in actions against accommodation indorsers?

ROCKFIELD et al. v. FIRST NAT. BANK OF SPRINGFIELD.

(Supreme Court of Ohio, 1907. 77 Ohio St. 311, 83 N. E. 392, 14 L. R. A. [N. S.] 842.)

SPEAR, J. Whether or not the answer avers a defense to the cause of action set up in the petition is the question here. The theory of the defendants' pleading is that Rockfield and Snyder, by writing their names across the back of the note, became indorsers in the commercial sense, and therefore entitled to notice of demand at maturity of the maker and of nonpayment, and, failing that, no liability attached. The theory of the petition is that these defendants, having signed the note before delivery, must be held to have signed with the purpose of giving it credit and of aiding negotiability, and therefore stand as maker, and although their names appear on the back of the instrument, and they are in law sureties, yet they are not indorsers in the commercial sense, and therefore not entitled to notice of demand and nonpayment. This view is the one adopted by the trial court, which incorporated in the judgment entry a finding that the defendants are in-

debted as joint and several makers of the note, and this is the view taken of the question by the circuit court in affirming the judgment of the common pleas. Which is the correct view is the question we have. * * *

That the conclusion adopted by the lower courts is in accord with the law as held in this state from early times, and with all decisions of this court thus far made, is conceded. The latest deliverance on the subject is the case of Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. 1094, 35 L. R. A. 786, 60 Am. St. Rep. 719, opinion by Williams, C. J. It is here held that where the name of a third party, a stranger to the note, appears in blank upon the back of the note at the time it takes effect, his undertaking rests upon the consideration which supports the note, and the presumption is that he intended to be liable as a surety, and he will be held accordingly, unless it is shown that there was a different agreement between the parties. This conclusion is reached after a careful and somewhat extended review of authorities, many of them decisions of this court, and is supported by strong and convincing argument. While a contrary doctrine, holding such party to be an indorser in the commercial sense, had been held in a number of states, notably Alabama, California, Connecticut, Indiana, Mississippi, New York, Oregon, Pennsylvania, and Wisconsin, the Ohio rule, as above indicated, had been the settled common-law rule of the states of Arkansas, Colorado, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, North Carolina, Rhode Island, South Carolina, Texas, Utah, and Vermont. The statute referred to is the act of April 17, 1902, known as the Negotiable Instruments Act. * * *

The question at issue very largely turns upon what is meant by the terms of section 64, the substance of which we here repeat: "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser," etc. It seems to have been the view of the learned circuit court (see opinion by Dustin, J., Rockfield v. First Nat. Bank, 8 Ohio Cir. Ct. R. [N. S.] 290) that, inasmuch as the liability defined by the rules following the above-quoted portion of section 64 does not differ essentially from the liability attaching to such party under the decisions of this court, no change in the law can be presumed to have been intended by the General Assembly in the enactment of the statute; also, that the subsequent provisions of the sections relating to indorsers and providing what shall be done to fix liability, etc., are inconsistent with this conclusion because the later sections apply only to general indorsers, and in those sections every indorser is described as such—is called an indorser—while in the earlier section the party described is only to be deemed an indorser, and has the liability of an indorser only to a limited extent.

The contention, further, is that the terms of section 63 forbid the conclusion that such party is to be deemed an indorser in the commercial sense, because he must, in order to have that effect, place his name on the back otherwise than as maker, and the rule is, and was, that the person so placing his name is a maker unless he shows a different agreement between the parties. There is much plausibility in these contentions, and they would seem to be sound were it not for the incorporation of the words "as indorser" in section 64. Had these words been left out of the section the construction claimed would

be an unnatural one. But we are required, by the inexorable rule of construction, to give to them some signification—some meaning consistent with a rational purpose in placing them in the statute. The lawmakers were making law. They cannot be presumed to have been simply dealing with legal terms in a loose, popular sense. The word "indorser" has a distinct, clearly defined legal meaning. An indorser is one who undertakes to be responsible to the holder of the paper for the amount thereof, if the latter shall, at maturity, make legal demand of the payer, and, in default of payment, give proper notice thereof to the indorser. The language of the section is plain and free from ambiguity. The words express a clear meaning. The party has placed his name upon the instrument where general indorsers sign. He is not a party to the note, but is a stranger.

Section 63 says he shall be deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity. He has used no word appropriate or otherwise. His status on the paper is, therefore, fixed by the emphatic words of the statute. Then follows the fixing of liability. He is liable "as indorser." And how is that? Why, he must pay when, and only when, proper demand has been made of the maker at maturity and legal notice given him. This is clearly shown by what follows. Every indorser who indorses without qualification engages that on due presentment and dishonor, and due notice to him, he will pay. This expresses the extent of his liability; without these requisites being complied with he is discharged. And, then, as though to cover a doubtful situation, the provision is (section 17[6]) that, where the language of an instrument is ambiguous, because of the signature being so placed that it is not clear in what capacity the person intended to sign, he is deemed to be an indorser. Of the rules prescribed by section 64, it is enough to say that they are not inconsistent with the obligation of the general indorser. He, too, is liable to those who come after him as indorsers or holder. The important question is, not to whom is such party liable, but in what capacity—in what relation—is he liable? * * *

But another purpose seems to us to be indicated by this legislation. Not only were the courts of the country in conflict respecting the attitude and liability of a third party—a stranger—who placed his name in blank on the back of commercial paper, but the situation was in itself an anomalous one, calculated to lead, as it often did lead, to confusion respecting the duty of the holder of such paper with regard to demand and notice. Mistakes in this respect were easy and were frequently made, often resulting in litigation, and, not infrequently, loss. To clear this situation up, and to establish a plain, easily understood rule, and one of universal application, was surely a result of high importance to all who deal in commercial paper, and it seems to us that the desire to accomplish this purpose had much to do with inducing the enactment of the negotiable instruments act by our General Assembly. * * *

It follows from these conclusions that * * * a person who, being a stranger to a promissory note, places his name on the back by blank indorsement, is an indorser of the paper and cannot be held in any other capacity. As such he is entitled, in order to render him liable, to notice of demand upon those who are primarily liable, and, failing such demand and due notice to him, he is discharged. The

answer, therefore, stated a defense, and the sustaining of the demurrer and rendering judgment for the bank upon the note was error.

Judgment reversed, and cause remanded. * * *

FAR ROCKAWAY BANK v. NORTON.

(Court of Appeals of New York, 1906. 186 N. Y. 484, 79 N. E. 709.)

Action by the Far Rockaway Bank against Franklin C. Norton. From a judgment of the Appellate Division, unanimously affirming a judgment on the report of a referee in favor of plaintiff, defendant appeals.

CULLEN, C. J. The action is brought on a promissory note made by one Smith to the plaintiff, which the defendant indorsed prior to its delivery to the payee. * * * The note was given in renewal and to take up an earlier note, also indorsed by the defendant. To establish the fact that the defendant had indorsed the note with the purpose of giving the maker credit with the payee, proof was given tending to show that, default having been made in the payment of the earlier note, notice of protest thereof was given to the defendant. It is urged that the evidence as to the protest of the earlier note was not of a proper character. It is unnecessary to consider this question, for, since, the enactment of the negotiable instruments law, the law obtaining in the case of such indorsement as that made by the defendant has been radically changed. Prior to that time the indorser was presumed to be a second indorser, and not liable to the payee, though it was competent for the payee to prove aliunde that the intention of the indorser was to give the maker credit with the payee. * * * The negotiable instruments law prescribes a different rule. * * *

The judgment appealed from should be affirmed, with costs.

HADDOCK, BLANCHARD & CO., Inc., v. HADDOCK.

(Court of Appeals of New York, 1906. 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. [N. S.] 136.)

Action by Haddock, Blanchard & Co., Incorporated, against John C. Haddock. From a judgment of the Appellate Division, affirming a judgment for plaintiff, defendant appeals.

CHASE, J. The plaintiff is a foreign corporation authorized to do business in this state and engaged as a wholesale dealer in coal at Binghamton. The Plymouth Coal Company, a corporation, was engaged in the operation of coal mines in Pennsylvania prior to March, 1902, at which time it went into the hands of a receiver. The defendant was the president and manager of said coal company and the owner of substantially all of its stock. The defendant was, until May, 1902, the president of the plaintiff, and during all the times herein mentioned had charge of plaintiff's New York office. At the time when the note and bills hereinafter mentioned were given the plaintiff was engaged in selling on commission at wholesale the coal mined by the Plymouth Company or its receiver, under a contract made with said coal company. One B., the vice president of the plaintiff prior to May, 1902, and its president thereafter, passed upon the financial responsibility of persons seeking credit with the plaintiff, and he arranged with a trust company at Binghamton to discount commercial

paper of the plaintiff's customers. The Lenape Coal Company, the Living Stone Coal Company, and the Montauk Coal Company were severally organized as corporations and engaged in the business of retailing coal in or near the city of New York, and the defendant was the owner of substantially all of the stock of each. Soon after the organization of such corporations to retail coal, they sought credit with the plaintiff, and their financial responsibility was investigated by B. The responsibility of each was found to be unsatisfactory, and B. so reported to the defendant, and the defendant replied that said companies were his companies and he would guarantee their credit by indorsing their paper.

On February 13, 1902, said Lenape Coal Company, for value received, executed and delivered to the plaintiff, as payee, its certain promissory note for $880.96, dated on that day, payable four months after date at a bank in the city of New York. On and between January 27, 1902, and May 13, 1902, the plaintiff, for value received, made several drafts each on either said Lenape Coal Company, said Living Stone Coal Company, or said Montauk Coal Company, payable to the order of itself as payee, which drafts aggregated $26,833.15, each of which drafts was, for value received, accepted by the coal company on which it was drawn, payable at a place and on a day in each respectively specified. The drafts or bills were all similar in form, and the following is a copy of one of said bills: "1327.41. Coal Office of Haddock, Blanchard & Co., Incorporated, New York, Apl. 28, 1902. Four months after date pay to the order of ourselves thirteen hundred twenty-seven and $^{41}/_{100}$ dollars, value received, and charge the same to account of Haddock, Blanchard & Co., Incorporated. C. N. Blanchard, Asst. Treas. To Montauk Co., Brooklyn, N. Y." Indorsed across the face: "Accepted. Payable at the Binghamton Trust Co., Binghamton, N. Y. The Montauk Coal Co., Chas. B. Smith, Treas." Indorsed on the back: "Haddock, Blanchard & Co., Incorporated. C. N. Blanchard, Assistant Treasurer. John C. Haddock."

Said note after it had been signed by said Lenape Coal Company, and each of said bills after they had been accepted by the corporation on which they were severally drawn, were indorsed by the defendant before delivery, and thereafter each of them, so indorsed, was before maturity delivered to the plaintiff as payee, and the plaintiff thereafter and prior to their maturity severally indorsed and procured them to be discounted at a trust company at Binghamton. Said note and each of said bills were given and delivered to the plaintiff for the purchase price of coal sold and delivered by the plaintiff to the acceptors, respectively, of said bills and the maker of said note, or in renewal in whole or in part of prior notes or bills given or accepted for the purchase price of coal so sold and delivered. Said note and each of said bills were so indorsed by the defendant for the accommodation of the maker of said note and the acceptor of said bills, respectively, and for the purpose of giving such maker and acceptors credit with the plaintiff, and in pursuance of an agreement between the defendant and the plaintiff by which the plaintiff agreed to sell coal on credit to the acceptors of said bills and to the maker of said note upon the defendant's guaranteeing the credit of said companies respectively, and the plaintiff was induced to take said accepted bills and said note, and each of them for such coal by reason of the indorsement of the said defendant and pursuant to said agreement that the defendant would be

liable thereon to the plaintiff in case the respective corporations primarily liable thereon should make default in payment thereof. The proceeds of said bills and note were remitted to the defendant at the New York office of the plaintiff to provide funds to pay for coal, and other current expenses. At the time when said note and bills respectively became due they were presented for payment at the place where they were respectively made payable, and payment duly demanded, which was refused, and thereupon each was duly protested for nonpayment, and notice thereof given to the plaintiff and to said defendant. Thereafter the plaintiff was compelled to take up said note and drafts and pay the amount due thereon, respectively, and became the owner and holder thereof and of each of them.

This action is brought to compel the defendant to pay to the plaintiff the amount of said note and bills pursuant to his said agreement with the plaintiff when they were severally indorsed by him, and the facts upon which the plaintiff's claim is based are stated in the complaint. The defendant denies that he indorsed the note and bills for the accommodation of and as surety for the retail coal companies, respectively; but the evidence is sufficient to sustain the findings of the court from which the statements of fact in this opinion have been taken. As the facts are found, if the intention of the parties is to prevail, the defendant should be required to pay to the plaintiff the amount of such note and bills as established by the judgment. The defendant contends that the position of his name upon the note and bills conclusively establishes that he indorsed the several instruments without liability to the plaintiff, and that parol evidence should not have been received to affect or overcome the alleged conclusive presumption arising from his indorsements as made.

In the early decisions by the courts in this state there was some confusion relating to the liability of a person who indorsed a note or bill prior to its delivery. * * * This court, in Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326, referring to a case of a person who for the accommodation of a maker indorsed a note payable to a third person, say: "Some confusion has been thrown around this subject from what has been finally settled to have been an error, treating such an indorsement as a guaranty and charging the indorser as a maker or guarantor. This doctrine was advanced in Herrick v. Carman, 12 Johns. 160, and was adjudged in Nelson v. Du Bois, 13 Johns. 175, and Campbell v. Butler, 14 Johns. 349. It was attacked in Dean v. Hall, 17 Wend. 214, and in Seabury v. Hungerford, 2 Hill, 80, and was finally overthrown in Hall v. Newcomb, 3 Hill, 233, and the same case in error, 7 Hill, 416, 42 Am. Dec. 82. The Chancellor, in his opinion in the latter case, says: 'If the object of the second indorser was to enable the drawer to obtain money from the payee of the note upon the credit of the accommodation indorser, he may indorse it without recourse, and by such indorsement may either make it payable to the second indorser or to the bearer; and such original payee may then, as legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him and subsequent indorsement of the note to him by the second indorser.'" The court further say: "If a note be made and indorsed for the accommodation of A., who indorses it to another person, and afterward in the course of trade again becomes the holder, he could maintain no action against the maker and indorser for his ac-

commodation, notwithstanding their apparent liability to him on the face of the paper. The fact of the accommodation making and indorsing might be proved to defeat the action, and it would establish that the agreement of the parties, contrary to the legal inference from the face of the paper, did not impose a liability on the maker and indorser to pay the party suing."

There has always been conflict among the courts of the several states both in asserting the principles upon which irregular indorsers upon commercial paper are to be held and in the conclusion arrived at in particular cases litigated. The number of cases is so great, and the possibility of even a partial reconciliation of them so remote, that we will confine our citation of authorities wholly to those in this state. It was well settled in this state for many years prior to the enactment of the Negotiable Instruments Law that a person who puts his name on the back of a bill or note before its delivery is presumably a second indorser and not liable to the payee, but the presumption could be rebutted by parol evidence to show that the intention of the indorser was to become surety for some prior party to the instrument. * * *

The Negotiable Instruments Law was first enacted in this state in 1897. * * * Section 64 provides: [Court quotes section 64.] By this section of said law the presumption as established by the courts in this state was changed, and an irregular indorser is now presumed to be liable in accordance with the express language of the statute. Questions relating to the sufficiency of the pleadings are settled by the statute. A complaint upon a note or bill, without alleging a collateral agreement between the parties whose names are on the instrument, seeking to recover against a person except as provided by the statute, would clearly be demurrable.

The note of the Lenape Coal Company was payable to the plaintiff, a third person, and the defendant, according to the provisions of said section, is liable to the plaintiff, the payee therein. No serious contention has been made to the contrary. The serious question for consideration arises from the fact that the bills were payable to the maker and drawer thereof, respectively, and the defendant, as an indorser thereon before delivery, is not under the statute prima facie liable thereon to the plaintiff. Should parol evidence have been allowed to show the intent of the parties? We have not discovered any exception to the rule as established by the courts of this state allowing parol evidence as between the parties whose names appear on the bill or note to determine their liability as between themselves. It is frequently stated that where a note is payable to a person other than the maker, and is indorsed by a third person before delivery, the intention of the indorser is ambiguous and uncertain on the face of the paper, and such uncertainty justifies the receipt of parol evidence to determine the true intention of the parties. We do not see that any greater certainty exists upon the face of a bill as to the true intention of the parties, where it is drawn to bearer or to the order of the maker, and it is indorsed by a third person after acceptance by the acceptor and before delivery to the payee and maker. There is a certain rule of presumption determined by common law or by statute, but the alleged reason for the rule in either case is not very apparent. The long-established rule to allow parol evidence that the intention of the parties may prevail seems to have met with somewhat general approval, with-

out discussing specifically the principles upon which such evidence is admitted. * * *

In Good v. Martin, 95 U. S. 90, 24 L. Ed. 341, the court say: "Considerable diversity of decision, it must be admitted, is found in the reported cases, where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee and before it is delivered to take effect; the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed. * * *"

It must constantly be borne in mind that the acceptance of a bill makes the acceptor the principal debtor. A bill, when accepted, becomes similar to a promissory note; the acceptor being the promisor, and the drawer standing in the relation of an indorser. * * * There is nothing in the negotiable instruments law to indicate an intention on the part of the Legislature to change the rule as established in this state relating to the receipt of parol evidence to determine the primary liability as between the persons whose names appear upon the instrument or as between those secondarily liable thereon. * * * Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, and also to determine which other party to the instrument he had accommodated. The plaintiff was the holder of the note for value, and the evidence showed that the defendant was an accommodation indorser for the benefit of the acceptor. The last subdivision of section 64, as we have quoted, makes parol evidence necessary to establish whether the indorser signed the instrument for the accommodation of the payee. It is true that this section does not expressly state that, if the indorser signed for the accommodation of the acceptor, he is liable to all parties subsequent to the acceptor; but the fact that such a provision is not included in section 64 does not prevent the admission of parol evidence to determine generally the questions relating to an accommodation party as provided by section 29.

The Negotiable Instruments Law by section 196 provides: "In any case not provided for in this act the rules of the law merchant shall govern." By section 68 of the Negotiable Instruments Law it is provided: "As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise." As we have seen, upon the acceptance of the bill the acceptor becomes the principal debtor and the one primarily liable to pay the amount of the bill, and all other parties to the instrument, including the maker and indorser, are secondarily liable. We are of the opinion that the maker of the bill is in legal effect and within the intention of this section an indorser, and that as between the plaintiff and the defendant parol evidence is authorized to determine the liability as between them.

The articles of the Negotiable Instruments Law relating to the presentation of bills and notes for payment and notice of dishonor * * * further show an intention by the Legislature to leave the order of lia-

bility among those whose names are on the instrument subject to determination by any competent evidence. * * *

There is no reason that we can conceive why the Legislature should intend to change the rule in regard to the admission of parol evidence as it had existed in this state for many years. All of the quotations that we have made from the negotiable instruments law show that it has enlarged rather than restricted the rules allowing parol evidence to show the true liability and relation of the parties whose names appear upon the bill or note in all actions between themselves. It is certainly very material to the drawer of a bill whether an indorser signs it at his request or at the request and for the benefit of the acceptor. We do not think it was the intention of the Legislature by the enactment of section 64 of the Negotiable Instruments Law to establish a rule as to the liability of an irregular indorser conclusive on the parties to the instrument as between themselves in an action where the facts showing a different intention are fully alleged. All of the decisions of our courts since the enactment of the negotiable instruments law tend to sustain the views herein expressed. * * *

In Kohn v. Consolidated Butter & Egg Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265, McAdam, J., said: "That this is the proper interpretation of the act is obvious. The true intention of indorsers as between themselves can always be shown by oral evidence. * * * To go further, and decide that the statute intended to create an incontestable liability against irregular indorsers, would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interest of law reform."

The judgment should be affirmed. * * *

COOPER v. SONK et al.

(Supreme Court of Michigan, 1918. 201 Mich. 655, 167 N. W. 842.)

Action by Arnold B. Cooper, doing business as A. & W. Cooper, against Michael Sonk and others. To review judgment for plaintiff, defendants bring error.

KUHN, J. This action was brought in the justice's court for the city of Detroit to recover from the defendants, as indorsers, the balance claimed to be due on a certain promissory note, of which the following is a copy:

$600.00 Detroit, Michigan, February 1, 1915.

"Six months after date we promise to pay to the order of A. and W. Cooper six hundred dollars at the Wayne County & Home Savings Bank, Detroit, Michigan, for value received, with interest at six per cent. per annum.

"[Signed]

St. Michael's Archangel Polish National Catholic Church
"M. Sonk.
"Victor Gorniak.
"A. Citorski."

On the back of the note appear the names of the said M. Sonk, Victor Gorniak, and A. Citorski and also of the twelve other defendants. The note was not paid at maturity and was duly protested. Judgment for $500 was rendered in favor of plaintiff by the justice

of the peace, and on appeal the circuit judge directed a verdict in plaintiff's favor for the same amount.

The note was given in renewal of a prior note which had been accepted by the plaintiff in lieu of filing a lien against the church property for materials furnished in the erection of said church. Mr. Gage Cooper, plaintiff's manager, testified that when the settlement by note was proposed, the representatives of the church agreed to have the note indorsed by some men of financial responsibility; that he looked up the proposed indorsers, found they were all right, and took the note with their indorsement. It is the claim of the defendants that the note was the note of the church corporation solely; that the names appearing on the face and back of the note were the names of the committee of the church and were signed by those persons as committeemen and not in their individual character; and that the plaintiff knew and understood this fact at the time the note was taken. Upon the trial the defendants attempted to introduce testimony to show these facts, but the court, upon objection by plaintiff's counsel, refused to admit it, on the ground that the unqualified signatures on the note could not be explained or varied by parol evidence. Whether or not the court erred in refusing to admit this testimony is the question raised by the appellants' assignments of error.

[Court here quotes sections 63 and 64 of the Negotiable Instruments Law.]

Mr. Bunker, in his work on Negotiable Instruments, in which he has annotated this act, in a footnote to the last section above set forth, in reviewing the decisions applicable thereto, says: "The statute seems to fix absolutely the status of the irregular indorser and thus excludes parol testimony to vary his liability. The only question of fact would seem to be, Did the person 'not otherwise a party to the instrument,' place his signature thereon 'before delivery'?"

From the instrument here in question it appears that the indorsements on the back of the note were unqualified, and in accordance with the decisions of this court we are of the opinion that parol evidence is not admissible to vary the terms of this negotiable instrument. As was recently said by Mr. Justice Steere in the case of Holland City State Bank v. Meeuwsen, 192 Mich. 326, 158 N. W. 1032: "Under the undisputed facts in this case, defendants' testimony along those lines, as the trial court ultimately held, was wholly incompetent, and but an attempt to reduce this written instrument from an absolute, unqualified undertaking according to its written terms to a conditional, defeasible agreement, by proof of a contemporaneous, oral contract. The court properly rejected such evidence. * * *"

The court ruled properly in rejecting the testimony in controversy. The judgment is affirmed.

SHEA v. VAHEY et al.

(Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 80, 102 N. E. 119.)

Action by John P. Shea against James H. Vahey and others. Judgment for defendants, and plaintiff excepts.

RUGG, C. J. There was evidence from which it might have been found that the plaintiff was simply the agent of one of the indorsers

of the note in taking up the note after maturity and in bringing this action.

The defendant was the first of the four indorsers upon the note. The true relation as between themselves of parties liable on a note may be shown by oral evidence in actions between them to determine their respective obligations. It is only in the absence of proof to the contrary that the law fixes the legal effect of their liability on the instrument in accordance with the order of the signature. * * * When an outside agreement is proved the rights of the parties as to each other are fixed in accordance with its terms regardless of the order in which the signatures appear on the note. * * * There was ample evidence to support a finding that the indorsers, of whom there were three at the outset, agreed before signing the original note that they should share equally whatever they might be required to pay on it, and that later when the wife of one of the three signed a renewal of the original note making four indorsers it was agreed that the proportion of liability of the defendant should remain the same. The jury as shown by the verdict believed that this agreement was made. The plaintiff technically was not entitled to recover on the note. The action should have been by the indorser who has paid for contribution upon the oral agreement. * * * The rulings were sufficiently favorable to the plaintiff.

Exceptions overruled.

SECTION 5.—RIGHTS OF THE HOLDER AGAINST THE RESTRICTIVE INDORSER

No section of the act deals expressly with the liability of a restrictive indorser to subsequent holders. Section 66, in terms, applies to "every indorser who indorses without qualification." A restrictive indorser is not a qualified indorser, therefore it would seem that the liability of the restrictive indorser is to be ascertained from this section unless the relations existing between the restrictive indorser and subsequent holders are of such a nature as to prevent, by implication, the application of this section. It will be recalled that section 36, in defining what shall constitute a restrictive indorsement provides that "an indorsement is restrictive, which either (1) prohibits the further negotiation of the instrument; (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in trust for or to the use of some third person." Section 37 deals with the rights of an indorsee under a restrictive indorsement, which are: (1) "To receive payment; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so." It appears, therefore, that section 37 does not impose any liability on the instrument upon the restrictive indorser to subsequent indorsees. Taking these two sections together it appears that every restrictive indorsement will either (1) pass the title to the restrictive indorsee in trust for the restrictive indorser or in trust for a third party. Where the restrictive indorsee holds the title in trust for the restrictive indorser

there is no reason for and it is virtually impossible to impose a liability upon the restrictive indorser, the cestui que trust, to the restrictive indorsee, the trustee. A contrary holding would, in effect, render a party liable to himself. In such a situation as this the restrictive indorser is the real beneficial owner, the indorsee under the restrictive indorsement being invested with certain rights and duties to be exercised and discharged for the benefit of the restrictive indorser.

In the second case, where the restrictive indorser has passed the title to the indorsee under the restrictive indorsement in trust for a third person, the reason for not imposing a liability upon the restrictive indorser disappears. The restrictive indorser has parted with his entire interest. If the instrument had been negotiated direct to the cestui que trust, clearly the indorser would have been liable to him. It should make no difference that the indorser passed the title to a trustee for such beneficial owner. The restrictive indorsee should, therefore, be able to charge the restrictive indorser under section 66. This result would easily be reached were it not for the language of section 37. Under this section the indorsee is given the right to bring any action which the indorser could bring. If this section means that the indorsee may bring only those actions which the restrictive indorser could bring, then the indorsee under the restrictive indorsement cannot hold the restrictive indorser liable. This would be unjust to the cestui where the transfer was made for a consideration. While the section apparently means that the indorsee cannot sue the restrictive indorser in any case, the courts are likely to avoid this result, even though it involves a strained interpretation of section 37 (2), in the case where the negotiation was to a restrictive indorsee in trust for a third party. In all other cases any duty which the restrictive indorser might owe to the restrictive indorsee would arise, not from the law of negotiable instruments, but from the law of trusts or agency or both.

SECTION 6.—RIGHTS OF THE HOLDER AGAINST THE DRAWER

The liability of the drawer of a bill of exchange, like the liability of an indorser upon his indorsement, is both a conditional and an unconditional liability. The conditional does not arise until there has been a due presentment upon the drawee, dishonor by the drawer, and the notice of dishonor given to the drawer. Unlike that of the indorser, the drawer enters into no warranties, although he is estopped to deny the truth of certain facts. This liability is unconditional. There are some differences between the liability of the drawer of a check and the drawer of other bills of exchange. The sections involved are as follows:

N. I. L. Section 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse,

and engages that on due presentment the instrument will be accepted or paid or both according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

N. I. L. Section 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

N. I. L. Section 70. * * * Presentment for payment is necessary in order to charge the drawer and indorsers.

N. I. L. Section 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged.

N. I. L. Section 188. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.

The questions raised by the foregoing sections involve more or less the further questions as to what constitutes a due presentment for payment and a due notice of dishonor. It is important to note here: (1) That the only unconditional liability on the instrument assumed by the drawer of a bill of exchange, including checks, is the admission of the existence of the payee and his capacity to indorse. (2) The drawer of a bill of exchange, other than a check, is absolutely discharged—(a) if there has been a failure to make a due presentment for payment upon the drawee; (b) or if after due presentment there has been a failure to give due notice of dishonor to the drawer. (3) The drawer of a check is not absolutely discharged by failure of the holder to make a due presentment for payment but is discharged only to the extent of the loss caused by the delay. (4) But the drawer of a check is absolutely discharged by a failure of the holder to give him due notice of dishonor. This last rule is unfortunate. Section 89 should be limited to drawers of bills of exchange other than checks, and section 186 ought to be amended so as to provide that a failure to give the drawer of a check due notice of dishonor should discharge such drawer only to the extent of the loss caused by the delay.

Cases illustrating the above sections are inserted in the next chapter where the further question is involved: What constitutes a due presentment for payment and the giving of due notice of dishonor? Section 188 is illustrated by the case following.

TIMES SQUARE AUTOMOBILE CO. v. RUTHERFORD NAT. BANK.

(Court of Errors and Appeals of New Jersey, 1909. 77 N. J. Law, 649, 73 Atl. 479, 134 Am. St. Rep. 811.)

GUMMERE, C. J. One Purdy, being desirous of purchasing a secondhand automobile, employed Millard Ashton, an automobile salesman, to assist him in making a proper selection. Ashton took him to the salesroom of the Times Square Automobile Company, and, after looking over its stock, Purdy, with Ashton's approval, selected a car, the price of which was $600, and gave his check on the Rutherford National Bank for the purchase price. The check was drawn to the order of Ashton who indorsed it and delivered it to the manager of the automobile company. Immediately after receiving it, the automobile company sent it by special messenger to the banking house of the Rutherford National Bank with a request that it be certified. This request was complied with. Afterward, when the check was presented for payment, the bank refused to honor it, upon the ground that it had received instructions from Purdy not to pay it. The automobile company thereupon brought suit against the bank on its contract of certification. The defendant admitted that it had certified the check, and that it did so at the request of the plaintiff, the holder thereof, but sought to justify its refusal to pay upon the ground that Purdy had been induced to purchase the car by false representations made by the manager of the plaintiff as to its condition and value. It was contended on behalf of the plaintiff that this defense was not open to the defendant. It was, however, admitted over its objection. At the close of the case plaintiff asked for a direction of a verdict in his favor. This request was refused, the case was sent to the jury, and a verdict in favor of the defendant was rendered. The plaintiff now seeks a reversal of the judgment entered upon that verdict, on the ground that its request for a direction in its favor should have been complied with.

The effect of the certification of a check by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. When a check is presented by the drawer for certification, the bank knows that it has not yet been negotiated, and that the drawer wishes the obligation of the bank to pay it to the holder, when it is negotiated, in addition to his own obligation. A certification under such circumstances does not operate to discharge the drawer (Minot v. Russ, 156 Mass. 460, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472 * * *); and so long as the drawer remains undischarged, such a defense as that set up in the present case is open both to him and to the bank. But when the certification by the bank is done at the request of the holder, the effect is radically different. The transaction, then, is virtually this: The bank says: "That check is good; we have the money of the drawer here ready to pay it; we will pay it now, if you will receive it." The holder says: "No, I will not take the money now; you may retain it for me until the check is presented for payment." The bank replies: "Very well, we will do so." First Nat. Bank of Jersey City v. Leach, 52 N. Y. 353, 11 Am. Rep. 708. The result is to discharge the drawer from any further liability on the check (Negotiable Instrument Act * * *), and to substitute a new contract between the holder and the bank by the terms of which the money called for by the check is transferred

from the account of the drawer to the account of the holder. In contemplation of law the obligation of the bank to the holder, when the certification is at his request, is the same as if the funds had been actually paid out by the bank to him, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. * * *

The defendant, in refusing payment of Purdy's check, apparently considered that its obligation to the holder was no greater than if its certification had been made at Purdy's request. It failed to realize that its act operated as a payment of the check, so far as Purdy was concerned, and transferred the moneys which it called for to the account of the plaintiff. The situation was the same, so far as the defendant was concerned, as if Purdy had paid cash to the plaintiff for the car which he had purchased, and the plaintiff had then deposited the cash in the defendant's bank. Having accepted the plaintiff's money, and issued to him a certificate of deposit therefor, it did not concern the defendant from whom, or how, or under what circumstances the money had been obtained. Its contract required it to pay the amount of the deposit to the plaintiff or its order, and it could not avoid its obligation to do so by showing that the plaintiff had fraudulently obtained the money which it had deposited with the defendant.

The defense interposed should have been overruled, and a verdict directed for the plaintiff. The judgment under review will be reversed.

CHAPTER VI

PRESENTMENT, NOTICES OF DISHONOR, AND PROTEST

Section
1. Introduction.
2. Time of Presentment for Payment of Demand Notes.
3. Time of Presentment for Payment of Demand Bills of Exchange, in Order to Charge the Drawer and Indorsers, Drawers of Checks Excepted.
4. Time of Presentment of Checks in Order to Charge the Drawer.
5. Time of Presentment of Instruments Bearing a Fixed Maturity.
6. Other Aspects of a Due Presentment for Payment.
7. Presentment for Acceptance.
8. Notice of Dishonor.
9. Protest.

SECTION 1.—INTRODUCTION

It appears from the preceding chapter that a part of the liability of the drawer of a bill of exchange and the indorsers of bills of exchange and notes is a conditional liability. Their duty to pay the holder does not arise until the fulfillment of certain conditions precedent; i. e., due presentment for payment, the fact of dishonor, the giving of due notice of dishonor, and, in the case of foreign bills, of protest. This chapter is devoted to the consideration of the question: What constitutes a fulfillment of these conditions precedent to the liability of secondary parties to the holder?

SECTION 2.—TIME OF PRESENTMENT FOR PAYMENT OF DEMAND NOTES

At what time must the holder of a demand note present the same to the maker for payment in order to be able to hold the indorsers thereon in the event of its dishonor?

N. I. L. Section 71. Where the instrument is not payable on demand presentment must be made on the day it falls due. Where it is payable on demand presentment must be made within a reasonable time after issue, except that in the case of a bill of exchange, presentment will be sufficient if made within a reasonable time after the last negotiation thereof.

We are interested here only in the first clause of the second sentence. In view of the fact that the last clause deals with bills of exchange, the word "it" in the first clause refers only to notes. Therefore, a demand note must be presented within a reasonable time after issue. What is a reasonable time?

N. I. L. Section 193, provides: **In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with**

respect to such instruments, and the facts of the particular case. We have already made use of this section in another connection. We had a similar problem raised in regard to the time within which a holder must have acquired the demand note in order to be a holder in due course, and we found that it was possible for him to purchase several months after issue and be a holder in due course; that is, he would be in such a position that he could hold the maker free from all personal defenses. But that question must not be confused with the present question. There the holder was seeking to obtain certain rights against the maker; here the holder has already abandoned his rights against the maker and is seeking to hold indorsers. Is the period of time any different? If a person bought a demand note six months after issue and if at that time he made due presentment and gave due notice of dishonor, would he be able to hold indorsers in the event that his judgment against the maker proved fruitless? Probably so. The courts seem to treat these two periods of time in the same way. Generally speaking, if a holder acquired title of a demand note within such time from date of issue that he would be a holder in due course, if he then makes due presentment and gives due notice of dishonor he would be able to hold indorsers. However, it should be noted that the two questions are essentially different; and it is altogether possible that the usage of trade or the facts of the particular case or both may indicate one period of time within which one must purchase in order to be a holder in due course, and a different period of time within which a due presentment must be made upon the maker in order to preserve the liability of indorsers. Important evidence bearing on the question what constitutes "reasonable time" will be the banking custom in the community. It has even been held that evidence that the banks held paper for more than a year before presenting was admissible on the issue of reasonable time.

SECTION 3.—TIME OF PRESENTMENT FOR PAYMENT OF DEMAND BILLS OF EXCHANGE, IN ORDER TO CHARGE THE DRAWER AND INDORSERS, DRAWERS OF CHECKS EXCEPTED

On a negotiable note, only the indorsers are under a conditional liability. On a bill of exchange, there are two classes of secondary parties—the drawer and the general indorsers. Therefore, in this section, our question is: Within what period of time, and from what fixed event, must a demand bill of exchange be presented to the drawee, or acceptor, in order to preserve the liability of the drawer and the indorsers to the holder?

N. I. L. Section 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a rea-

sonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

It appears, therefore, that, in order for the holder of a sight bill of exchange to preserve the liability of the drawer and of the indorsers, the holder must present the instrument for payment to the drawee, within a reasonable time from the **last negotiation.** The period begins to run from the act of the **last negotiation** and not from the **date of issue,** as is the case of demand notes. It makes this striking difference: That, in the case of a note, the liability of indorsers cannot be preserved for more than a few months, possibly a year, but usually the liability of indorsers will cease to exist unless presentment for payment has been made upon the maker within a period less than a year from the date of issue of the note. But in case of a bill of exchange the liability of the drawer and of the unqualified indorsers thereon may be preserved for the full period allowed by the statute of limitations. The statute of limitations will begin to run from the date on which each first assumed liability on the instrument. This period varies in the several states. We have yet to consider how many days, weeks, or months may elapse after the date of the last negotiation before the reasonable time expires; but, assuming that the present holder presents the instrument upon the drawee within a reasonable time after the last negotiation, it is possible that the date of this last negotiation may have been many years after the issue of the bill. It is then necessary only that presentment must have been made within such time that actions may be commenced against the drawer and indorsers within the period allowed by the statute of limitations.

How many days, weeks or months, after the last negotiation, may elapse before the reasonable time expires? It will be a relatively short period, measured in days, possibly weeks, in some cases, but not in months. The period will be shorter than is allowed a holder of a demand note where he may have from one month, to a year or perhaps a few months in addition. A reasonable time from the last negotiation should be not more than a few weeks. However, from a practical standpoint, delay will not materially affect the holder, for, so long as he is within the period prescribed by the statute of limitations, he may negotiate the instrument to another party. What formerly was the **last** negotiation has now been superseded by another negotiation, which is now the last one. On this point it is possible for the courts to hold that a negotiation made for the sole purpose of reviving the liability of the drawer and indorsers constitutes fraud and that therefore the negotiation would fail to have the effect of reviving liability of the drawer and indorsers. This point has not been decided.

The section which we are now considering changed the law from what it was before the act. Before the act, the liability of the

drawer could be preserved only for a reasonable time after he issued the bill. Each indorser was held liable for an equal, but not the same, period of time. Each indorser would be liable for a reasonable time, which period of time began to run from the date on which his liability first arose. Accordingly the liability of the drawer would first expire, then that of the first indorser and so on. But under section 71 of the Negotiable Instruments Law, the liability of the drawer and of all indorsers may be continued simultaneously for the full period of limitations. Of course, this change in the law is greatly to the advantage of the holder; but, as soon as the holder ceases to be such and becomes an indorser, it works against him. He then has outstanding a conditional liability which will not die for the full period of limitation, five, ten or fifteen years, as the case may be. It has been vigorously argued that to compel an indorser to keep account on his books of all outstanding conditional liabilities on bills of exchange which passed through his hands for so long a time is unjust. So far, the section has not caused wide dissatisfaction, for the reason perhaps that for purely business reasons demand bills of exchange are forced through to an early presentment, and payment, or in the event of dishonor, to an early suit against secondary parties.

COLUMBIAN BANKING CO. v. BOWEN.

(Supreme Court of Wisconsin, 1908. 134 Wis. 218, 114 N. W. 451.)

Action by the Columbian Banking Company against John Bowen. From a judgment for plaintiff, defendant appeals.

June 10, 1903, the banking firm known as the Farmers' & Merchants' Bank, of Bangor, Wis., sold to the defendant a $400 draft, drawn in the usual form, dated on that day, payable to defendant's order, and drawn by such firm on the National Bank of North America, at Chicago, Ill. The draft was sent to the defendant at Barron, Wis., and was indorsed by him to A. R. Tabbert, to whom it was forwarded by mail, at Spokane, Wash., June 16, 1903, and was there received by him June 20th thereafter. He was at Spokane temporarily and was on his way to the city of San Francisco, Cal. July 14, 1903, he indorsed the draft and sold the same to the plaintiff at such city, receiving $400 therefor. On that day, in due course, plaintiff sent the draft by mail to the Bankers' National Bank, of Chicago, Ill., by which it was received July 18th thereafter, and was then, as requested, duly presented to the drawee for payment, which was refused, whereupon it was duly protested for nonpayment by a duly authorized notary public, who forwarded a manifest thereof with notices of protest for A. R. Tabbert, the plaintiff and the defendant, to the plaintiff at San Francisco, Cal., and also sent due notice to the National Bank of North America at Chicago, Ill., and to the drawer at Bangor, Wis., July 19, 1903. Plaintiff upon receipt of the manifest and notices duly sent the one for defendant to him at Barron, Wis., by whom it was duly received, and sent the one for Tabbert by mail to his post-office address and reputed place of residence, that being San Francisco, Cal. Thereafter due demand was made on defendant for payment of the draft,

and the same was refused. July 28, 1903, the property of the drawer was placed in the possession of a receiver, who duly paid upon the draft $144.49, January 6, 1904, $61.93, May 20th thereafter, and $30.96, June 5th following. Plaintiff was the owner of the draft at the time of the commencement of the action, and at the time of the trial thereof there was due thereon $210.

The pleadings presented issues for decision involving facts as above detailed. The case was tried by the court resulting in findings of fact in accordance with the statement, and a conclusion of law that plaintiff became the owner of the draft in due course, and was entitled to judgment for $210, with costs. Judgment was accordingly rendered.

MARSHALL, J. (after stating the facts as above). Counsel for appellant have presented quite an extended argument, referring to many authorities, as to the law antedating and independently of the negotiable instrument statute * * * to support the proposition, that appellant was released from liability on the instrument in question, because of the period intervening between his parting therewith and the presentation thereof to the drawee for payment. Such statute was enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper, and, therefore, so far as it speaks without ambiguity as to any such question, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading.

The negotiable instrument law is not merely a legislative codification of judicial rules previously existing in this state making that written law, which was before unwritten. It is, so far as it goes, an incorporation into written law of the common law of the state, so to speak, the law merchant generally as recognized here, with such changes or modifications and additions as to make a system harmonizing, so far as practicable, with that prevailing in other states. That it contains some quite material changes in previous rules governing commercial paper we have had occasion heretofore to point out. * * *

The primary question discussed by appellant's counsel, it is believed is fully covered by the negotiable instrument law. There are a multitude of decisions regarding the character of a bill of exchange and that of a check, as those terms are used in business transactions, and to what extent the incidents of one are identical with those of the other, which decisions are so variant in their phrasing of the matter as to produce more or less confusion in respect thereto with many apparent, and some real, conflicts, to remedy which was one of the principal objects of the law. To that end it was provided * * * in section 185, "A check is a bill of exchange drawn on a bank, payable on demand."

As to whether the incidents of the species of bills of exchange last mentioned are the same as those of bills of exchange generally, it was further provided in the section last referred to, "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." The only exception referred to material to this case is contained in section 186, in these words: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Keeping in mind that the discharge from liability above referred to because of unreasonable delay after the issuance of a check in present-

ing it for payment, is of the drawer only, and that this action is against the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to section 71, which provides, as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, "presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

From the foregoing it seems plain that as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed. * * *

As to an ordinary bill of exchange put in circulation, it was quite anciently held that the period between July 18th of one year and January 16th of the next year was not necessarily unreasonable. * * * Perhaps one might now keep a bill of exchange for such length of time as to destroy its circulating character notwithstanding he ultimately passed it along to another person, but that situation, as we view the case, does not exist here.

Applying the law as aforesaid to the facts of this case it is readily seen that the delay in presenting the paper for payment between its date and the negotiation to the bank at San Francisco is immaterial. Appellant unqualifiedly indorsed the paper and put it in circulation by sending it to Tabbert at a distant part of the country, probably knowing that he was a traveler. Tabbert received the paper while journeying with the intention of going to San Francisco and held it till he arrived there and then negotiated it. It was promptly presented for payment thereafter and so in time, as regards that circumstance, to preserve the liability of appellant.

The court decided, as indicated, that Tabbert was a traveler with San Francisco as his destination and properly held that such circumstance sufficiently explained, if any explanation were necessary, the lapse of time between his reception of the paper and his negotiation thereof, preserving its circulating character and warranting the finding that the respondent came thereby in due course.

The point is made that the instrument was not presented to the drawee for payment during banking hours. The negotiable instrument law at section 72 provides that "Presentment for payment to be sufficient, must be made: * * * at a reasonable hour on a business day. * * *" The evidence shows that the paper, after taking its course through the clearing house, was presented to the drawee for payment on the afternoon of the same day between the hours of 3 and 6 o'clock. The proof is to the effect that such was the customary

way of doing such business in Chicago, where the drawee was located. That is, as we understand it, that the business day of the bank continued after the closing of the clearing house transactions so as to enable banks holding paper for collection, refused recognition in such transactions, to be presented for payment as was done in this case. That satisfies the statute. What constitutes business hours of a bank, within the meaning of the statute, has reference to the general custom at the place of the particular transaction in question. In case of a transaction occurring in a foreign jurisdiction, as in the instance in question, the court cannot take judicial notice of what constitutes reasonable hours on a business day. * * * It is a matter of proof, though in case of the notarial certificate of the transaction, as here, being regular so as to furnish prima facie proof that the paper was duly presented for payment, that raises the presumption that the presentment was made at a proper time. * * *

Judgment affirmed.

AEBI v. BANK OF EVANSVILLE.

(Supreme Court of Wisconsin, 1905. 124 Wis. 73, 102 N. W. 329, 68 L. R. A. 964, 109 Am. St. Rep. 925.)

Action by Albert Aebi against the Bank of Evansville. From a judgment for plaintiff, defendant appeals.

Plaintiff, a farmer, residing about five miles from Evansville, kept account in defendant bank. It was accustomed to receive checks payable to his order upon the faith of his indorsement, and credit them to him as cash, and collect them without charge, and in a case of dishonor to charge the checks back to him on his account. On September 14, 1901, plaintiff received a check dated August 31, 1901, from one Speich, a cheese dealer at Brodhead, upon the bank at that city, 17 miles distant from Evansville, with daily mail between these places. This check, on September 21st, he indorsed and deposited with the bank, and was given credit for it as cash. The defendant on the same day mailed it to the Brodhead Bank for payment and remittance; heard nothing from it, and gave no further attention to it for about 10 days, when a card of inquiry was sent, to which no reply was received. After waiting several days longer, defendant cashier telephoned to the Brodhead Bank, and learned that no such check had been received, and waited still several days, and telephoned again, receiving the same information. It was proposed that the Brodhead cashier ask Speich for a duplicate. Not until October 19th did defendant notify the plaintiff that the check was not paid. Then the assistant cashier asked him to apply to Speich for a duplicate, which he consented to do when opportunity presented. He accordingly saw Speich on the 21st of October, who wrote out a duplicate check, payable to plaintiff, dated same as former, marked "Duplicate," and with notation, "Original not payable," and mailed it to defendant. On the following day the defendant wrote to plaintiff "to call and sign check when in town." On October 25th he called, and, at the request of the defendant, wrote his name on the back of the duplicate check. The check was then sent to the Brodhead Bank, reaching there October 26th, and was refused, Speich having about that time absconded, leaving a bank balance of about $400, which was absorbed by the Brodhead Bank by charging up a note to him. During the time from September 21st to October

26th Speich persistently had a balance at the Brodhead Bank, except for a day or two, when there was a few dollars overdraft, and seems to have been in good credit in that bank, for they discounted his note on one or more occasions.

DODGE, J. * * * We have no doubt of the correctness of the court's finding of fact that by the general indorsement of the check in question its acceptance by the bank, and the credit of the amount as cash to the plaintiff in his general account to be checked against as he saw fit, with nothing to qualify the effect of such acts, the bank became the owner of the check, as distinguished from a mere agent to collect the same on behalf of the plaintiff. All of the acts above recited prima facie indicate the discount and completed transfer of the check. * * * Only by clear evidence could a contrary significance be accorded them. There is no such evidence sufficient to constitute a clear preponderance such as would be necessary to warrant us in disagreeing with this finding. Such being the transaction, the right of the defendant to charge back the amount of this check or to collect from the plaintiff, is only that resulting from the relation of indorsee and indorser. The rules governing that relation are familiar, and largely now codified in our Negotiable Instrument Law of 1899, p. 681, c. 356. In order to charge indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes to his possession. * * * Such reasonable time is not fixed by statute, but by consensus of authority, in absence of special circumstances of excuse, is limited to the next business day, or, if the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment. * * * The check in question never was presented for payment until October 25th or 26th, and clearly, by such delay, the indorser was discharged, unless such delay was excused. The only excuse suggested is the loss of the check. If it be conceded that the defendant was guilty of no negligence in adopting the United States mails as a method of transmission, nor in sending the check direct to the bank upon which it was drawn, thus taking chances of acquiring prompt knowledge whether it was honored or dishonored when it reached the payee, nevertheless it is excused from making presentment and demand only so long as, consistently with reasonable diligence, it was prevented by the loss of the check. * * * It would seem extremely doubtful whether defendant could claim, in the exercise of due care, to have been so prevented even during the 10 days which it waited after mailing the check before making any inquiry about it and before learning of its loss. By ordinary course of mail the check should have reached the Brodhead Bank as early as the 23d, and, unless there was some difficulty, plaintiff should have been notified of its payment or refusal at least as early as the 24th of September. We shall not deem it necessary to decide whether it was not the duty of the defendant to make inquiry immediately upon failure to receive such notification in such ordinary course of mail. Even if that were not so, it did receive notice of the failure of the check to reach its destination some time about the 1st of October. Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least for the purposes of immediate presentment, and demand by means of a copy or sufficient description of

the check, and in case of nonpayment to give notice to the indorser. * * * Surely reasonable diligence would have enabled presentation long before October 19th. While the effect of the failure to present for payment and to give notice of dishonor within a reasonable time absolutely discharges the indorser without proof of damage or injury to him, it may be pointed out that in this case damage is quite obvious. * * *

Judgment affirmed.

PLOVER SAVINGS BANK v. MOODIE.

(Supreme Court of Iowa, 1906. 135 Iowa, 685, 110 N. W. 29.)

WEAVER, J. On March 8, 1903, one C. F. Scholer, who was a depositor in the Greenville Bank, doing a banking business at Greenville, Clay county, Iowa, made and delivered to one Claude Heathman his check on said bank payable to the order of said Heathman for the sum of $50; and thereafter on March 12, 1903, said Scholer made and delivered to said Heathman another similar check on the same bank for the further sum of $50. On or about the last-mentioned date Heathman indorsed and delivered both checks to the appellant. On Friday, March 13, 1903, near the close of business hours, the appellant indorsed and delivered the checks to the appellee bank which was doing business at Plover, in Pocahontas county, Iowa, and received in exchange therefor a certificate of deposit for $100 which was afterward paid. While the towns of Plover and Greenville are but 45 miles apart they are on different lines of railway, and the course of the mails between them is quite indirect, and had the appellee forwarded the checks by letter to the Greenville Bank on Saturday they would probably not have reached their destination until after banking hours on Monday, March 16th. Instead of sending them direct to Greenville, the appellee, following its customary method in such matters, sent the checks to its correspondent, the Des Moines Savings Bank at Des Moines, Iowa, by the first mail in that direction on Saturday, March 14th. On Monday, March 16th, the Des Moines Savings Bank forwarded the checks to their correspondent the Citizens' State Bank at Spencer, Clay county, Iowa, where they were received on March 17th. On the same day the Citizens' State Bank turned the checks over to the Citizens' National Bank of Spencer, which was the local correspondent of the Greenville Bank. On the following day, March 18th, the Citizens' National Bank forwarded them direct to the Greenville Bank. The daily mail from Spencer to Greenville does not leave until some time in the afternoon, and if the checks reached Greenville on March 18th, as they doubtless did, it was after banking hours, and were not received by the bank until the morning of March 19th. Prior to this date, probably about March 16th or 17th, the drawer had stopped payment on the checks claiming that they had been procured from him by fraud, and acting upon this notice the Greenville Bank on March 19th declined to honor them, and caused them to be duly protested.

Thereupon, the appellee instituted this action at law to recover upon the appellant's indorsement of the checks. The appellant answered denying liability upon said indorsement because of appellee's alleged negligence in presenting the checks for payment. Other defenses pleaded are not urged in argument, and we need not consider them. In addition to these matters it was also shown in evidence, without

substantial dispute, that the method adopted by appellee and by the several correspondents mentioned in forwarding the paper for presentation and demand of payment was in accordance with the general custom prevailing among banks in dealing with checks drawn on other banks not doing business in the same city or town, and cashed by the receiving bank. No evidence was offered tending to show that either of the banks, receiving these checks after their indorsement by appellant, failed to forward them on their way on the day of the receipt or on the following day, except possibly in the case of the Des Moines Savings Bank, and the day there intervening, if any, was Sunday. At the close of the testimony offered on the trial, the court sustained a motion to direct a verdict for the plaintiff for the amount of the checks with interest, and from the judgment entered on such directed verdict the defendant appeals.

The single question to be determined is whether this record presents a case in which a verdict for the defendant, if one had been returned, could properly be permitted to stand. Counsel's contention in support of the appellant's position is based upon two propositions.

It is said that in failing to forward the checks by the most direct route from Plover to Greenville, and by electing to send them by a more circuitous route through the hands of correspondent banks, appellee occasioned an unreasonable delay in the presentation of the checks to the drawee for payment, and thereby discharged the appellant from liability as an indorser thereon. By the terms of the negotiable instrument statute a bank check, in the ordinary form, is classed as a bill of exchange payable on demand. * * * By the same statute it is provided that to charge the indorser of a bill of exchange payable on demand, presentation to the drawee and demand of payment shall be deemed sufficient if made within a reasonable time after its issue, or after the last negotiation of such bill. * * * It is also further provided that, in determining what is a "reasonable time" within the meaning of this act, regard must be had to the nature of the instrument, the usage of the trade or business, if any, with respect to such instruments, and the facts of the particular case. * * * Contrary to the requirement for notice to the indorser of the dishonor of a check or bill upon presentation for payment * * * the holder of the indorsed paper is not held to any fixed or invariable limit of time in which to make such presentment and demand. He is required to act with reasonable diligence and promptitude taking into consideration the nature of the instrument, the usages of the business world and the peculiar facts, if any, attending the particular transaction in hand.

With this rule as our standard, we are clearly of the opinion that the record presents nothing to support a finding that the delay, if any, in presenting the checks for payment was chargeable to negligence on part of the appellee. It was shown by the evidence without controversy—indeed, it is a matter of common knowledge—that, by the system to which the handling of such business has been reduced, the innumerable checks and bills received by the banks scattered all over the country flow in concentrating currents to distributing banks, whence they go out to correspondent banks at or near the city or town where the drawee banks are located, for collection. To hold that the time between the issue of a check upon a distant bank and its presentation for payment by this method is unreasonable, and serves to discharge the indorser, would not only tend to create disastrous confusion in this

most important branch of business, but to a disregard of the statute which makes the usage in such business one of the standards by which the reasonableness of the time of presentation for payment is to be determined. Again, as disclosed by the testimony, the transaction under consideration was not a simple matter of collecting checks deposited with the appellee for that purpose. The checks were negotiated by the appellant to the appellee who paid full value therefor. The appellee indorsed the checks to the Des Moines Savings Bank, receiving credit upon its deposit account with the latter for the full amount as for a deposit of so much cash. In other words, the checks were negotiated by the appellee to the Des Moines Savings Bank, and under the statute already quoted * * * reasonable time for presentation and demand is to be reckoned from the last negotiation of the paper. Checks are an almost universal substitute for money. They pass from hand to hand, bank to bank, and city to city, and, within reasonable limits, it may be said that no matter how long they remain outstanding, so long as one negotiation promptly follows another and the checks are in fact in circulation the statute requires us to hold that the indorser is not legally prejudiced by the consequent delay in their presentation for payment. Indeed, while at common law it is generally held that when one receives a check payable at a distant bank reasonable diligence requires him to forward it for presentation not later than the next business day thereafter, yet it is equally well settled that this rule is not always one of imperative obligation, but is at times made to give way by reason of circumstances which sufficiently rebut any presumption or inference of negligence on part of the holder. * * * And, among other circumstances having a bearing upon this question, the general course of business has always been recognized as important. * * * Thus, even without the statute it would be extremely doubtful whether a verdict for the appellant upon the ground here contended for could be upheld; and with it, we think, the correctness of the ruling of the trial court thereon is not open to serious question.

It is next insisted that the act of the Citizens' National Bank of Spencer in sending the checks direct to the bank on which they were drawn instead of some suitable third person to present the same at the counter of the bank, and demand payment thereon, was negligent as a matter of law, and discharged the indorser. In support of this contention we are cited to Sash & Door Co. v. Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609; Scraper Co. v. Sadilek, 50 Neb. 105, 69 N. W. 765, 61 Am. St. Rep. 55, and other cases of like import. We have no doubt of the correctness of the precedents referred to, and we shall not hesitate to follow them in a proper case. The substance of the rule of these cases is that where the holder of a check or bill upon a distant bank places it in the hands of another bank for collection, and the latter sends the check direct to the hands of the bank which is under the duty of paying it, and thereby the claim is lost, the bank receiving it for collection will be held chargeable with negligence. In each of the cited cases and in all others of that class which have come under our observation the drawee bank to which the paper has been sent for collection and remittance has closed its doors after receiving it and without remitting the amount due, or by some other act of negligence or fraud occasioned a loss to the real

party in interest which would not have occurred or might possibly have been avoided had presentation and demand of payment been duly made by the collecting bank or by some suitable agent selected by it for that purpose. No such circumstances appear in this case. So far as appears from the record, the drawee bank was and is entirely solvent, the drawer had funds on deposit sufficient to pay the checks and the only reason why they were not honored was the notice received from the drawer to stop payment. The bank acted promptly, protested the notes at once, and gave due notice thereof to the payee and the several indorsers. The parties stand precisely in the same position which they would have occupied had some third person presented the checks over the bank's counter, and been met with the same refusal to pay. The notary who made the demand and protest was for the time being the agent of the transmitting bank, and we cannot see how such presentation and demand by him was any less efficient to protect such bank and all prior indorsers than would be the case had they been made by some other person who had been expressly authorized and employed to perform that service. * * *

Error is assigned upon the ruling of the trial court refusing to permit the appellant to testify to his want of knowledge of the custom of banks with respect to the manner of transmitting checks for payment. To this exception we think it a sufficient answer that want of knowledge by one who negotiates and indorses a check, as to the usage of banks relating to its presentation for payment, cannot prevent the application of the statute which makes such usage a factor in determining whether due diligence has been shown. So, also, it may be said that the usage or custom here relied upon is not one of mere private or local character, but one of general observance in the banking business and as such will be presumed to be known by all persons dealing with such institutions. * * * Appellant knew that the checks were negotiable in character and as such were liable to pass from one indorser to another in their transmission to the bank of payment, and when he negotiated them he must be held to have done so with reference to the usual and ordinary manner in which such business is transacted, and to have consented to presentation, demand of payment being made in the manner which generally prevails among prudent, well-conducted banks. Had he negotiated them to a merchant or farmer or other individual who in turn negotiated them to the appellee bank, appellant being sued upon his indorsement would not be heard to deny knowledge of the usage of banks with respect to such business, and we cannot see that such want of knowledge would be of any more avail in a case like the present one where he indorses the paper direct to the bank. His contract, implied from his indorsement, was that if, upon presentation and demand within a reasonable time, the checks were dishonored, and due notice given thereof, he would make them good to his indorsee, and it can make no difference whether he did or did not understand what in law would be held a reasonable time for such presentment. Other questions argued are ruled by those already discussed, and we need not further consider them. Of course, we are not to be understood as holding that banks are at liberty to adopt any usage or manner of business they see fit, and escape all imputation of negligence for resulting losses to those with whom they may deal. It is reasonable to hold that checks must go forward for presentation with due regard to the interest of the drawers and indorsers, and if

banks adopt unreasonably circuitous routes and methods whereby loss results they should bear the burden, but, ordinarily, the natural caution which is engendered by self-interest will be sufficient to insure promptness and dispatch in the discharge of duties of this nature. Where, however, there is reasonable ground upon which to base the charge of negligence, the case should go to the jury under proper instructions.

In the instant case we find nothing to support a finding of this nature, and the judgment of the district court is affirmed.

SECTION 4.—TIME OF PRESENTMENT OF CHECKS IN ORDER TO CHARGE THE DRAWER

The preceding section shows that the time within which a demand bill of exchange must be presented to the drawee for payment in order to charge the drawer of a bill of exchange other than a check and the indorsers upon all forms of bills of exchange, including checks, is the same—a reasonable time after the last negotiation. A special rule exists as regards the time within which a check must be presented for payment in order to charge the drawer. This result is brought about by the following sections:

N. I. L. Section 70. * * * **Except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.**

N. I. L. Section 71. * * * **in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.**

N. I. L. Section 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

Sections 70 and 71 apply to drawers of bills of exchange other than checks, indorsers of bills of exchange including indorsers of checks.

Section 186 contains a special rule applicable only to drawers of checks. It is as follows:

A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from all liability thereon to the extent of the loss caused by delay.

The nature of the liability of the drawer of a check is substantially different from that of the drawer of other forms of bills of exchange. A failure to make a due presentment to the drawee of a bill of exchange other than a check works an absolute discharge of all liability of the drawer upon the instrument. In the case of a check, failure to make a due presentment upon the drawee bank does not work an absolute discharge of the liability of the drawer, for in no case will a drawer of a check be discharged to an extent greater than the loss caused by the holder's delay in making presentment; that is, the drawer of a check, when sued by the holder,

who has failed to make a due presentment, will be liable for the full amount in spite of such failure of the holder to make a due presentment. The only way for the drawer of a check to avoid or cut down his liability to the holder of his check is to show that he (the drawer) lost by reason of the holder's failure to present to the drawee. In the case of the drawer of any other form of a bill of exchange, the drawer avoids all liability on the instrument by merely showing failure of the holder to make due presentment. He is not required to show affirmatively that he actually sustained a loss because of the delay. The effect, therefore, is virtually to make the liability of this drawer of the check an absolute liability, instead of a conditional liability; at least this should be so, and would be so, were it not for the unfortunate wording of section 89, which provides that a failure to give due notice of dishonor absolutely discharges the drawer of all bills of exchange, and this section includes drawers of checks.

Under what circumstances will the drawer of a check be able to show that he sustained a loss arising from the holder's failure to present? Suppose the drawer delivers his check to the payee, and the payee or some indorsee holds the check for several weeks, months, or even years, just so long that the statute of limitations has not run, and at this late date the holder presents, and he finds that the drawer now has no funds in the drawee bank. In the meantime the drawer has either drawn out his deposit or checked it out to creditors. The holder sues the drawer. May the drawer defeat liability by claiming that, if the check had been presented within a reasonable time after issue and while he still had funds in the bank, the check would have been paid? Most certainly not. The drawer here cannot show any loss to him caused by the holder's delay, for the simple reason that the drawer himself used all the funds then standing to his credit in the drawee bank.

About the only case where the drawer is able to show an actual loss arising from the failure of the holder to present the check to the drawee bank for payment within a reasonable time after its issue is to show **that the drawee bank became insolvent.** This is a real loss to the drawer. If the check was delivered before the bank closed, upon presentment, the check would have been paid. If the holder waited an unreasonable time after issue before presenting, and if in the meantime the drawee became insolvent, the drawer will be discharged to the extent of his loss. Note that the "reasonable time" begins to run from the **date of issue** of the check, **not from the date of the last negotiation.**

To illustrate: The drawer delivers his check to the payee at 9 o'clock Monday morning. The drawer then has funds in the bank sufficient to cover the check. The payee or any indorsee has a reasonable time from 9 o'clock Monday within which to present. During the running of this reasonable time the holder runs no risk; that is, if the bank closed its doors at 10 o'clock Monday, the holder could still recover from the drawer the full amount of the

check. Let X equal the period of time which is here called reasonable. If, during the period X, the drawee becomes insolvent, and passes into the hands of a receiver, and the holder has not presented, the holder may recover the full amount from the drawer. But, if the doors of the bank were closed in accordance with the law at just one minute after period X expired and the holder had not yet presented, then the holder cannot recover the full amount from the drawer, because the drawer has sustained a loss arising from the delay of the holder to present while period X was running. How much will the holder recover from the drawer? The holder will recover that proportion of the face of the check which the total dividends paid by the receiver of the insolvent bank to the drawer bore to the drawer's deposit as the deposit stood at the moment period X expired. For example, suppose at the moment the drawer had on deposit $1,000, and that the check was drawn for $100, and suppose, further, that the receiver of the insolvent bank paid a total dividend to the drawer of $500, then the holder of this check would recover from the drawer just $50. The loss caused by the delay was $50. The next case illustrates this rule and lays down the test for determining how many hours or days are to be included in the period allowed to the holder to present.

GORDON v. LEVINE.

(Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 418, 80 N. E. 505, 10 L. R. A. [N. S.] 1153, 120 Am. St. Rep. 565, 10 Ann. Cas. 1119.)

Action by Samuel R. Gordon against Max Levine. Judgment in favor of plaintiff, and defendant brings exceptions.

MORTON, J. This is an action upon a check by the plaintiff as payee against the defendant as drawer. The check was dated December 30, 1905, though there was some question whether it was actually drawn and delivered on that day, or the 31st. The plaintiff is described in the writ as of Chelsea and the defendant as of Boston. The bank on which the check was drawn was in Boston and the check was drawn and delivered there. The plaintiff testified that the defendant asked him not to present the check for a couple of days as he did not have sufficient funds to meet it, but that he presented it Monday morning and was told there were no funds, and that he went to see the defendant at his place of business but did not see him. The plaintiff also testified that in the afternoon of the same day he passed the check to one Saievitz in payment of a bill which he owed him receiving the balance in cash. And there was testimony tending to show that on the next day Saievitz indorsed it to one Rootstein who deposited it on January 4th, in the Faneuil Hall National Bank, Boston, for collection, and that that bank's messenger went with it on the afternoon of the following day, Friday, January 5th, to the bank on which it was drawn, the Provident Securities & Banking Company, and found its doors closed. The plaintiff also testified that he told the defendant the bank had failed and that the defendant promised to make the check good. The defendant denied this and also the plaintiff's statement that he had asked the plaintiff not to present the check for a couple of days, and

introduced testimony tending to show that at the time when the check was drawn he had sufficient funds on deposit at the bank to meet it, and continued to have down to the failure of the bank. It was admitted that the bank failed Friday, January 5th, and the defendant introduced evidence tending to show that he had received no payment or dividend on account of his deposit. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the court to give certain instructions that were requested and to the admission of certain testimony.

The defendant, in substance, asked the court to instruct the jury that a check must be presented for payment in a reasonable time and that in order to have been presented within a reasonable time the check in suit should have been presented before the close of banking hours on Monday; that its transfer to successive holders would not extend the time for presentment and a presentment on January 5th would not be within a reasonable time and if the bank failed in the meantime and the defendant sustained a loss in consequence of delay in presenting the check, he would be discharged from liability to that extent. The court gave in part the instruction thus requested, and refused it in part. It instructed the jury that the check must have been presented for payment within a reasonable time, and that if it was presented on Monday that would be within a reasonable time. But it refused to instruct the jury that the transfer to successive holders would not extend the time, or that a presentment on Friday was not within a reasonable time. On the contrary, it instructed them that "the court had occasion to consider that in one case in this commonwealth (referring, we assume to Taylor v. Wilson, 11 Metc. 44, 45 Am. Dec. 180), and it is there stated that a check may also be passed from hand to hand and a reasonable time is allowed to each party receiving the same to present it for payment." And after calling their attention to the provisions of the statute * * * that in considering what a reasonable time is "regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of each particular case," left it to them to determine whether the check was presented on Monday, or, if they were not satisfied that it was, then to determine whether if it passed from hand to hand and each one had a reasonable time to present it the presentment on Friday was within a reasonable time. For aught that appears the jury may not have been satisfied that the check was presented on Monday and may have found for the plaintiff on the ground that the presentment on Friday was within a reasonable time. The question is therefore distinctly raised whether a presentment on Friday could have been found to be within a reasonable time.

The general rule is as was stated by the court and as is provided in the Negotiable Instruments Act * * * that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented and the drawer sustains a loss by reason of the failure of the drawee he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instrument, which, though defined in the Negotiable Instruments Act * * * as "a bill of exchange drawn on a bank payable on demand," is intended for immediate use * * * and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the loss, if any, resulting from failure to pre-

sent it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The Negotiable Instruments Act provides generally * * * as the court said that "in determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments and the facts of the particular case." This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in the passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which have been established is that where the drawer and drawee and the payer are all in the same city or town a check to be presented within a reasonable time should be presented at some time before the close of banking hours on the day after it is issued and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterwards the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss it falls not on him but on the holder. * * *

The case of Taylor v. Wilson, supra, relied on by the plaintiff, was a case where a check was drawn by one doing business in Charlestown and living in Roxbury on a bank in Charlestown in favor of a resident of Newport. The check was dated September 30, 1842, which was Friday, and was received by the payee Saturday evening, October 1st. On Tuesday, October 4th, having been previously cashed for the payee by a local bank, it was given by the cashier of that bank to a messenger to be carried to the Merchants' Bank at Providence in the usual course of remitting its funds and securities and was received by that bank on Wednesday and sent by its cashier to the Suffolk Bank at Boston. That bank received it on the next day (October 6th) and presented it on the same day to the bank on which it was drawn and payment was refused; the bank having closed its doors on Monday morning, October 3d, and being insolvent. The case was submitted to the court on agreed facts with power to draw inferences and the court found in favor of the payee and against the drawer. The court held in effect that under the circumstances there had been no laches and that the check had been presented within a reasonable time. There is a sentence in the opinion to the effect that a check may pass from hand to hand and that a reasonable time is allowed to each party receiving it to present it for payment and the case has been cited to that point with approval in Veazie Bank v. Winn, 40 Me. 60. But we do not think that the court meant to lay down the rule that under any and all circumstances each party receiving a check from a previous holder was entitled to a reasonable time to present it for payment, or that the case required that it should lay down such a rule. On the contrary the court expressly said that a party receiving a check was not guilty of laches if he did not present it on the same day on which it was drawn, but was allowed a reasonable time for that purpose, and that the next day was held to be such reasonable time. The decision should be limited to the case before the court which was that of a check drawn on a bank in one place and sent to a payee in another place at considerable distance and forwarded for presentment

in the usual course of business and so understood and applied was correct.

It follows from what has been said that the exceptions must be sustained. The conclusion to which we have come on the principal question renders it unnecessary to consider the questions of evidence, though we may observe that we see no error in regard to them.

Exceptions sustained.

SWIFT & CO. v. MILLER.

(Appellate Court of Indiana, 1916. 62 Ind. App. 312, 113 N. E. 447.)

FELT, J. * * * Under the rules of the law merchant, a check must be presented within reasonable time after it is received. Under ordinary conditions when the holder resides at the place the check is made payable, such reasonable time for presentment includes all of the banking hours of the day immediately following the day on which the check is received. If the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and be presented not later than the day immediately following the day of its receipt at the place of payment. * * *

As between the holder and drawer of a check, delay in presentment will not ordinarily discharge the drawer from liability, but if loss results from the delay for which the drawer is not responsible, the delay is at the peril of the holder. As between the holder of a check and an indorser, unreasonable delay in presentment for payment, or in giving notice of dishonor, will discharge the indorser from his liability without regard to whether such delay did or did not occasion loss to the holder. * * *

SECTION 5.—TIME OF PRESENTMENT OF INSTRUMENTS BEARING A FIXED MATURITY

We have yet to consider the rules prescribing the time for presentment of instruments payable at a fixed date. This is relatively simple. These rules are alike for all kinds of negotiable time paper.

N. I. L. Section 71. Where the instrument is not payable on demand presentment must be made on the day it falls due.

N. I. L. Section 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls on Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

N. I. L. Section 85 abolishes days of grace, which, before the Act, were commonly allowed. A few states expressly allow three days of grace on sight bills.

N. I. L. Section 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified

event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.

N. I. L. Section 72. Presentment for payment must be made at a reasonable hour on a business day.

Where the instrument bears a fixed date of maturity but is subject to an earlier payment upon the happening of some event or upon the exercise of an option by the holder, it is not certain at what time presentment must be made. We have already been concerned with this situation (1) as regards the negotiability of such an instrument; and (2) as to whether a bona fide purchaser before the fixed date arrives but subsequent to the actual maturity under the acceleration clause, could be a holder in due course. We noted that there is a conflict of authority on the question whether such an instrument is negotiable. On the analogy of the rule recognized in section 52 (2) that one may be a holder in due course of a time bill of exchange purchased after dishonor by non-acceptance, but before the arrival of the fixed date, it would seem that in all other cases a holder who acquired title before the fixed date, but after an act or event which under an acceleration clause operated to mature the instrument, would be a holder in due course. So, also, with respect to the time of presentment of such an instrument, presentment should be effective if made before the fixed date, if the holder had no knowledge of the occurrence of the event which matured the instrument earlier.

N. I. L. Section 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time, during the day, in which case presentment at any hour before the bank closed on that day is sufficient.

It should be noted, however, that the person to make payment has until the close of business hours to deposit money in the bank to meet the instrument. If presentment is made and the same is not then paid and the debtor deposits money subsequent to the presentment, the instrument is not dishonored.

SECTION 6.—OTHER ASPECTS OF A DUE PRESENTMENT FOR PAYMENT

(a) WHEN PRESENTMENT FOR PAYMENT IS NECESSARY

N. I. L. Section 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

(b) WHAT CONSTITUTES A DUE PRESENTMENT

N. I. L. Section 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

(c) PLACE WHERE PRESENTMENT MUST BE MADE

N. I. L. Section 73. Presentment for payment is made at the proper place—

1. Where a place of payment is specified in the instrument and it is there presented;

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

(d) BY WHOM PRESENTMENT MUST BE MADE

N. I. L. Section 72 (1). Presentment for payment, to be sufficient, must be made by the holder, or by some person authorized to receive payment on his behalf.

(e) TO WHOM PRESENTMENT MUST BE MADE

N. I. L. Section 72 (4). Presentment for payment, to be sufficient, must be made to the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

N. I. L. Section 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

N. I. L. Section 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

N. I. L. Section 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

(f) WHAT CONSTITUTES DISHONOR BY NON-PAYMENT

N. I. L. Section 83. The instrument is dishonored by non-payment when—

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

(g) LEGAL EFFECT OF DISHONOR BY NON-PAYMENT

N. I. L. Section 84. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

(h) LEGAL EFFECT OF FAILURE TO MAKE DUE PRESENTMENT FOR PAYMENT

N. I. L. Section 70. * * * But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

N. I. L. Section 186. A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

(i) EXCUSES FOR FAILURE TO PRESENT FOR PAYMENT

N. I. L. Section 82. Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;

2. Where the drawee is a fictitious person;

3. By waiver of presentment, express or implied.

N. I. L. Section 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

SECTION 7.—PRESENTMENT FOR ACCEPTANCE

(a) WHEN PRESENTMENT FOR ACCEPTANCE IS NECESSARY

N. I. L. Section 143. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

(b) WHAT CONSTITUTES PRESENTMENT FOR ACCEPTANCE

N. I. L. Section 145. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

N. I. L. Section 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.

N. I. L. Section 72. Presentment for payment, to be sufficient, must be made—

1. By the holder, or by some person authorized to receive payment on his behalf;

2. At a reasonable hour on a business day;

3. At a proper place as herein defined;

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

N. I. L. Section 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

N. I. L. Section 194. Where the day, or the last day, for doing any act herein required or permitted to be done, falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

(c) LEGAL EFFECT OF FAILURE TO PRESENT FOR ACCEPTANCE

N. I. L. Section 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.

N. I. L. Section 147. Where the holder of a bill, drawn payable elsewhere than at the place of business or the residence of the drawee, has not time with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting

the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.

(d) WHAT CONSTITUTES DISHONOR BY NON-ACCEPTANCE AND ITS LEGAL EFFECT

N. I. L. Section 149. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused, and the bill is not accepted.

N. I. L. Section 150. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

N. I. L. Section 151. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

N. I. L. Section 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

N. I. L. Section 52. A holder in due course is a holder who has taken the instrument under the following conditions: * * * (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; * * *

(e) EXCUSES FOR NON-PRESENTMENT FOR ACCEPTANCE

N. I. L. Section 148. Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

2. Where, after the exercise of reasonable diligence, presentment cannot be made.

3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

SECTION 8.—NOTICE OF DISHONOR

(a) WHEN NOTICE OF DISHONOR IS NECESSARY

N. I. L. Section 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged.

(b) WHAT CONSTITUTES NOTICE

N. I. L. Section 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

N. I. L. Section 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(c) TIME WITHIN WHICH NOTICE MUST BE GIVEN

N. I. L. Section 102. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

N. I. L. Section 103. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.

3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following.

N. I. L. Section 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision.

N. I. L. Section 105. Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to

have given due notice, notwithstanding any miscarriage in the mails.

N. I. L. Section 106. Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department.

N. I. L. Section 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

(d) PLACE WHERE NOTICE MUST BE GIVEN

N. I. L. Section 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

(e) BY WHOM NOTICE MAY BE GIVEN

N. I. L. Section 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

N. I. L. Section 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

N. I. L. Section 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(f) TO WHOM NOTICE MUST BE GIVEN

N. I. L. Section 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

N. I. L. Section 98. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative,

notice may be sent to the last residence or last place of business of the deceased.

N. I. L. Section 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

N. I. L. Section 100. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

N. I. L. Section 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

(g) IN WHOSE FAVOR NOTICE OPERATES

N. I. L. Section 92. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

N. I. L. Section 93. Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

(h) LEGAL EFFECT OF FAILURE TO GIVE NOTICE

N. I. L. Section 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged.

N. I. L. Section 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

BACIGALUPO v. PARRILLI.

(Supreme Court of New York, Appellate Term, 1908. 112 N. Y. Supp. 1040.)

SEABURY, J. This action is upon a check drawn by the defendant and by him delivered to the plaintiff. The check was drawn upon "Banca P. Caponigri," and was delivered to the plaintiff on January 10, 1908. On Saturday, January 11, 1908, the plaintiff presented the check at the bank of Caponigri and was told by the cashier of the bank that Caponigri was not in, that "he made a kind of deposit this morning, and we are kind of short of funds." The cashier further told the plaintiff that "You can come here Monday morning, and we will cash the check." To this information the plaintiff replied "All right," and returned on Monday, January 13th, and demanded the payment of the check, and was informed that Caponigri had no money and could not pay the check. It is undisputed that at the time the check was given to the plaintiff the defendant had on deposit with Caponigri a sufficient sum to pay the check, and that he did not withdraw this

sum. It is also admitted that Caponigri is insolvent. Under the circumstances disclosed, the loss for the amount of the check must fall upon the plaintiff, and not upon the defendant. After the plaintiff presented the check on January 11th, and payment was refused, and he was told that the banker was "kind of short of funds," it was his duty to notify the defendant that payment had been refused, if he wished to hold the latter upon the check. Upon the nonpayment of the check, the drawer was entitled to notice of that fact, and, in the absence of such notice, was discharged from liability, section 160 of the Negotiable Instrument Law. * * * If the drawer had been promptly notified of the refusal of the banker to pay the check, he might have been able to have taken action to secure the amount deposited with the banker.

The judgment appealed from is reversed, and the complaint dismissed. * * *

(i) EXCUSES FOR FAILURE TO GIVE NOTICE

N. I. L. Section 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

N. I. L. Section 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

N. I. L. Section 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of presentment and notice of dishonor.

N. I. L. Section 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

N. I. L. Section 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

N. I. L. Section 114. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;

2. Where the drawee is a fictitious person or a person not having capacity to contract;

3. When the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

5. Where the drawer has countermanded payment.

N. I. L. Section 115. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

2. Where the indorser is the person to whom the instrument is presented for payment;

3. Where the instrument was made or accepted for his accommodation.

N. I. L. Section 116. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

N. I. L. Section 118. Where any negotiable instrument has been dishonored, it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

SECTION 9.—PROTEST

(a) WHEN PROTEST IS NECESSARY OR PERMITTED

N. I. L. Section 152. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

N. I. L. Section 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

N. I. L. Section 118. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

N. I. L. Section 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

N. I. L. Section 158. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

N. I. L. Section 167. Where a dishonored bill has been accepted for honor supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

(b) WHAT CONSTITUTES PROTEST

N. I. L. Section 153. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;

2. The fact that presentment was made and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

N. I. L. Section 160. When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(c) TIME WITHIN WHICH PROTEST MUST BE MADE

N. I. L. Section 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(d) PLACE WHERE PROTEST MUST BE MADE

N. I. L. Section 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(e) BY WHOM PROTEST MUST BE MADE

N. I. L. Section 154. Protest may be made by—

1. A notary public; or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

(f) LEGAL EFFECT OF FAILURE TO PROTEST

N. I. L. Section 152. * * * If it is not so protested, the drawer and indorsers are discharged. * * *

(g) EXCUSES FOR FAILURE TO PROTEST

N. I. L. Section 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

CHAPTER VII

DISCHARGE

Section
1. Introduction.
2. Discharge of the Maker and Acceptor.
3. Discharge of the Regular Indorsers.
4. Discharge of a Surety.

SECTION 1.—INTRODUCTION

This chapter is devoted to the consideration of the circumstances that will operate to discharge the various parties to a negotiable instrument as against persons other than holders in due course. There are three classes of parties, which must be considered separately: (1) Parties primarily liable on the instrument —the maker and the acceptor; (2) parties secondarily liable—indorsers; and (3) sureties, whether primarily or secondarily liable. A negotiable instrument, being a special kind of contract, is subject to discharge by facts which will not discharge a simple contract. This fact, taken in connection with the fact that we must deal with the matter of the discharge of sureties, makes it impossible to lay down the broad proposition that parties to negotiable instruments will be discharged when, and only when, facts exist which would discharge a simple contract for the payment of money.

SECTION 2.—DISCHARGE OF THE MAKER AND ACCEPTOR

The Negotiable Instruments Law specifies the following methods of discharge: (1) Payment; (2) cancellation; (3) material alteration; (4) renunciation; (5) any act which discharges a simple contract for the payment of money; (6) by the debtor's acquisition of the instrument as a holder at or after maturity. These methods will be taken up in order. The following sections of the act will be considered first, only in so far as they discharge the parties, other than sureties, who are primarily liable on the instrument. These parties are the maker and the acceptor.

N. I. L. Section 119. A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

N. I. L. Section 88. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

(a) DISCHARGE BY PAYMENT—WHAT CONSTITUTES PAYMENT

FIRST NAT. BANK OF PHILADELPHIA v. NATIONAL PARK BANK OF NEW YORK.

(Supreme Court of New York, Trial Term, 1917. 100 Misc. Rep. 31, 165 N. Y. Supp. 15.)

NEWBURGER, J. On July 21, 1916, the Mutual Trust Company of Orange, N. J., being indebted to the plaintiff, sent its check for the sum of $18,231.66, which plaintiff forwarded to the Hanover National Bank, its correspondent in this city. On Monday morning, July 24, 1916, the Hanover National Bank sent the check, with other exchanges, to the New York Clearing House, where it was presented to the representative of the defendant bank; that, according to the custom in said clearing house, a balance was struck between the representatives of the Hanover Bank and the defendant, whereby it appeared that a large sum was due to the Hanover Bank, and that the check sued upon was included in the aggregate credited to the Hanover National Bank, and thereafter the packages containing the checks received by the defendant drawn upon it were opened and sorted and examined by clerks whose business it is to ascertain whether such checks are properly drawn and are in all respects items which the drawee bank is prepared to pay, and the drawee bank then had the privilege, under the provisions of the constitution of the clearing house, of returning any checks before 3 p. m. to the bank which had presented them through the clearing house. The credit balance due to the Hanover National Bank on the 24th day of July, 1916, was paid by the defendant in accordance with the rules of the clearing house. A list was prepared of the items and totals of checks of each depositor, and this check, drawn by the Mutual Trust Company to the plaintiff, was included and then entered on a separate sheet under the name of the trust company and sent to the ledger bookkeeper, who entered this total on the debit side of the account of the trust company. At the time of the entry on the ledger there was a sufficient credit balance to meet the check of $18,231.66.

It appears that the Mutual Trust Company, which opened for business on July 24, 1916, was closed shortly after 11 a. m. of that day by the Banking Department of New Jersey. A telephone message to that effect was received by the defendant about half past 1, and at half past 2 the same was confirmed by letter, whereupon the cashier of the defendant directed the return of the check in suit to the Hanover National Bank, and subsequently the bookkeeper erased the entry on the ledger and made a new entry of the check in suit as part of the credit balance of the trust company and not as a debit against it. It appears that while such erasure was made on the ledger, on the slip containing the itemized list of checks received by the defendant from the Hanover National Bank through the clearing house the item of $18,231.66 was not erased. See plaintiff's Exhibit 1. The check in suit was returned to the Hanover National Bank and repayment claimed under the rules of the clearing house, which was made by said bank. The same afternoon plaintiff telegraphed a protest to the defendant, and later made a tender of the check and demanded payment of $18,231.66, with interest, but payment was refused. It is true that it has

been repeatedly held that, under the rules of the Clearing House Association, the payment of balances by it is merely a tentative payment of items debited against any individual bank, and is not to be deemed complete until the debtor bank has had an opportunity to examine the items debited against it and has, either by silence or affirmative act, approved of the debit, and until a drawee bank has actually accepted a check it may render such check not good by refusing to honor it and by returning it to the bank presenting it. See Columbia Knickerbocker Trust Co. v. Miller, 215 N. Y. 191, 109 N. E. 179, Ann. Cas. 1917A, 348. * * *

It will be noticed, however, that in these cases cited the courts, while holding that the drawee banks under the rules of the clearing house had the right to return the checks at any time before 3 o'clock, it could only do so where the bank had at no time debited the amount of the check against the account of the drawer. In this case the account of the Mutual Trust Company was charged with the check of $18,231.66, and in doing so it constituted a payment of the check, and the mere physical act of the bookkeeper, after notice of the suspension of the trust company, of striking out the charge and transferring it to the credit column, did not deprive the plaintiff of the right that had accrued by reason of the charge that had been made against the debit account. By charging the account of the trust company with this check, the same has been paid, nothing more was left to be done, and the plaintiff was entitled to receive the proceeds of the check. * * *

As was said by Mr. Justice Miller in Baldwins Bank v. Smith, 215 N. Y. at page 83, 109 N. E. at page 140, L. R. A. 1918F, 1089, Ann. Cas. 1917A, 500: "All that is necessary to constitute payment is the intention to make the application, which may be evidenced in a variety of ways, e. g., by bookeeping entries, by canceling the note and surrendering it to the makers, by the drawing of a check by the makers and its acceptance in payment by the bank." * * *

I am therefore of the opinion that the defendant recognized the validity of the check when it debited the check against the account of the drawer, the Mutual Trust Company of Orange, and plaintiff is entitled to a judgment for $18,231.66 and $832.38 interest. * * *

HUNT v. SECURITY STATE BANK.

(Supreme Court of Oregon, 1919. 91 Or. 362, 179 Pac. 248.)

Action by John P. Hunt against the Security State Bank. Judgment for plaintiff, and defendant appeals.

The defendant, the Security State Bank, is a corporation engaged in the banking business in Woodburn, Or. The plaintiff, John P. Hunt, opened a general deposit account in the bank; and afterwards, on January 24, 1917, he drew a check directing the bank to pay $90 to the order of E. Burdick, and delivered the check to the payee in Salem. On January 27, 1917, at about 8:30 a. m., the defendant received, through the mail, from the United States National Bank of Portland, a "cash letter" and ten checks drawn on the Woodburn bank. The "cash letter" is dated January 26, 1917. It contains an itemized statement of the amounts of the accompanying checks, shows that the total amount of the checks is $671.95, and directs the Security State

Bank to remit to the United States National Bank "in Portland exchange." The Burdick check was among the 10 checks received with the "cash letter." When the Burdick check reached the plaintiff it bore on its back the indorsements of E. Burdick, Ashley & Rumelin, Bankers, and the United States National Bank. Immediately upon receipt of the "cash letter" and the 10 checks E. H. Hoff, the president of the Security State Bank, "footed the checks on the adding machine to see if they would total right with the cash letter, then examined the checks as to their signatures, and as to whether each account had sufficient funds to meet it," and then each check, including the Burdick check, was marked "Paid, Security State Bank Jan. 27, 1917," with the bank's "Paid" stamp, and finally each check was "placed upon a three-cornered spindle that has a three-cornered cutting edge, and are there mutilated." Whenever the Woodburn bank received a check through the mail, and ascertained that there were not sufficient funds to pay it, or if the signature was not regular, the bank never marked the paper "Paid," but the check was always returned to the forwarding bank. The steps taken by the defendant with reference to the "cash letter" and checks received from the Portland bank followed the same course which the bank had always taken when it received checks through the mail from outside banks.

At about 9:15 on the morning of January 27, 1917, but after the Burdick check had been stamped "Paid" and placed upon the spindle, Hunt appeared at the bank, and asked for a statement of his account "up to date." The statement was at once prepared and delivered to Hunt. * * * Upon receiving the statement of this account, Hunt proceeded to examine it, and he says that, when he "saw that the E. Burdick check wasn't charged" to his account, he told Hoff that he "had a check out for ninety dollars in favor of E. Burdick," and that he "desired to stop payment on the check." Hunt testified that Hoff then said, "The E. Burdick check has just arrived; I have it here right in my hand;" and, according to Hunt's testimony, Hoff "reached to his left and picked off the spindle the check and handed me, which was the E. Burdick check."

We shall assume that the verdict of the jury necessarily implies a finding that Hunt directed the bank not to pay the check. At about 3 o'clock in the afternoon of January 27, 1917, the defendant drew a draft directing the Scandinavian American Bank of Portland to pay to the United States National Bank of that city the sum of $671.95, the amount of the 10 checks, including the Burdick check, which had been received with the "cash letter." This draft was mailed that afternoon to the United States National Bank, and was subsequently paid by the drawee bank.

In March, 1917, the plaintiff received from the defendant a statement, together with canceled checks mentioned in the statement, showing the condition of this account to March 2, 1917. The statement contained a charge of $90 under date of "Jan. 27," and the Burdick check was among the canceled checks. In the language of Hunt, "I didn't acknowledge the correctness of this statement, and I returned him [Hoff] the ninety-dollar check then and there." Subsequently, on April 21, 1917, the plaintiff drew a check on the defendant for $90 payable to "self," but the bank refused to pay the check, and wrote on it the words "Account closed." The plaintiff then commenced this action to recover the sum of $90, which he claims the bank wrongfully

charged against his account. A trial resulted in a verdict and judgment for the plaintiff for $90. The defendant appealed.

HARRIS, J. The defendant vigorously contends that it was entitled to a directed verdict. This contention proceeds upon the theory that the act of placing it upon the spindle, where all "paid" checks were kept until entries were made upon the books, after having first ascertained that there were sufficient funds to the credit of the drawer, and that the signature was genuine, operated as a charge against the drawer, and as a credit to the holder of the check, and amounted to payment. The plaintiff insists that the acts of the defendant did not effect a transfer of credit from Hunt to the United States National Bank of Portland, the holder.

The relation existing between a bank and its depositor is that of debtor and creditor; a check is simply an order signed by the creditor (depositor) directing the debtor (bank) to pay money to named person; an uncertified check of itself does not operate as a legal or as an equitable assignment of any part of the funds in the bank, and, unless it accepts the check, the bank is not liable to the holder; and consequently the drawer of the check can, if he chooses, countermand the check or first order, and the bank will be obliged to obey the second or countermanding order, unless the bank has paid, or has become obligated to pay, the check. * * * If what the bank did prior to Hunt's conversation with Hoff amounted to payment, then Hunt had lost the right to countermand payment of the check.

During the investigation we must not lose sight of the fact that payment and acceptance are essentially different. Payment is the natural, expected, and intended end of a check. Acceptance strengthens the vitality of a check, and serves to prolong, rather than to terminate, the life of it. * * * We must remember, too, that the case now under consideration is not like those where the holder enters a bank with a check, presents it, and is given credit for the amount as a deposit; nor is this case like those where the holder mails a check to the drawee bank, and the latter, in obedience to instructions, charges the account of the drawer, and credits the account of the holder, with the amount of the check, for in all those cases payment is made just as completely as it is when the bank actually pays the money over the counter to the holder and he at once returns it to and deposits it with the bank. * * * The instructions to the defendant were to "remit in Portland exchange." The Woodburn bank did not draw or mail its draft for the purpose of remitting to the United States National Bank of Portland until after Hunt countermanded payment of the Burdick check, and therefore we need not decide whether payment was completed when the draft was deposited in the post office or when received by the Portland bank.

When Hunt ordered the defendant not to pay the check, the bank had done nothing more than to satisfy itself that the check was genuine, and that there was sufficient funds to pay it, and to stamp it "Paid," and to place it upon the spindle. All this was merely preparing to pay; it was simply a step towards payment; it was not payment. No entry was made on the books. The drawer was not charged; the holder was not credited. It may be assumed that the bank intended to make appropriate entries on its books and to remit; but we are confronted with a situation where the bank had not yet executed its intentions. An intention to pay is not payment. What the bank did

was done in contemplation of payment; but payment was not completed. * * *

The plaintiff cannot recover, if what was done by the defendant resulted in an acceptance of the check. * * * The word "Paid" was stamped upon the check by the defendant. When determining whether this constituted an acceptance within the meaning of the law, we must not forget the essential difference between payment and acceptance. Payment ends the life of a check. Acceptance reinvigorates it. The word "Paid" tends to indicate, if it evidences anything, extinction rather than rejuvenation of the check. To the extent that it speaks at all, the word "Paid" tells of what has been done rather than of what will be done. In Guthrie National Bank v. Gill, 6 Okl. 560, 565, 54 Pac. 434, 436, it was decided that the word "Paid," stamped upon a draft, "had no tendency to establish an acceptance," because it did not evidence "an agreement or promise to do something." * * * Stamping the word "Paid" did not of itself produce an acceptance of the check. * * *

Hunt countermanded payment of the check before the bank had either paid or accepted it, and the judgment appealed from must therefore be affirmed.

In re WEGMAN PIANO CO.

(United States District Court, N. D. New York, 1915. 221 Fed. 128.)

RAY, District Judge. * * * It is well settled in the state of New York and in the courts of the United States that, where a debt is owing by one person to another, the giving of a note by the debtor to the creditor and the receipt of such note by the creditor will not pay or extinguish the original claim or debt, in the absence of an agreement between the parties that the note is to be received as payment. This is the common-law rule, which prevails in England and has been adopted in nearly all of the states in this country. In Indiana, Maine, Massachusetts, and Vermont the rule is different. In those states it has been held that the note extinguishes the existing debt, unless it is agreed to the contrary. However, the rule applicable to this controversy is the one first stated. * * *

It is, of course, competent for the parties to the transaction to expressly agree that the note will be and is accepted in full payment and extinguishment of the original debt; but to establish this as a fact the evidence should be clear and satisfactory. There is no presumption that the note is accepted or received as payment. * * *

(b) DISCHARGE BY CANCELLATION

N. I. L. Section 119 (3). A negotiable instrument is discharged by the intentional cancellation thereof by the holder.

N. I. L. Section 123. A cancellation made unintentionally, or under a mistake or without authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under mistake or without authority.

(c) DISCHARGE BY MATERIAL ALTERATION

N. I. L. Section 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

COLUMBIA GROCERY CO. v. MARSHALL.

(Supreme Court of Tennessee, 1915. 131 Tenn. 270, 174 S. W. 1108.)

Bill by the Columbia Grocery Company against O. M. Marshall. Bill dismissed, and complainant appeals.

FANCHER, J. The case was brought to collect on an open account. Notes had been executed by defendant covering the account but materially altered by complainants. The case involves the question as to whether suit can be maintained on the original account.

The Columbia Grocery Company is a partnership composed of Mose and Ben Lazarous, doing a wholesale grocery business at Columbia, Tenn. Defendant O. M. Marshall was a retail merchant at Campbell's Station, in Maury county, and for several years had purchased goods of the complainants, and a running account had existed for considerable time. Complainants sold this business and desired to close out their accounts. They urged defendant to pay his indebtedness, and he disputed a large part of the account. After some considerable dispute about this, he finally agreed to give his interest-bearing notes, which he did, covering the account of $1,073.78 and $45 of interest. The notes were 11 in number, bearing date February 2, 1914—9 for $75 each, and one for $200, and another for $242.88. One note fell due each two months during the years 1914 and 1915.

The notes were prepared by complainants some days before execution and handed to defendant. They were actually executed February 21st and delivered to complainants. That evening Ben Lazarous discovered that the bookkeeper had left out a clause they usually inserted in serial notes of this character, and they had it filled in with a typewriter on each note; the first being as follows: "This is note 1 of a series of 11, default in payment of any note of this series all notes become due and payable."

Defendant's attention was not called to this alteration. The notes were then put in a box with other notes and papers and placed in the vault in the bank for safe-keeping. * * * Defendant * * * called to pay the first note, and, when the note was produced, he noticed the typewritten alteration, and thereupon refused to pay. * * *

It was customary for the bookkeeper to write this clause into notes of this character, and some notes had been so fixed after their execution, in other instances.

This suit was brought to recover on the original account. The defendant resists a recovery on the grounds:

First. That the notes were intended and did extinguish the original

indebtedness, being taken in settlement and closing out of the account; and that, the notes being void because of the alteration, no recovery can be had.

Second. That, the alteration being fraudulently made, no recovery can be had, regardless of whether the original account was extinguished.

From a review of the authorities, we are of opinion that the weight of authority is as follows:

That the taking of a promissory note of a debtor does not extinguish the original debt, nor operate as a payment, unless so intended or agreed between the parties, though it may extend the time of payment, and if for any reason without fraud the creditor loses his right to sue on the note, he is at liberty to sue on the original indebtedness. * * *

The early doctrine on this subject applied to deeds, because anciently most transactions which were reduced to writing were evidenced by instruments under seal, and an immaterial change made by the obligee, or in a material point if made by a stranger, avoided it. * * *

But now this early doctrine is nowhere adhered to, and is superseded by a more reasonable doctrine that an immaterial change, by whomsoever made, at least when unaccompanied by fraudulent design, will not invalidate the instrument, and that a material change by a stranger will not avoid it. * * *

It does not clearly appear in the present case that there was an intention, at the time these notes were executed, that they were to settle and extinguish the original demand for goods, wares, and merchandise sold and delivered. And the modern rule being that this intention must appear or else the creditor can sue upon the original debt when he loses his right innocently or without fraud, we reach the conclusion that the case must turn alone on whether the complainants have lost that right on account of their own wrongs. * * *

The question in the case then is: What is the degree of the wrong or the effect of the material alteration made in each of these notes?

Very able and exhaustive briefs have been furnished on the questions involved, and we find no material difference in the position of counsel either as to the facts or the law. It is the conclusion from the facts upon which counsel differ. The complainants maintain that these insertions in the notes were made innocently and in accordance with complainants' custom, and do not affect the right to sue on the original debt.

The defendant says that though he did not owe the complainants as much as they claimed, in order to get time, and prevent them from closing him out in business, he gave these notes; that the insertion of a stipulation after delivery, without his assent or knowledge, that default in the payment of any one note would cause all the notes to become due and payable, was a material change in the contract; that such a change, which the chancellor mildly termed constructive fraud, was in reality an intentional and subtle fraud and deception, for which the punishment will be inflicted to the extent that they will lose their right to sue on the original contract.

The modern rule, as expressed in many authorities touching this whole question, may be stated as follows: The intent with which an alteration of an instrument is made is not of material consequence in determining the effect upon the immediate instrument, but the intent

or motive is of great importance in determining whether a recovery can be had upon the original debt or consideration.

If the alteration of a written instrument is made by the holder with a design and intent to defraud the maker, it extinguishes the debt. This rule is founded on public policy, and in order to preserve the integrity of valid legal instruments, by providing a punishment for the wrong, and to deter the holder from tampering with it. If, however, the alteration is without fraudulent intent, while it will destroy the instrument, it will not destroy the right to recover on the original consideration, of which the instrument is a mere evidence. Thus, if a holder of a promissory note makes a material alteration in it after its execution but without any design to defraud, and in the belief that he had a right to alter it in order to make it conform to the original agreement of the parties, such alteration does not deprive the holder of the right to elect to disregard the note and to sue on the original obligation, provided the note was not accepted as payment thereof. * * *

There is some authority that although the alteration be material and fraudulent, since a bill or note suspends and is not absolute payment of the debt for which it was given, such alteration only extinguishes the security, and the original consideration remains, but this is not sound doctrine. The correct rule undoubtedly is that, when a party to a bill or note fraudulently alters its legal effect, he not only destroys the instrument, but he also extinguishes the debt for which it was given. * * *

We think the chancellor very mildly termed this act of the complainants a constructive fraud. It was more than that. It was not made in an innocent effort to conform the instrument to the true intention and agreement of the parties or through ignorance, or any other simple, guileless motive. It was a secret and stealthy attempt to gain an advantage. The defendant says that he would not have executed the papers with stipulations that, in the event of default of one, all would become due and payable, and it is reasonable to believe he would not. He was attempting to get a breathing spell between payments so he could meet them, one by one, through a period of two years. His wife had been sick in the hospital, and he was embarrassed financially. His debts were pressing him. These insertions in the notes destroyed the whole advantage he had gained by closing the account and substituting time notes, if he should be so unfortunate as to fail in one small payment. He went to make a payment before it was due and discovered the change, and thereupon promptly refused to pay.

The law on the subject is founded on wise public policy, and we are not at liberty to disregard it.

Affirmed.

(d) DISCHARGE BY RENUNCIATION

N. I. L. Section 122. The holder may expressly renounce his rights against any party to the instrument, before, at or after maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does

not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

(e) DISCHARGE BY AN ACT WHICH WILL DISCHARGE A SIMPLE CONTRACT

N. I. L. Section 119 (4). A negotiable instrument is discharged by any other act which will discharge a simple contract for the payment of money.

This general provision incorporates the various methods of discharge of simple contracts which were taken up in Chapter 5 of Contracts: novation, accord and satisfaction, discharge by bankruptcy, by statutes of limitations, etc.

(f) DISCHARGE BY ACQUISITION OF TITLE FROM A HOLDER

N. I. L. Section 119 (5). A negotiable instrument is discharged when the principal debtor becomes the holder of the instrument at or after maturity in his own right.

It is possible for a maker to acquire title to the note as agent for another, in which case he becomes a holder not in his own right. The instrument in such case would not be discharged. Nor would the instrument be discharged upon its surrender to the maker, upon the execution and delivery by the maker to the holder of a new note which, for any reason, was invalid. But a surrender of the note, upon part payment and an oral promise of the maker to pay the balance, would discharge the maker on the note. In various ways the question may be presented: Did the party primarily liable acquire title in his own right? The fact that such party has regained physical possession of the instrument is not conclusive that the instrument is discharged.

SECTION 3.—DISCHARGE OF REGULAR INDORSERS

N. I. L. Section 192. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

N. I. L. Section 120. A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by the release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

SECTION 4.—DISCHARGE OF A SURETY

There is no provision in the Negotiable Instruments Law expressly dealing with the subject of discharge of sureties. A surety may occupy any position on the instrument: Acceptor, maker, or indorser. Consequently the circumstances under which a surety will be discharged must be sought in section 119, dealing with the discharge of the instrument, and section 120, dealing with the discharge of parties secondarily liable.

It will be recalled from the cases in Contracts dealing with the rights of a surety, that certain facts will operate to discharge a surety which will not operate to discharge a principal debtor. The surety, in other words, will be discharged by any act which will not operate to discharge a debtor and in addition he will be discharged whenever the creditor does any act which in general tends to prejudice the rights of the surety. The Negotiable Instruments Law does not recognize that a surety on a negotiable instrument may be discharged by the special circumstances which, in the law of suretyship, have always operated to discharge the surety. The question is: Does the Negotiable Instruments Law, by implication, take away from the surety these special defenses. Where the surety has signed as an accommodation indorser, the circumstances that will discharge him are specified in section 120, dealing with the discharge of parties secondarily liable. By subsections 5 and 6 of section 120, the Negotiable Instruments Law expressly recognizes two of these special defenses of the surety but recognizes no other. It is possible to argue that, having dealt with some aspects of the law of suretyship, the surety is deprived of all other special surety defenses. But where the surety is not an accommodation indorser but is an acceptor or maker, the surety's right of discharge is governed by section 119. Here the surety's position is worse than it is when he is an accommodation indorser, for section 119 does not confer upon such a surety any of these special defenses. The fact that some special rights of the surety were dealt with in section 120, and not dealt with in section 119 leads to the inference that the framers of the act intended to take away from all sureties who were primarily liable on the instrument as maker or acceptor all of the special defenses of the surety. This inference is possible unless the phrase "a person secondarily liable," as used in section 120, may be interpreted to mean not only all regular and accommodation indorsers—which it unquestionably does include—but also all sureties who were makers or acceptors. If a surety maker or acceptor may be called "a party secondarily liable" then such party may at least avail himself of the two special defenses recognized by subsections 5 and 6 of section 120, dealing with the matter of release of or granting an extension of time of payment, to the principal debtor, by the holder. If a surety maker or acceptor may not be regarded as a party secondarily liable then such party is thrown back on sec-

tion 119. This section either takes away all special defenses of the surety or leaves the whole matter of a surety's defenses untouched. Section 196 provides that: **In any case not provided for in this act the rules of the law merchant shall govern.** If this section is applicable here then the surety's special rights as developed in the law of suretyship are preserved. The cases following indicate the state of the authorities on these questions.

UNION TRUST CO. v. McGINTY.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525.)

Action by the Union Trust Company against William H. McGinty. Verdict for $365 was directed for plaintiff, and defendant excepted.

RUGG, C. J. The single question presented in this case is whether the accommodation maker of a promissory note is discharged, if the holder, knowing that the note was made for the accommodation of the payee and indorser, by agreement with the indorser upon a valuable consideration, without the maker's consent, extends the time of payment.

Before the enactment of the Negotiable Instruments Act (St. 1898, c. 533; R. L. c. 73, §§ 18–212) one who made a promissory note for the accommodation of another was as between the parties a surety. The holder, who had knowledge of the true relation of the parties, was bound to act toward such accommodation maker as toward a surety in order to preserve his rights against him. Under such circumstances an extension of time to the person ultimately liable, without the consent of the surety, that is the accommodation maker, released the latter. * * * The precise point is whether this rule of law has been changed by the Negotiable Instruments Act.

It is matter of common knowledge that the Negotiable Instruments Act was drafted for the purpose of codifying the law upon the subject of negotiable instruments and making it uniform throughout the country through adoption by the Legislatures of the several states and by the Congress of the United States. The design was to obliterate state lines as to the law governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions amongst the several states, and to make plain, certain and general the controlling rules of law. Diversity was to be moulded in uniformity. This act in substance has been adopted by many states. While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. It ought to be interpreted in such a way as to give effect to the beneficient design of the Legislature in passing an act for the promotion of harmony upon an important branch of the law. Simplicity and clearness are ends especially to be sought. The language of the act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory interpretation are to be employed. Care should be taken to adhere as closely as possible to the obvious meaning of the act, without resort to that which had theretofore been the law of this commonwealth, unless necessary to dissolve obscurity

or doubt, especially in instances where there was a difference in the law in the different states.

Approaching the act from this point of view, it is apparent that no relation of principal and surety is established or contemplated by any of its sections. It determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, whether for accommodation or otherwise is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute. * * * The act makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of the instrument signed. The fact that one is an accommodation maker gives rise to a duty no less or greater or different to the holder for value than that imposed upon a maker who received value. This is expressly provided by the act, even though such holder knew at the time of making that the maker was an accommodation maker. * * * The act further provides in definite terms that the instrument and hence one primarily liable is discharged in one of five different ways, * * * that is, by payment by the principal debtor, or by the party accommodated, by cancellation, by any other act which would discharge a simple contract, and by the principal debtor becoming the owner at or after maturity. There is no mention here of a discharge of an accommodation party by extension of time. But among the ways in which a party secondarily liable may be discharged is * * * an agreement by the holder to extend the time of payment or to postpone his right to enforce the instrument "unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved."

Whatever force might attach to the enumeration of ways in which the instrument and consequently parties primarily liable might be discharged, if this provision stood alone, the inference arising from the omission of extension of time from such enumeration and its inclusion among the ways in which persons secondarily liable may be discharged is almost irresistible that the Legislature did not intend that persons primarily liable should be discharged in that manner. These two sections standing side by side, both dealing with the subject of discharge of liabilities of parties, the one mentioning, the other not mentioning, extension of time by the holder as a means of working discharge of liability, cannot be treated as accidental or without significance. It is strong proof of a legislative purpose to change the pre-existing law of the commonwealth. These considerations outweigh the argument adduced from the fact that the "instrument" rather than "parties primarily liable" is the language used in section 119 and from the phrase of clause 4 to the effect that the instrument may be discharged "by any other act which will discharge a simple contract." The act establishes a liability on the part of an accommodation maker, which is not affected by an extension of time given by the holder to any other party to the note, even though as between such party and the accommodation maker a different relation may subsist in fact from that appearing on the face of the paper. The result is to render somewhat more rigid the rights of the parties as set forth in the written instrument, and so far as the holder is concerned to establish liability to him upon a firm basis, not easily shaken by parol evidence. * * *

This appears to be the view taken without exception by the courts

of other jurisdictions which have considered the point. In the interpretation of a statute widely adopted by the states to the end of securing uniformity in a department of commercial law, we should be inclined to give great weight to harmonious decisions of courts of other states, even if we were less clear than we are in this instance as to the soundness of our own conclusion. Vanderford v. Farmers' Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; Cellers v. Meachem, 49 Or. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997; Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Bradley Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127; * * * Richards v. Market Exchange Bank, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99; Fritts v. Kirchdorfer, 136 Ky. 643–650, 124 S. W. 882.

Exceptions overruled.

SCANDINAVIAN-AMERICAN BANK OF FARGO v. WESTBY.

(Supreme Court of North Dakota, 1918. 41 N. D. 276, 172 N. W. 665.)

Action by the Scandinavian-American Bank of Fargo, N. D., against Simon Westby, with counterclaim by defendant. Judgment for plaintiff, and defendant appeals.

GRACE, J. The complaint states an action to recover upon a promissory note executed by defendant to plaintiff for $2,320.64. The answer admits the execution and delivery of the note, but denies it was executed for valuable consideration. The defendant, in a very extensive answer, sets out other defenses. To the answer there is a reply interposed. It is not necessary to set out the answer in full, but the substance of the answer is that on August 8, 1911, J. A. Stafne executed and delivered to plaintiff a promissory note for $1,745.90 with interest at 12 per cent., payable November 1, 1912. At the time the note was executed, there was pledged to plaintiff as collateral security to said note, certain stock certificates of the Citizens' State Bank of Alexander of the par value of $100 per share. The answer further states that in the year 1913, A. J. Stafne was the owner of 25 shares of the corporate stock of the Williston State Bank of the par value of $100 per share. It is claimed by the defendant that about the 1st day of August, 1913, A. J. Stafne gave defendant an option to purchase the 25 shares of the corporate stock of the Williston State Bank with the understanding that if the same were purchased by the defendant the purchase price thereof should be applied upon indebtedness of A. J. Stafne to the Williston State Bank of which the defendant was president, director, and stockholder. * * *

The plaintiff, in its reply, alleges the delivery of the note to it on August 8, 1911, by A. J. Stafne, and the pledging therewith at that time, as collateral security thereto, the 20 shares of stock of the Citizens' State Bank of Alexander. The reply further alleges, in substance, that the consideration of the delivery to the defendant by the plaintiff of 25 shares in the Williston State Bank was the guaranty of the payment at maturity of the note sued upon; that said guaranty was indorsed upon said note and was in the following words: "For value received, I hereby guaranty the payment of the within note at maturity or any time thereafter with interest at the rate of twelve per

cent. per annum until paid, waiving demand, notice of payment and protest"—which guaranty was signed by the defendant. * * *

The $1,745.90 note was not paid at maturity, and it was renewed three different times. The first time was on November 28, 1913, when Simon Westby and Albert J. Stafne executed a renewal note for $2,148.25. The second note was March 25, 1914, for $2,205, signed by the same parties. The third renewal, signed by the defendant only, was for $2,320.64, dated November 20, 1914, and is the note upon which suit is brought.

The first point which we consider is whether or not the defendant, by the giving of the renewal notes from time to time, is estopped to urge the enforcement and collection of the original note, to renew which renewal notes were executed. In other words, if there existed any infirmity in the original note, after the defendant has executed renewals of the original note is he estopped to set forth and rely upon the original infirmity or defense which he had, if any, to the original note? We are of the opinion that, as between the original parties to the obligation, where the holder of such note or obligation has not parted with anything of value, or assumed a more detrimental position by reason of the taking of a renewal note or obligation, any defense or infirmity defendant might have taken the advantage and benefit of if he had been sued upon the original obligation is equally open and retained to him where he has executed renewal note or notes and suit is brought upon the renewal note and there is no good reason why this should not be so. The renewal note or obligation is but the old note or obligation which is extended in the form of the renewal note. The renewal of notes may be said to be of as much benefit to the holder as to the maker thereof; while the renewal, in almost all cases, operates to extend the time of payment to the maker, the holder is benefited by having live paper which is of more use in the business world than past-due paper, and with these and a few other minor differences, the renewal note is the same obligation as the original note. * * *

The third and last point relates to the conversion by the plaintiff of the collateral, to wit, the bank stock in the Citizens' State Bank of Alexander. This is the most important point of the case, and involves an important point of the case, and involves an examination and construction of that part of the Uniform Negotiable Instruments Law, in its relation to the subject we are examining. It must be conceded that the relation of Westby to the plaintiff, the holder of the note, was that of surety. * * * [Court quotes sections 119 and 120 of the Negotiable Instruments Law.]

The claim of the plaintiff, in short, is that Westby, being a surety, his liability is a primary one, and nothing the plaintiff might do, by way of surrender of collateral or the extension of time without the knowledge or consent of the surety would, in any manner, cause the plaintiff any liability to the defendant. In other words, the plaintiff's claim amounts to this: That the holder of the note, to secure the payment of which there was admittedly abundant collateral security and, at the same time, having a surety on the note and knowing him to be such, may act with a free rein. He may turn the collateral back to the original debtor, or may otherwise dispose of it; may extend the time of payment, and, in fact, act with entire disregard as to the rights of the surety, and with total disregard to his liability as a

trustee, without incurring any liability on his part, all on the theory that primary liability of the surety relieves the holder of the note from all liability and responsibility to the surety arising out of any collateral security to the original note, or arising out of the extension of the time of payment of the original note, or in any other manner. If the Uniform Negotiable Instruments Act, as applied to this situation, means that the holder of the note, although he has abundant collateral security for his note, other than that of the surety, can deliberately dispose of the collateral or return it to the original debtor, or otherwise disposing of it, and can extend the time of payment without knowledge or consent of the surety, all without incurring any liability on his part to the surety, it appeals to our sense of fairness and justice in just about the same proportion as a strangle hold, where, in a contest of strength and science, one wrestler secures this deadly hold, and, slowly but surely, chokes his opponent into insensibility. We do not believe that primary liability of a surety means what several of the courts have said it means.

As a general rule, the surety signs the original note or instrument, and is thus an original promisor, and if the original instrument has consideration, that is, if the consideration of the original instrument is sufficient to uphold the contract of surety, in such case, the surety is an original promisor, and may be sued upon default occurring in the note or instrument which he signed. His liability may thus be considered a primary one. In the consideration of this case, we will assume and consider the liability of the defendant a primary one.

Having in this case arrived at the conclusion that the defendant is a surety and assuming that his liability is a primary one, the next point to analyze is whether section 7004 of the Compiled Laws of 1913 repeals all our laws relative to suretyship, either directly or otherwise. The merest inspection of such section determines that it does not directly attempt to repeal any of our statutory law relative to the rights, duties, and remedies of surety. The law does not favor the repeal of existing law by mere implication, and, even if it did, we find no basis, in said section, from which it might be inferred that the repeal of the laws concerning suretyship was implied. A careful examination of section 7004 supra, discloses that the five ways therein specified in which a negotiable instrument may be discharged do not apply exclusively to the maker of the note, but some of the subdivisions of said section apply also to the holder. The first subdivision implies that a negotiable instrument is discharged by payment in due course, by or on behalf of the principal. The second subdivision is by payment in due course by the party accommodated. The third is by intentional cancellation by the holder. The fifth, when the principal debtor becomes the holder of the instrument in his own right. It is self-evident that the negotiable instrument would be discharged under such circumstances. That would be true if there were never any law enacted upon the subject. The fourth subdivision of said section, however, is not so easily understood or so simple of construction. It is as follows:

"By any other act which will discharge a simple contract for the payment of money."

Keeping in mind the other subdivisions of said section, that the negotiable instrument may be discharged by certain acts not only of the maker but by the holder, we believe the language of subdivision 4 applies to both the maker and the holder. There may be other

ways than those set forth, whereby the maker may show that the negotiable instrument is discharged. For instance, that the contract was fraudulent or obtained under duress. The surety being primarily liable and an original promisor, the holder of the note might do certain acts which would operate to discharge the liability of the surety on such note, and thus discharge the instrument so far as the surety is concerned. If the law of suretyship has not been repealed, and we hold that it has not, if the holder of the note should, without the knowledge or consent of the surety, extend the time of the payment to a time certain, so far as the surety is concerned, the contract and instrument, being a simple one for the payment of money, is discharged. Again, if the holder of the note, at the time of the signing thereof by the surety, had taken collateral security from the principal debtor, it must be held that he holds such collateral in trust, and if the surety pays the obligation, he is entitled to stand in the shoes of the creditor and reimburse himself by having such collateral applied in reduction of the amount of money which the surety has paid the holder.

The holder of the note is under no obligation to first realize on the collateral before suing the surety. The holder may proceed against the surety without having first realized upon the collateral security, for the reason that the surety's liability is a primary one, but the holder must, nevertheless, be faithful to his trust in preserving the collateral, and must use ordinary care and vigilance to preserve it, and must not dispose or convert it, and if the collateral is realized upon, the value thereof must be indorsed upon the note. * * *

Subdivision 2 of section 6681 of the Compiled Laws of 1913 is as follows:

"How Exonerated. A surety is exonerated:

"1. In like manner with a guarantor;

"2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights or which lessens his security; or,

"3. To the extent to which he is prejudiced by an omission of the creditor to do anything when required by the surety which it is his duty to do."

Section 6683 provides that the surety may require his creditor to proceed against the principal, and if the creditor neglects to do so the surety is exonerated.

Section 6686 provides that, when a surety has satisfied the obligation of the principal, he is entitled to enforce every remedy which the creditor then had against the principal, until he is reimbursed for what he has expended. He can also require a contribution from cosureties.

Section 6687 provides: "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or by a cosurety at the time of entering into the contract of suretyship or acquired by him afterwards, whether the surety was aware of the security or not."

Section 6688 provides: "Whenever a property of a surety is hypothecated with a property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation."

Have all these various provisions been abrogated by the Uniform Negotiable Instruments Act? We are certain they have not, and that they still stand as the law of this state with reference to suretyship,

and were never intended to be repealed, and were protected under subdivision 4 of section 119.

In the case at bar at the time of the signing of the original note, the plaintiff knew that the defendant was a surety. He had like knowledge at the time of the signing of each renewal note, including the note sued upon. The relation of the defendant was, at all times, one of surety. * * *

The defendant entered into the contract to pay the original obligation or discharge the original instrument with all these considerations in mind, all of which were well known to the plaintiff. The collateral security was held by the plaintiff in trust for the payment of the original obligation, or, if the original obligation were paid by defendant, the collateral was held in trust to be turned over to him, if the defendant were compelled to pay the original obligation. If the plaintiff converts such collateral security to his own use, the instrument is discharged to the extent the collateral security has been decreased in value by failure of the creditor to exercise ordinary diligence in preserving the security, or if, after notice by the surety to proceed against the principal, and the principal fails to do so, the instrument is discharged to the extent of the damages which the defendant may show by reason of the creditor's failure to proceed. In other words, the contract which the defendant entered into is discharged to the extent herein indicated; and, where action is brought on the original instrument, or where an action is brought against the surety by the original holder, it is proper to set up and plead such damages, if any, by way of counterclaim, as a cause of action against the plaintiff.

If the creditor extends the time of payment to a time certain, without the knowledge or consent of the surety, such extension operates to discharge the instrument so far as the surety is concerned. It is simply another way in which, under subdivision 4 of section 7004, a simple contract for the payment of money may be discharged, and there is no reason why this should not be so, for to hold that the surety can be held on a note which has been extended to a time certain without his knowledge or consent is to hold that he can be held on a contract which he never made. To illustrate: Supposing A. executes a note to B. for $1,000 which A. owes B. The note is due one year from the date of its execution. C. signs the same as surety. At the time A. executes the note he is worth $20,000. At the maturity of the note, A. and B., without the knowledge or consent of C., extends the time of the payment of the note for five years to a time certain. During such five years B. cannot maintain an action against A. for the recovery of the debt. During the five years A. becomes bankrupt. Should C. be held to pay the debt? It is evident that if the suit had been brought at the end of the year when default was made in the first note B. would have gotten his money and C. would not have suffered, but by the extension of time a new contract between A. and B. was made in which C. was not a party, and C.'s loss is also by reason of the new contract to which he is not a party. What sensible or just reason is there, if any, why C. should not be discharged from his contract on such instrument? There can be none, and there is none, for the circumstances and conditions which compel C.'s loss are not the conditions to which he contracted. The contract has been, in fact, changed without his consent and he is discharged from the instrument and from liability, and we hold that such a condition was contemplated

under subdivision 4 of section 119 to discharge one from a simple contract for the payment of money where the circumstances we have above illustrated exist.

We hold that all the rights of suretyship, the right of subrogation, are all brought under subdivision 4 of section 7004. This is the only reasonable construction to be placed upon such section. In this connection, it must not be lost sight of that section 6943 of the Compiled Laws of 1913 provides as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable."

If a negotiable instrument is taken in due course of business in the belief that all the signers of such note are makers, and with no knowledge by the one who takes said note that any of the signers thereon are sureties, the surety could claim no benefit by reason of his relation as a surety instead of maker, until knowledge of the suretyship is brought home to the holder of the note. If, however, a holder in due course has knowledge of the suretyship and has collateral security for the payment of the debt from the time he acquired such knowledge he is in no different position than any other holder of the note, and must have due regard to the rights of the surety and exercise ordinary diligence to preserve the collateral security. He must bear in mind that a surety cannot be held beyond the express terms of this contract. * * *

It is clear the defendant did not authorize or consent to the conversion of the collateral by any person, and if the defendant did have knowledge that the plaintiff was turning the stock over to Eric Stafne for the purpose of having it reissued in the form of new stock, this knowledge would, in no manner, relieve the plaintiff from the necessity of accounting to the defendant for the value of said stock if plaintiff should pay the obligation to which such stock was collateral.

The defendant did not consent to the conversion of the stock by Eric Stafne or any one else. The defendant admits his liability upon the note sued upon and counterclaims for the value of 20 shares of the Citizens' State Bank of Alexander, which have a par value of $100 per share; there being no evidence to controvert the presumption that the stock is worth par.

We are of the opinion that such counterclaim is a proper one, and under the evidence as it now stands, the defendant should have judgment for the value of the 20 shares of stock of the Citizens' State Bank of Alexander at par, with interest thereon at the legal rate since the date of the conversion of said stock.

We are of the opinion that the matters disputed as a counterclaim were available by way of defense. From this view of the case, the only judgment plaintiff is entitled to is the excess of the note and interest over and above par value of the stock, with interest at the legal rate since the conversion.

Though the surety is primarily liable, that does not relieve the creditor or the holder of the note from liability if he does not use ordinary diligence in preserving the security which has been hypothecated to secure the payment of the note, nor (in the opinion of the writer) can the creditor and the principal debtor, by agreement between themselves without the knowledge or consent of the surety, extend the time of payment to a time certain, thus, in effect, making a new contract, and if such is done the liability of the surety, in my opinion, ceases. * * *

PART IV

SALES

Chapter

Introduction
I. Transfer of Title in Contracts of Sale of Ascertained Goods.
II. Transfer of Title in Contracts to Sell Unascertained Goods.
III. Powers of Persons Not Owners of Goods to Transfer Title to Innocent Purchasers.
IV. Negotiable Documents of Title.
V. Remedies of the Seller.
VI. Warranties.
VII. Rights and Remedies of the Buyer.

INTRODUCTION

The law of sales of personal property, in the main, is a branch of the general law of contracts. To some extent the law of property is involved. Contracts to sell land and transfers of interests therein by deed are not here taken up. The general law of contracts is, of course, applicable to contracts for the sale of real estate; but the law with reference to the transfer of legal interests in real estate by deed or by will constitutes a branch of law separate from that which governs the transfers of interests in personal property. These topics of the law of real property are not developed in this volume.

The following problems of the general law of contracts—offer and acceptance, consideration, rights of third parties in the contract, effect of mistake, fraud, duress, undue influence, illegality, and capacity, and of the statute of frauds—in their application to contracts to sell and of sales of personal property, are not reopened here, for the reason that the treatment of these matters in Part I is deemed adequate. There is no special reason for redeveloping these principles here. The special problems of the law of sales of personal property concern questions (1) of the nature and extent of the obligations of the parties; (2) performance; (3) discharge; and (4) remedies for breach. To put the matter more concretely it is evident that a contract to sell or of a sale is intended, ultimately, to result in the substitution of the buyer in the position occupied by the seller with respect to certain identified property or property specified by description. All the legal relations which the seller has with respect to his property are to be transferred to the buyer. This substitution is referred to commonly by the phrase "transfer of title," or "transfer of the property in goods." What are the circumstances under which title to personal property will pass to the buyer, is a most important question in the law of sales. It becomes important to ascertain the moment at which title passes, in order to be able to determine the extent of the rights and liabilities of the buyer and seller when certain unexpected events occur. Risk of loss usually follows

title; the right to sue for the purchase price, as distinguished from the right to sue for damages for breach of an executory contract to buy, is dependent upon a showing, as a rule, that title has passed to the buyer. Rights of creditors of the buyer and of the seller with respect to the subject of a sale are affected according as the title is in the buyer or seller. The first four chapters following deal with various manifestations of this broad inquiry. The remaining problems are three: (1) What is the nature and extent of the seller's obligations? (2) What are the remedies of the seller? and (3) What are the remedies of the buyer? The first leads us into the study of express and implied warranties, a topic developed in Chapter VI. The special remedies of the seller, taken up in Chapter V, and the special remedies of the buyer, taken up in Chapter VII, duplicate some aspects of legal remedies which were noted in Chapter X of Contracts; but, in several particulars, new aspects are presented. To some extent matters adverted to in Chapters V and VII define the substantive rights of the parties, rather than prescribe the nature and extent of legal remedies. For convenience these matters have been grouped together.

The law of sales, like the law of negotiable instruments, has been codified in many states. In 1906 the final draft of the Sales Act was approved at the National Conference of Commissioners on Uniform State Laws and recommended to the several states. The Sales Act has been adopted in Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wisconsin, Wyoming, and Alaska.

CHAPTER I

TRANSFER OF TITLE IN CONTRACTS OF SALE OF ASCERTAINED GOODS

Section
1. Introduction.
2. Title Passes When the Parties Intend It to Pass.
3. In Contracts to Sell Ascertained Goods in a Deliverable State, Presumptively Title Passes at the Time the Contract is Made.
4. Further Illustrations of the Application of the Presumption.
5. Application of the Presumption Where Acts of Weighing or Measuring Must Alone be Done to Ascertain the Amount of the Purchase Price.
6. Presumption That Title Passes at the Date of the Contract is Applicable Where the Sale is a Sale on Credit.
7. Presumption That Title Passes at the Date of the Contract Overcome by Proof That the Parties Intended a Cash Sale.
8. Contracts on Sale or Return and Contracts to Sell on Approval.
9. Conditional Sales.

SECTION 1.—INTRODUCTION

As has been noted in the introduction, one of the most important problems, if not the most important, in the law of sales, is the determination of the time when title to the property passes from the seller to the buyer. For the solution of this series of problems it is necessary to classify all contracts to sell into two groups: (1) Contracts to sell ascertained goods; and (2) contracts to sell unascertained goods. Some of the rules of law applicable to contracts in the one group also apply to contracts in the other group, but there are some rules which apply exclusively to contracts in but one of these groups. For these reasons, these two divisions must be considered separately. Each group, of course, must be further subdivided into several smaller groups; the contracts so classified in each having some features not common to the other groups.

The importance of determining the precise time at which title passes arises from the fact: (1) That, generally, the risk of loss follows the title. (2) If title has passed to the buyer he is liable for the purchase price, as distinguished from damages for breach of contract to buy, even though he has not received the goods or has refused to accept them. (3) The power to transfer the title to a third party vests in the person who holds the title, and this is true, even though by such resale the party selling breaks his contract with the other party. When the purchase price has not been paid, and the buyer has the title and is insolvent, the result will be a loss to the seller. Or, if the purchase price has been paid, and the seller, still holding the title, resells to a third party and is insolvent, the buyer will lose. (4) Creditors of the buyer and creditors of the seller, who are forced to sue for debts due them, possess the right to have the property which belongs to their debtors sold to satisfy their judgments. Since the possession of property

may be in one of the parties and title in the other, it will oftentimes be puzzling to the creditors of buyer and seller to know whether it is safe to levy on certain property. The levy will be effective, and the sale thereunder binding, only when the title to the property levied upon was in the judgment debtor.

Another, but more extended, aspect of this same problem arises when either the buyer or seller are adjudicated bankrupts. The trustee in bankruptcy takes title to all the property owned by the bankrupt for the benefit of the bankrupt's creditors. Complicated situations develop in such instances as these: When a large business enterprise is suddenly stopped by bankruptcy, the bankrupt will have any number of uncompleted contracts of sale outstanding. In some he will be the buyer, in others the seller, and the property may be scattered over many states. Each of such contracts of sale must be looked at with the view of determining, when the bankrupt was the seller, whether the title had yet passed to the buyer, or, if he were buyer, whether the title had yet reached him, for the trustee in bankruptcy, with but a few exceptions, will take only the property to which the bankrupt had title.

There are other types of problems where the controversy may only be decided after finding where the title was; but enough has been said to indicate the importance of this question, and also to point out the kinds of situations out of which they arise.

SECTION 2.—TITLE PASSES WHEN THE PARTIES INTEND IT TO PASS

Proceeding, now, to the question, when will title pass in a contract to sell ascertained goods, the Sales Act provides:

Section 18, Subsec. 1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

There are three independent questions raised by this section: (1) What are specific or ascertained goods? (2) What is meant by transferring property in goods? (3) How is the intent of the parties to be determined?

(1) The section deals with contracts to sell goods; that is, contracts to sell tangible personal property, such as a book, a house, or a carload of wheat. The section does not apply to intangible claims, nor to negotiable instruments. The section does not deal with all kinds of contracts to sell goods. It applies only to contracts to sell specific or ascertained goods. All goods are either ascertained or unascertained. When will goods be ascertained? This question rarely presents difficulty. Goods are ascertained when the parties understand what property, as distinguished from all other property, is meant. If the subject of the sale is physically present, so that buyer and seller may each see it, and language is

used in the negotiations, or in the contract, which shows that the object before them is the thing sold, the goods are said to be ascertained. But the subject of the sale need not be physically present, in order for the goods to be ascertained. The goods may be in another place. If the parties use language during the course of the negotiations which refers to the goods with sufficient definiteness as to their appearance and present location, so that the parties may find them, the goods are said to be ascertaintd or specified. They are capable of being identified. But the goods must not be so mixed up with other goods that they are not distinguishable. The sale of a machine bearing a certain number, not borne by other machines of the same kind, and described as to kind and location, would be a sale of ascertained goods. But the sale of a machine of specified description, stated to be located at a certain place, where there were other machines of the same kind, would not be a sale of ascertained goods.

(2) We have already discussed what is meant by transferring property or title in goods. Another way of stating the general legal effect of the passing of title to property to the buyer is to say that the buyer becomes the owner of it. The buyer may use the property, recover damages from one who injures the property, and the risk of loss or damage is on the buyer. The buyer may sell and pass a good title thereto, even though he may not have paid the seller.

(3) The most difficult question raised by this section is to determine what the parties did in fact intend. There has been and still is a good deal of litigation over this question. It is very important to keep in mind in the study of the following cases that the court's principal problem is to ascertain what the parties intended with respect to the time at which title to the goods was to pass. The law might have taken the view that title to goods contracted to be sold positively could not pass to the buyer, no matter what the parties intended, until (1) actual delivery to the buyer; or (2) until the price were paid; or (3) unless credit were expressly given. At one time this was the law, but to-day, if the contract concerns ascertained goods, the sole test as to when title shall pass is the intention of the parties.

If seller and buyer always expressed their intention in such forms that there could be no mistake concerning the matter, the problem of ascertaining intention would almost disappear. As a matter of fact, however, buyer and seller very rarely express their intention as to the time when title is to pass. At the time of a sale the attention of the parties is so firmly fixed upon the purely business aspects of the transaction that there is nothing to cause the parties to reflect upon this matter. They know and intend that finally title is to pass to the buyer, but they do not expressly agree as to the precise moment when this is to happen. In the great majority of transactions it will make very little, if any, difference as to the time when title passes. But there comes a

time when this question becomes of supreme importance. If during the negotiations, or subsequent thereto, and before payment of the price, the goods are destroyed by fire, or sink while on board a vessel, must the buyer pay for the goods? Or suppose the buyer, B., before payment to the seller, A., sells the goods to a third party, C., and C. pays B., and B. goes into bankruptcy, may A. keep the goods, or recover them from C., or must A. content himself with the dividends which will be paid from the bankrupt estate of B.? Again, suppose B. enters A.'s jewelry store to buy a watch. A. shows B. a watch, priced $100. B. says, "I will take it; show me a chain." The watch is left on the counter. A. and B. step to the case containing the chains, and B. finally selects one. On returning they find that the watch has been stolen. Must B. pay for the watch?

In all these and in many other similar situations the question raised can be answered only by finding out where the title was when the unexpected event, such as the loss or damage to the goods, the sale to a third party, or the bankruptcy of one of the parties, occurred. Usually the parties have not made known what their intention was as to the time when title should pass. Therefore the intention of the parties must be found in the circumstances of the case; that is, the courts will, in the light of all the evidence surrounding the negotiations, determine what the parties must have intended, having conducted themselves in such a manner. Quite likely the parties actually had no intention at all about the matter; therefore the search for something which had no existence may impress one as rather odd. This anomaly is explained in this way: Title had to pass at some time; having entered into a contract to sell, certainly the seller and buyer did in fact intend that title should pass at some time, although they may have had no intention as to the time when this event should occur. Therefore the search for the intention as to the time when title passed is in reality a search for some particular instant of time which, in the light of all the circumstances, is the most reasonable to suppose that the parties would have intended title to pass, had their attention been called to this feature of the sale.

The courts have recognized the great difficulty in ascertaining the intention of parties who had no intention, or, if they had, failed to express it, and as a result several rules have been developed which are a great aid, at least, in settling the controversy. These rules are of two kinds: (1) There is a rule which directs the court to examine with particular care into certain kinds of evidence, which experience has shown is the best evidence from which to infer what the intention of the parties was. (2) There are several rules, called rules of presumption, which assert that, if the parties have conducted themselves in a particular manner, and the goods are in such and such a condition, the presumption is that title passed at a time which the rule proceeds to indicate. A presumption is the equivalent of proof, or, rather, it is

taken to be the equivalent of proof until other evidence makes it appear that the conclusion thus presumed is not justifiable in the particular case, and therefore the presumption will not govern.

The first rule, discussed above, is expressed in the Sales Act as follows:

Section 18, Subsec. 2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Something has been said above in explanation of this section. Its purpose is to focus the attention of the courts upon four kinds of evidence which must be taken into consideration in ascertaining intention:

(1) The court must note the terms of the contract. Obviously, this is the first and best evidence. If the parties have definitely expressed their intention, that expressed intent must govern, no matter what contrary intention would be indicated by the other three kinds of evidence viewed alone.

(2) The court must take into consideration the conduct of the parties. This direction is very similar to the fourth kind of evidence which must be carefully considered; i. e., the circumstances of the case. Taken together, these two rules direct the court to look: (a) At the acts of the parties done with respect to the goods, or with respect to the payment of the price; (b) the nature of the goods and where located at the time of the transaction; (c) all the language employed by the parties during the course of the negotiations; and (d) perhaps many other matters, which, while difficult to conceive of and to express generally, would properly be called "the circumstances of the case," if we had before us a concrete situation.

(3) Usages of trade must be considered. The rule requiring the investigation of the usages of trade is most important. Practically all business is conducted according to certain established usages. Time and time again the most complicated of business transactions are entered into, where the acts of the parties are very few, cover but a short space of time and where practically nothing is said in explanation of the conduct of the parties. These apparently simple acts have the most far-reaching consequences; yet they are left by the parties unexplained. Perhaps it would not be incorrect to say that the great majority of business transactions finally generate into the observance of certain specified formalities the meaning and consequence of which can be learned only from a careful consideration of the usages established in that particular type of transaction.

We shall find, with respect to the narrower question of the effect of custom upon the passing of title, that this question is of great importance in ascertaining what the parties intended. It is incumbent upon a business man to know with considerable completeness and accuracy all of the established customs of the

trade, if he desires to avoid unforeseen and sometimes unfortunate consequences.

The second class of rules which have been established to aid in the discovery of the intention of the parties as to when title to goods contracted to be sold shall pass, as has been indicated, are rules of presumption. When the law raises a presumption that a certain conclusion is true, as, for example, that title to goods passed at a certain moment, the meaning is: First, that certain evidence then before the court justifies the legal conclusion asserted in the presumption. Were it not for the rule of presumption the probabilities are that the court would not be justified in reaching any conclusion at all until further evidence appeared. The rule of presumption, therefore, enables a court to decide a controversy upon evidence which might be insufficient to warrant any determination of the case. This should not be taken to mean that a decision so arrived at is unjust. On the contrary, the case very probably will be decided fairly for both parties. We should bear in mind that a particular rule of presumption was never formulated until the courts had been confronted with a great many cases. Upon such experience it was found that certain acts or words in the great majority of cases indicated what the intention of the parties was, and thereupon the courts decided that, for the future, when these selected kinds of evidence, found to be exceptionally cogent appeared the necessity of further proof would be dispensed with.

At this point the most important aspect of a legal presumption arises, a feature which is sometimes lost sight of. That feature is this: The presumption will be rendered inapplicable to the case upon further evidence that the parties intended the contrary. The presumption is not, in the strict sense, a rule of positive law. To illustrate the distinction: Simple contracts must be founded upon consideration. This is not a rule of presumption. It is a positive requisite to the existence of the contract. No matter how conclusively the parties have indicated that they intended to bind themselves without consideration, the law will not hold them to their intention. Contrast this situation with the following: A. is indicted for the murder of B. Suppose the evidence shows the fact that A. killed B., that he intended to kill B., and that there was no evidence of justification or excuse. The presumption arises that A. was sane, and was accountable for his conduct; but it is only a presumption, for evidence will be admitted to show that the defendant, by reason of mental deficiency or mental disease, was not capable of possessing the requisite criminal intent. The mistake which is often made is to regard a rule, which in reality is but a rule of presumption, capable of being rebutted and made inapplicable to the case by evidence showing that the parties intended something different, as an inflexible rule of law, which cannot be made inapplicable merely because the parties intended that such rule should not govern the transaction. Practically all the problems

where the question of the passing of title is raised we must consider one or more rules of presumption. The same is true with respect to many other sections of the law of sales. In every case we must know with certainty whether we are dealing with a presumption or a binding rule of law. If the rules applied and discussed in the cases are conceived of as binding rules of law, many of the cases will not be understood, and many will appear to be in conflict, when in reality they are not so. Perhaps the greatest value to the business man in studying this most important topic of the law is to call attention sharply to the sources of controversies out of sales contracts and to the methods by which these controversies are decided, to the end that attention be focused upon the necessity for providing expressly for these contingencies, at least where the risk is heavy.

With this preliminary discussion of the nature and importance of rules of presumption, we pass to the statement of the rules themselves, and to the consideration of their application to specific facts.

SECTION 3.—IN CONTRACTS TO SELL ASCERTAINED GOODS IN A DELIVERABLE STATE, PRESUMPTIVELY TITLE PASSES AT THE TIME THE CONTRACT IS MADE

Sales Act, Section 19. Rules for Ascertaining Intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1.—Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery or both, be postponed.

The most important matter presented by rule 1 is to note that it applies only to those contracts to sell ascertained or specified goods which goods are also in a deliverable state. Contracts to sell ascertained goods are divided into two classes: (1) Those goods which, though ascertained, are not in a deliverable state; (2) those goods which are ascertained and also are in a deliverable state. It would follow from rule 1 that, if goods were not in a deliverable state, the title—or the property, as the Sales Act here terms it—would not pass until they were put in a deliverable condition. But, if the Sales Act had nothing more to say about the time when title would pass in contracts to sell ascertained goods not in a deliverable condition, that would mean that title would not pass at the date of the contract in two classes of cases: (1) Where the seller, by the terms of the contract, was bound to put the goods into a deliverable state; (2) where the buyer was to

put the goods into a deliverable state. Accordingly the following rule was added:

Section 19, Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

It appears, therefore, that when we are dealing with a contract to sell ascertained goods there are two situations where the presumption is that title passes to the buyer at the date of the contract: (1) Where the goods are in a deliverable state at the time when the contract is entered into; (2) when the goods are not in a deliverable state at the time the contract is made, but where the buyer by the contract is bound to put the goods in a deliverable state. The important question is: When are goods in a deliverable state? The following cases discuss this question.

CARROLL v. HASKINS.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 593, 99 N. E. 477.)

Action by Arnold L. Carroll against Emmett F. Haskins. Verdict for plaintiff, and defendant excepts.

BRALEY, J. While as between the parties to the sale the title passed to the plaintiff if the jury believed the evidence yet the defendant who as a deputy sheriff subsequently attached the property on a writ against the seller is not liable for conversion unless there also was proof of actual or constructive delivery. * * * The evidence showed a bargain for the purchase in satisfaction of a debt due from the seller to the buyer of 4½ tons of hay, stored in two "bents" distinguished from each other by a post, and containing some 6 or 7 tons. Upon the day following the agreement the parties went to the barn where in their presence the "bent" in the northeast corner was measured, and the contents having lacked less than a ton of the amount purchased, the vendor, although he declined to sell the hay in the adjoining "bent," agreed, that the plaintiff could take therefrom enough to supply the deficiency, and gave a bill of parcels for the full quantity. It is not contended that the sale was made to defraud creditors, even if the plaintiff was given permission to remove the hay at his own convenience, and from the language and conduct of the parties the jury could find, that the seller for a valuable consideration, and in good faith, actually intended to part with possession, and the plaintiff intended to accept the transfer. * * *

By the act of measurement the line of demarcation could be ascertained, and the subject of the controversy could have been identified even if not physically separated from the other hay, as having been covered by the contract of sale. The bulky nature of the property having precluded manual possession unless the plaintiff had immediately taken the hay away, constructive delivery under the circumstances was sufficient, and the transaction resulted in the sale of specific goods where nothing further remained to be done. * * *

The defendant's request was rightly denied, and the exceptions must be overruled.

In re COPE'S ESTATE.

Appeal of COATES et al.

(Supreme Court of Pennsylvania, 1899. 191 Pa. 589, 43 Atl. 473.)

STERRETT, C. J. This appeal is from the decree of the court below disallowing appellant's claim of $8,037.55 for books and engravings sold by him to said decedent, except to the extent of $880, which represents the value of goods delivered at his home. Mr. Cope, the decedent, was a gentleman of independent fortune, and of literary and artistic tastes. For many years he had been an extensive purchaser of books and engravings from appellant. During the last three years of his life his payments to him aggregated over $11,000.

The nature of appellant's present claim for balance disallowed by the orphans' court will perhaps be best understood by referring to the testimony of witnesses examined in support thereof. Col. J. E. Barr, their salesman, testified, inter alia, as follows: "Mr. Cope came to the store every time, I think, that he came to town; made it a place where he always stayed, and when any new invoices of prints came in, I would always tell him, and he would come in and go over them,—look at them,—and if there was anything he liked he would say: 'Put them away for me,' 'I will take this,' or 'I will take that,' and I put them away in the drawers. Q. Were they put in general drawers or special drawers? A. Special drawers set apart for him, with nothing else in. Q. And drawers to which he had access A. He and I; nobody else touched them. * * * Q. Would the prices be named? A. He would ask the price, and I would give it to him,—mark it on the prints. * * * Q. These prints, after he bought them and the price agreed upon marked and put away in his drawers, and did he get them from time to time? A. If you will allow me to tell you, Mr. Cope was in the habit of making mats for his own prints, and making little biographical sketches on the back of each, and then put them away into portfolios, and catalogue them, and in that way he would take them home as fast as he could do that, and put them away in proper portfolios, and in that way the prints in the store would accumulate faster than he could take them home. He did not want them at home, lying about, because they were fine prints, and he just took enough home from time to time to catalogue and mat them, and put them away in the portfolios, and in the meantime invoices came from all parts of the world, and he would see them all, and select what he wanted, and they were put away in these drawers. Q. And then, as he finally took them away, you sent a bill for them? A. Yes, sir Q. You did not send a bill until he took them away? A. Oh, no. Q. He was a peculiar man, was he not? A. Yes, sir; he would make his own list when he would take them home. He would bring the list, which he would hand to me, and tell me to charge them up. Q. Were those put aside in those drawers for approval or actually sold? A. No; absolutely sold, I would not dare to take them out. Q. They were his? A. Yes, sir." Appellant's bookkeeper testified that charges were made and bills rendered in the manner sworn to by Col. Barr, their salesman. He further testified: "Q. When you took account of stock each year, including these drawers, did you put that in your general stock, or how did you charge the amount in these drawers? A. It was charged

up to Mr. Cope, so that we would not take it into stock each year. Q. On your book it would appear as charged each year? A. Yes, sir. Q. By Mr. Thompson: It was a memorandum merely for the purpose of showing where the goods were in your account of stock. Of course it was that. A. Showing where they were. Q. That is all? A. They were not belonging to us at all. They were not included in our stock. Q. But you never rendered any bill for them, of course? A. No."

On behalf of the appellee evidence was offered to show that the decedent always paid his bills promptly, and at the time of his death left no other outstanding accounts, except for medicine and medical attendance. It was also attempted to be shown by a salesman of the publishing house of J. S. Lippincott & Co. that decedent was in the habit of having books laid aside for inspection. This testimony was as follows: "Q. Was it not at times a habit of his to have set aside the books, that he would come back and confirm or disaffirm? A. No, sir. Q. He was always prompt in his payment? A. If he wanted a book, he would say, 'I will take it.' If I said to him, 'Perhaps you would like to look at it a different time,' he would say, 'No,' he did not want it. He was a man that would make up his mind in a very little time if he wanted an article." This testimony on behalf of the appellee, so far as it has any bearing on the case, is corroborative of appellant's witnesses, and tends to support his contention.

The learned auditing judge, who was sustained by the court in bank, held that there was no contract of sale, "because the minds of the parties did not come together in a common intention." In this we think he was mistaken. The evidence to support the auditing judge's conclusion is far from being satisfactory. In examination in chief of appellant's salesman, Mr Barr, he was emphatic in his assertion of an unconditional sale, and this was reiterated by him on cross-examination. In endeavoring to strengthen appellee's line of defense, he was asked on cross-examination: "Q. Was it not your habit of showing him prints, and was it not his habit to look at them, and then come back, and, having concluded to take them, to order them? A. I never put these away until he told me to do so. Q. Did he not tell you to lay these aside? A. No. sir; I never laid any prints aside for Mr. Cope." The language employed by decedent is entirely consistent with a consummated contract of sale. The conduct of appellant was uniform in treating the transaction as a sale. In every case the selected engravings were marked with their respective prices, separated from the common stock, and made accessible to the decedent and Mr. Barr alone, then charged to him, and never thereafter carried into the general stock. The learned auditing judge attached too much importance to the fact that the bills were not rendered until the goods were taken away. There is nothing in that circumstance that is inconsistent with an absolute sale, especially when we consider the uniform course of dealing which the decided weight of the evidence shows the parties themselves adopted. The appellant was under no obligation to notify Mr. Cope of the charge. It would not have been in accord with their mutually recognized mode of dealings, and might have resulted in the loss of a valuable customer. If it had been sought to establish the contract of sale by the dealings of the parties alone, without regard to the evidence of their mutual understanding in relation thereto, there might be some force in the position contended for by the appellee; but the direct evidence of a sale and mutually un-

derstood mode of delivery, in drawers specially designated as receptacles for decedent's purchases, is positive and uncontradicted, except by the circumstances relied on by the appellee. Unfortunately for him, none of those circumstances are inconsistent with a sale.

It follows from what has been said that the assignments of error must be sustained. Decree reversed, at appellee's costs, and ordered that the record be remitted to the court below, with instructions to allow the residue of appellant's claim.

J. B. BRADFORD PIANO CO. v. HACKER.

(Supreme Court of Wisconsin, 1916. 162 Wis. 335, 156 N. W. 140.)

Action by the J. B. Bradford Piano Company against Bertha Hacker. From a judgment for defendant, plaintiff appeals.

This is an action to recover the purchase price of a Conover inner player piano sold by the plaintiff to the defendant. * * * At the time the contract was entered into defendant finally showed a preference for one and agreed to take it provided the case would be stained a certain darker color and the tone made more brilliant, which was agreed to. * * *

An order was duly sent, confirming the verbal order, dated April 4, 1914. On April 7, 1914, the defendant sent a letter to the Bradford Piano Company repudiating the contract. The Bradford Company on May 2, 1914, made a tender of delivery of the piano as refinished. At the time of the trial the piano was in the warerooms of the Bradford Company. * * * The trial court directed a verdict for the defendant.

SIEBECKER, J. The trial court held that the facts and circumstances show, as matter of law, that the property in the piano was not transferred to Miss Hacker at the time the written order for the purchase was given nor prior to the time Miss Hacker repudiated this contract on April 7, 1914. The plaintiff assails this holding of the trial court upon the ground that, on the evidence, it was a question for the jury to determine whether or not the parties to the contract intended that the property in the piano was transferred prior to the time defendant repudiated the sale. The evidence shows that defendant and plaintiff's agent negotiated for the sale on April 2, 1914, at the factory of the Cable Company in the city of Chicago, where the defendant selected the piano in question. It appears that she was not satisfied with the color of the case of the instrument she selected, and insisted on having the color altered and made darker. The manufacturer agreed with plaintiff and defendant to alter the color so as to comply with the understanding of the parties, to regulate the tone of the instrument as defendant desired it, and to insert the player action and test it, as is usually done before sending instruments from the factory to customers. The sale price and the shipment of the instrument by railroad to Hartford, Wis., by the plaintiff were agreed upon by plaintiff's agent and defendant, as specified in the written memorandum of sale set out in the above statement. The defendant signed this memorandum at the depot in Chicago. The evidence shows that the piano was returned to the varnishing department of the factory, and a color coat of varnish applied to bring the color to the shade desired by the defendant. After this coat had dried two more coats of regular varnish

were put on, which, when properly dried, completed the piano so that it was ready for shipment. This process took from two to three weeks, when the instrument was boxed and shipped. Defendant repudiated the contract on the fifth day from the date of sale.

The facts and circumstances show that the piano was not in a deliverable condition at any time up to the date of the repudiation on April 7, 1914. The contract also required the shipment of the instrument from Chicago to Hartford, Wis., which could not be done, and in fact was not attempted to be done, within two weeks or more after the sale. The conduct of the parties at the factory and in negotiating the sale, when taken in connection with the terms of the contract and the circumstances of the case, fail to show that it was mutually understood and intended that the property in the instrument should pass to defendant at this time. It is plain that the defendant had no control of nor any dominion over the instrument while in the factory, and that the Cable Company retained full control and possession to deal with the property as its own. The evidence, showing the entire transaction, does not permit of the inference that the parties mutually intended that the property passed to defendant under the agreement of sale of the instrument, as contemplated by the provisions of section 19, rule 2, of the Sales Act. * * *

It is obvious that the piano was not in a deliverable state until the coloring of the case had been altered to comply with the conditions of the sale within the contemplation of this statute, and hence the property had not passed when defendant repudiated the sale. * * * Under the circumstances and conditions of the sale, defendant's breach of the contract on April 7, 1914, renders her liable to the plaintiff for the damages it suffered from such breach. * * * It was held in Badger State Lumber Co. v. Jones Lumber Co., 140 Wis. 73, 121 N. W. 933, that, where specific performance cannot be enforced, either party may stop performance and subject himself to the payment of compensatory damages. "In such cases it is held that an action cannot be maintained to recover the contract price, but may be maintained to recover damages for the breach of the contract"—citing cases in this court. The complaint is framed for recovery of the purchase price, and no evidence was offered to show damages resulting from the breach of contract.

Appellant makes no claim upon the record for recovery of damages. The most liberal rule of practice, * * * in the light of the record, would entitle plaintiff to no more than nominal damages, and requires affirmance of the judgment. * * *

The judgment appealed from is affirmed.

AUTOMATIC TIME-TABLE ADVERTISING CO. v. AUTOMATIC TIME-TABLE CO.

(Supreme Judicial Court of Massachusetts, 1911. 208 Mass. 252, 94 N. E. 462.)

Action by the Automatic Time-Table Advertising Company against the Automatic Time-Table Company. There was a verdict for plaintiff, and defendant brings exceptions.

This was an action of contract for damages for defendant's failure to comply with its terms. The contract recited that defendant sold plaintiff the following goods: Twelve automatic time-table machines

complete, together with all printed matter, time-tables, electro-plates, printed goods and advertising matter, and advertising contracts, relating to said machines, which were sold, assigned and transferred to the said Automatic Time-Table Company by the said Automatic Time-Table Advertising Company under agreement, dated July 13, 1909. Said machines are described and located as follows: One machine located at Merrimack Square, in Lowell, Mass., one machine located in Lawrence, Mass., one machine located in Haverhill, Mass., one machine located in Salem, Mass., one machine located in Lynn, Mass., one machine located in Chelsea, Mass., six machines now standing in the shop of the Automatic Time-Table Company, 58 Middle street, Lowell, Massachusetts, and numbered on door on battery side of case respectively as follows: 8, 9, 10, 11, 12 and 13.

LORING, J. The contract of July 16th was a contract for the sale of 12 specific machines and not a contract for the sale of 12 machines of a particular description. By its terms it purports to be a present sale, but it was a sale of "twelve automatic time-table machines complete," and there was evidence that no one of the "six machines now standing in the shop of the Automatic Time-Table Company" was complete.

The bill of exceptions is somewhat obscure on this point. But as we interpret it there was evidence that apart from the Gordon batteries no one of these six machines was complete. We speak of the parts of the machine other than the Gordon batteries because it seems to have been the undisputed fact that as matter of practice these batteries were not put into the machines until they were set up for use on the premises of the purchaser or licensee, and setting up these machines on the premises of the plaintiff was not part of the obligation of the vendor under the contract here in question. It appeared that that was to be paid for by the vendee in addition to the purchase price named in the written contract.

The contract does not say that the "twelve automatic time-table machines" were complete, but it says that the defendant sells to the plaintiff "twelve automatic time-table machines complete." Evidence that the six here in question were in fact incomplete was admissible as one of the circumstances under which the contract was made and so one of the circumstances in the light of which it was to be construed.

Since something had to be done to the machines to put them in a deliverable state and a different intention did not appear, the property in the 6 machines here in question did not pass on the execution of the contract. The transaction was governed by the sales act (St. 1908, c. 237) and it is there so provided in section 19, rule 2. The rule was the same at common law. * * *

The defendant contends that the cases of Glover v. Austin, 6 Pick. 209, Glover v. Hunnewell, 6 Pick. 222, Sumner v. Hamlet, 12 Pick. 76, Thorndike v. Bath, 114 Mass. 116, 19 Am. Rep. 318, Mauger v. Crosby, 117 Mass. 330, and Whittle v. Phelps, 181 Mass. 317, 63 N. E. 907, are decisions to the contrary. Those are cases where it appeared that it was the intention of the parties to sell the chattel in its unfinished condition with an agreement by the seller to complete it; or in the language of St. 1908, c. 237, § 19, those were cases where a different intention did appear.

The contract of July 16th, therefore, was not a contract of present sale of six unfinished machines with an agreement on the part of the

defendant to complete them, but it was a contract to complete the six unfinished machines which on completion were to become the property of the plaintiff. * * * The bill of exceptions went no further than to state that the "fire greatly damaged the 6 machines standing in the defendant's premises." * * *

The learned counsel for the defendant misconceives the character of the action now before us when he contends that the plaintiff has not put himself in a position to sue on the footing that the contract is rescinded. This is not an action founded on the decision of the contract of July 16th, but it is an action on that contract to recover damages for the defendant's failure to complete the 6 machines which at the date of the contract were standng in its shop, and on completion of them to pass the title to the plaintiff. * * *

SECTION 4.—FURTHER ILLUSTRATIONS OF THE APPLICATION OF THE PRESUMPTION

An owner of hogs is fattening them for market. There is a contract to sell them when they are fattened. Does title pass at the date of the contract, if there is no other evidence of the intention of the parties? No; because the hogs are not in the condition which the parties intend that they shall be in, at the time when the buyer is to take them. But suppose the buyer says, "What will you take for those hogs?" The seller names a price. The buyer adds, "They are not fat enough to take to market, but I will buy them anyway." They so agree. The hogs are stolen that night. The buyer has not paid the price. Must he pay? Yes; because the subject of the contract here is not "fattened hogs," but, on the contrary, the sale is of "unfattened hogs."

Where the contract is to sell logs to be cut, cotton to be ginned, wheat to be threshed, etc., in all these cases the parties have shown that they have in mind as the subject of the sale certain goods, then identified, but which are to be put in a different condition before the buyer is under any obligation. But the greatest of care must be exercised in examining the evidence, the circumstances of the case, custom, etc., to determine whether or not the parties, after all, intended to sell these identified goods in their present unfinished or incomplete condition. For certainly parties may buy and sell cotton which has not been ginned, or wheat not yet threshed or logs which have not yet been cut or sawed into lumber. Payment of the price is strong evidence that the parties intended title to pass to the goods in their incomplete condition. Other evidence may be equally strong, but neither will be conclusive. Another variation arises when the parties have agreed upon a sale of goods in an incomplete state, with the superadded obligation upon the seller to complete them. It is possible here that the obligation of the seller to complete the goods is a new obligation, based upon an entirely different contract—i. e., a contract by which the buyer employs the seller to do some work upon the buyer's own goods.

The opportunity for variation is indefinite, a fact which emphasizes the impossibility of isolating all conceivable situations in selling transactions and in laying down beforehand a rule of thumb by which all such cases may be decided. This cannot be done. The intention of the parties is the test and the parties may intend anything.

SECTION 5.—APPLICATION OF THE PRESUMPTION WHERE ACTS OF WEIGHING OR MEASURING MUST ALONE BE DONE TO ASCERTAIN THE AMOUNT OF THE PURCHASE PRICE

Suppose we are confronted with a contract to sell a stack of hay, or a pile of wood or coal, where the mass is identified and is in a deliverable state; that is, the parties have agreed to buy and sell that particular mass in its present state, not in some other condition, as would be the case if the contract called for baled hay, or wood sawed into specified lengths, or the coal screened. We have a case, therefore, where the presumption which we have been discussing should apply, and title would pass at the time the contract was made, unless the parties expressly agree that title shall pass at some later time. But suppose the parties do not know what quantity, measured in tons, cords, etc., is sold. They have agreed upon a sale of an identified mass, and they have agreed upon the price per unit of weight or measure, but they do not know what the total price will be. Query: Is the presumption that title passes at the time of the contract made inapplicable, simply because the amount of the purchase price has not been ascertained? The courts have not agreed upon this question. Most courts have held that title does not pass in such a case, provided the act of weighing or measuring was to be done by the seller. Where the act of weighing or measuring to ascertain the price was by the contract, to be done by the buyer, the general rule was that the title passed at the time the contract was made. When the courts held that the title did not pass, if the seller was bound to weigh or measure the goods, they were not holding that the fact that the price was unascertained meant that the goods were not in a deliverable state, but they did say that it was just as sensible to suppose that the parties intended title not to pass until the goods were weighed or measured and the price fixed as it was to assume that, when goods at the time of the contract were not in the physical condition contemplated by the contract, the parties intended title not to pass until the goods were put in a deliverable condition; that is, there were two rules, similar, but not identical. Is it, after all, a fair assumption that the parties intend title not to pass until the price has been ascertained, the goods in all other respects being ascertained and in a deliverable state? The Sales Act has left out all mention of this question, the intention being

thus to change the rule of presumption. Probably, therefore, in all those states which have enacted the Sales Act, the former rule, that title did not pass when the goods were yet to be weighed or measured either by the seller or buyer, to ascertain price, has been changed, so that the special presumption that title passes upon execution of the contract to sell goods in a deliverable state applies.

SECTION 6.—PRESUMPTION THAT TITLE PASSES AT THE DATE OF THE CONTRACT IS APPLICABLE WHERE THE SALE IS A SALE ON CREDIT

The sale on credit is well understood. The legal effect of the transaction is that the seller intends to part with his ownership in the goods. Usually possession of the goods passes to the buyer, or the goods may in part be delivered to him. It is possible for the seller to remain in possession, title having passed. In such case the seller simply has possession of the buyer's goods. The seller is in very much the same situation that any bailor is in with respect to property in his possession. There is this difference: A seller in possession of goods already sold does have the power to sell to a third party, and thus to cut off the claim of the first purchaser, while a bailor does not have such power. This point will be taken up later.

The Sales Act expressly contemplates that the presumption that title passes at the date of the contract is applicable to sales on credit, because section 19, rule 1, provides that the presumption is applicable, "whether the time of payment, or the time of delivery, or both, be postponed." The sale on credit therefore, is a sale where the seller has intended to part with ownership. How is such intention manifested? This intention may be expressly or impliedly shown. A sale is never presumed to be on credit. Where wholesalers sell to retailers, it is very common for the invoice to state that the goods are sold on ten, thirty, or sixty days' time, etc. In such a case, of course, the intention that the goods are sold on credit is clearly shown. Frequently resort must be had to the course of dealing between the parties. This is another illustration of the importance of custom in business transactions. People do not always put into language everything that goes on in their minds with respect to a particular transaction. Each assumes that the other knows what he is thinking about. Time does not permit extended discussion. Where parties have had business relationships extending over considerable periods of time, their dealings have repeated themselves so often that it is not necessary to put all of their understandings into writing. Perhaps the majority of the obligations of the parties are not adverted to in the course of each new transaction. When controversy arises, their meaning can be discovered only by resort to the course of dealing.

These propositions are true, no matter what particular type of controversy has arisen.

The question as to whether the course of dealing in a particular case shows a sale on credit is only illustrative. If A. has, for some substantial period of time, had a charge account at a store, and on a particular occasion asks for—let us say—a hat; he finally says, "I will take this," and the buyer thereupon wraps it up and places the hat on the counter and in front of A.; A. picks it up and says, "Charge it to me"—would the seller have the right to demand possession of the hat on the theory that a sale was intended for cash? Probably not. The course of dealing shows a sale on credit. It is A.'s hat, although he has not yet paid for it. A. would not be guilty of converting the shop-keeper's hat, nor of stealing the hat. The shopkeeper might feel aggrieved if in his own mind he had actually intended a cash sale and had intended to refuse further credit to A.; but, since he had not made known what was actually going on in his mind, this unexpressed intention would not control. On the other hand, had the hat blown off the counter into the street, where it was run over by a passing automobile, the shopkeeper would have no regrets that he had not made his secret intention known, for in this case, the sale being a sale on credit, title passing, the buyer was under an obligation to pay for the hat. It was A.'s hat which blew away, and not the shopkeeper's hat.

Resort to custom is but one way of ascertaining the intention of the parties as to whether the sale was a sale on credit. Everything said and done by the parties during negotiations is equally important. Sometimes we shall find conclusive evidence as to intention in one group of circumstances; sometimes in another. The parties should not leave such matters unprovided for. Uncertainty as to the nature and extent of contract obligations fosters controversy and unnecessary litigation. These things are within the control of the parties while the contract is being made. After that, it is a closed book, not subject to alteration, except upon mutual agreement. Of course, the necessity for speed in the conduct of modern business renders impossible the exercise of the highest degree of care. It is better to take the risk sometimes than to slow up the process of exchange. But the risk is there, and the parties should realize the source and the nature of that risk.

ABRAHAM v. KARGER.

(Supreme Court of Wisconsin, 1898. 100 Wis. 387, 76 N. W. 330.)

PER CURIAM. This was an action for the recovery of a lot of merchandise stored by the defendant, Karger, at No. 559 East Water street, Milwaukee, and was in charge of one Bing, a relative of Karger, to sell for him on commission. The plaintiff, Clara Abraham, was at this time conducting a business under the name of the "Milwaukee

Knitting Works." This business was managed for her by her father, Louis Abraham, as her agent, who a few days prior to August 26, 1896, began negotiations with Bing for the purchase of the merchandise belonging to the defendant, Karger. These negotiations were in part conducted, according to the evidence of the plaintiff, Abraham, in the presence of, and with the sanction of, the defendant, Karger. There was a dispute between the witnesses for the plaintiff, on the one side, and the defendant and his witnesses, on the other, as to the terms of sale finally agreed on between the plaintiff and defendant.

On the part of the plaintiff, Louis Abraham testified that the agreement as finally made was that the plaintiff was to pay the defendant, Karger, for this stock $2,000 in cash, and to deliver to him the note of one W. A. Meyer for $500; and this was corroborated by the evidence of James L. Gates, a witness on the part of the plaintiff, who testified that the defendant, Karger, stated to him that such was the case. The testimony of Karger and his witnesses was that the plaintiff was to pay to the defendant $2,500 in cash, and that Karger did not agree or consent in any way to accept the note of Meyer in payment of part of the consideration; and it appeared that this dispute as to the terms of the sale was the only matter upon which there was any conflict of testimony. On all other points the witnesses substantially agreed. At the time when the bargain was made, Louis Abraham paid Bing $25 to bind the bargain. The next day, the plaintiff, Abraham, paid to Bing $1,500, and at the time Bing gave to Abraham an invoice or statement, drawn up in Bing's handwriting, which recites the value of the merchandise at $4,100, the payment by cash and merchandise in exchange of $3,100; the balance of $1,000 to be paid, $500 in cash, and $500 in W. A. Meyer's note. Both Bing and Abraham admit that the purchase price was $2,500, and that no merchandise was given in exchange; that the bill or invoice was made out this way as a matter of convenience between the parties. And Bing further claims that the statement that the balance was to be $500 in cash and $500 in notes did not express the true understanding between them. August 24th, the plaintiff, through Louis Abraham, paid $500 more on the purchase; and, on the 26th of August, Louis Abraham tendered to the defendant, Karger, Meyer's note for $500, payable to the Milwaukee Knitting Works, and indorsed, "C. Abraham, Proprietor." This tender was refused, and Karger said to Abraham, "If you don't have the money before noon, I am going to store the goods, and you will have to pay the costs;" whereupon the plaintiff, Clara Abraham, brought replevin, charging the unlawful and wrongful detention of the property.

The court, in its charge to the jury, in effect told them that the question at issue was whether the sale was to be for cash and notes, as testified to by the plaintiff's witnesses, or for cash solely, as testified to by the defendant and his witnesses; that, if they found the claim of the plaintiff to be correct, then the verdict should be in favor of the plaintiff; if they found the facts as to the sale or agreement to be as claimed by the defendant, then they should find for the defendant. The jury found for the plaintiff, and that she was the owner of, and entitled to the possession of, the goods seized under the writ; that the same were unlawfully detained from her by the defendant; that the value of the property was $3,500; and the plaintiff had judgment

against the defendant for the possession of the property, and for the recovery of the costs, together with the damages of 6 cents. * * *

There was evidence on the part of the plaintiff to maintain these contentions. It is established by the verdict as a verity that payment of the $2,000 in money, and tender of the note of Meyer for $500, were made. Such payment and tender of payment prior to the time of the commencement of the action had the same effect as actual payment upon the rights of the parties. There is nothing to show that the contract was executory, so far as anything remaining to be done to the goods was concerned. The evidence shows that they were ready for delivery, and set apart, and the price agreed upon, and a partial delivery made before the tender of the $500 note. The goods were in the sight of the parties, and were pointed out in the presence of Karger, the defendant, when it was agreed that he was to get $2,000 in cash and W. A. Meyer's note for $500 for them. There can be no doubt but that, under the circumstances stated, the title to the goods, and the right of possession as well, passed to the plaintiff, and, if afterwards they were wrongfully detained, she might maintain replevin for them. "When the terms of sale are agreed on, and the bargain is struck, and everything the seller is to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or time of payment. But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivery of the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him." 2 Kent, Comm. (9th Ed.) 671. * * * The evidence as to what actually did occur, or what was agreed on between the parties, is in some respects conflicting and contradictory. The case was rightly submitted to the jury to find upon the vital point in dispute, and thus determine whether the property and right of possession passed to the plaintiff. The evidence was clearly sufficient to sustain the finding of the jury, and the court could not have properly directed a verdict for the defendant. * * *

A discussion of the evidence contained in the printed case would serve no useful purpose. For these reasons, the judgment of the superior court of Milwaukee county must be affirmed. Judgment is ordered accordingly.

SECTION 7.—PRESUMPTION THAT TITLE PASSES AT THE DATE OF THE CONTRACT OVERCOME BY PROOF THAT THE PARTIES INTENDED A CASH SALE

We are still discussing the application of the rule of presumption stated in section 19, rule 1, that where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes when the contract is made. We see that in a sale on credit title passes to the buyer when the contract is made. It will usually not be difficult to decide whether a particular contract was a sale on credit or a cash sale. Suppose the evidence, the character of which was commented upon in the

preceding section, shows that the parties did not intend a sale on credit, but on the contrary the evidence shows that the passing of the title to the goods was in some way tied up with the obligation to pay the purchase price. If we had only two kinds of sales, sales on credit and cash sales, it would be easy to determine the circumstances under which we would have a cash sale. But the trouble is that there are several types of transactions which are not sales on credit. One of them is the **cash sale**, another is the **conditional sale**—and there are at least three varieties of the conditional sale—and finally there is a sale for which we have no single descriptive word, which may be called a **sale with the reservation of a lien.** How are we to identify the cash sale?

So far we have discussed but one of these—the sale on credit. After deciding that a particular sale is not a sale on credit, the question narrows down to the ascertainment of the features which distinguish a cash sale from a sale with a reservation of a lien, on the one hand, and from the three types of conditional sales, on the other. To distinguish the cash sale from the sale with a reservation of a lien is the more difficult problem. We shall discuss this problem in this section. The analysis of the three kinds of conditional sales will be taken up in the succeeding sections, wherein the difference between them and the cash sale will appear.

In order to get the proper perspective here, we should recall the cases and the discussion in sections 3 and 4. We were there dealing with contracts to sell ascertained goods, in some of which the goods were in a deliverable condition; in others the goods were not in a deliverable condition. We found that title passed at the time the contract was made, when the goods were in a deliverable condition; but, if they were not, title did not pass until they were put in a deliverable condition. Notice that, in such cases, we were concerned only with one type of evidence; i. e., the evidence as to the physical condition of the goods. For the time being we did not recognize the possibility that evidence of a wholly different nature, not dealing with the physical condition of the goods, might completely change the result. In this section we must open the doors to such possibilities and see what effect they have upon our former determinations.

All contracts of sale, which are not sales on credit nor conditional sales, break up into two groups. These two groups possess the common element that the buyer cannot gain actual possession of the goods until he pays the purchase price. The two groups differ in the nature of the right reserved by the seller for the purpose of securing his actual possession of the goods until the price is paid. In the first group, the nature of this security is a lien upon the goods; in the second group, the nature of the seller's security is title itself. The first may be called a sale with the reservation of a lien; the second is called the cash sale. The cases which we discussed in sections 3 and 4 might have been either sales with the reservation of a lien or cash sales. The cases did not call for a

determination of this question. But the question is frequently presented: How are sales of the one class to be distinguished from sales of the other?

Before taking up this matter a word should be added concerning the nature of a lien. A lien may be defined as a mere personal right to retain the possession or physical control over the goods until the other party to the contract has performed his obligations. The lien gives its holder no remedies of compelling payment in addition to that which the lienholder has independent of his lien. The lien does bring about an additional pressure upon the debtor to pay. The ownership in the property is in the debtor. There has simply been subtracted from the total rights of ownership the right to retain possession until a certain thing is done. To illustrate the rather delicate nature of the right of the lienholder, we find that the act of a voluntary surrender of the possession of the goods to their owner causes the lien to disappear. Even if the former lienholder regained possession the lien would not thereby be re-created. Common carriers have liens on goods shipped to secure payment of freight; pledgees of property also hold liens on the property pledged. Similarly an unpaid seller has a lien on the goods to secure payment of the price.

We are now prepared to consider the circumstances under which the seller has merely a lien on the goods still in his possession, or whether title is retained. The parties may do either. If they use language which expressly reserves a lien or title, such case, of course, furnishes no difficulty. But in the majority of transactions the parties do not think about this matter, and they have no understanding regarding it. Again, we are forced to explore the circumstances of the case, the course of dealing, custom, etc., in search of evidence which may indicate what the parties probably would have intended, had their attention been called to this aspect of their dealings. The most important evidence in determining this question is as to the time when the parties contemplated the exchange of the goods for the price, with respect to the time when the contract was made; that is, we are dealing with three acts: (1) The execution of the contract; (2) the delivery of the goods; (3) the payment of the price. In both cases—i. e., a sale with a reservation of a lien, or a contract to sell, title being retained—we know that act (2), the delivery of the goods, and act (3), the payment of the price, must be concurrent acts; they are to be done at the same time. So the solution of the problem turns on whether the parties intend that acts (2) and (3) are to be done at the same time that act (1) is done. If the parties contemplate that all three acts are to be done at the same time, we have a cash sale. If any fairly substantial period of time is intended to elapse after act (1), before acts (2) and (3) are performed, we have a sale with a reservation of a lien. In cases of doubt, the sale should be regarded as a sale with a reservation of a lien, rather than a cash sale. The learned author of the Sales Act and of a

treatise on the law of sales, Professor Williston, thus states the rule: "It is submitted that the true test is this: If the parties when they make their bargain contemplate an exchange of the goods for the price immediately on making the bargain, the sale is to be regarded as a cash sale. There is no occasion to invoke the doctrine of a sale subject to a lien. On the other hand, if the parties do not contemplate an immediate exchange of the money for the goods, even though they do contemplate that possession of the goods shall not be delivered until the price is paid, it is presumptively an absolute sale as soon as the parties agree on the terms of the bargain and the goods are in a deliverable state in accordance with the rules previously given. In case of doubt it seems better to assume that the latter kind of bargain was intended." [1]

In the early law every sale was presumed to be a cash sale—that is, where title was reserved until the price was paid—but today the presumption is that every sale of goods in a deliverable state is presumed to be a sale with the reservation of a lien only, until circumstances or other evidence show it to be a cash sale, conditional sale, or a sale on credit.

There are two well-known transactions of daily occurrence, wherein the circumstances show that the delivery of the goods and the payment of the price are to occur at the time the contract is made and hence a cash sale results. These cases are: (1) Ordinary retail sales over the counter; and (2) where the buyer is to execute and deliver some negotiable instrument at the time of the delivery of the goods to him. If A. walks into a store and asks for a certain article, the price being given, and A. indicates that he will buy the article, all the circumstances go to show that the merchant expects payment before delivery of the goods, and also that payment and delivery are to be then made. This is a cash sale. Title remains in the seller until he is paid. If, as frequently happens, the goods are actually placed in the hands of the buyer before he pays the price, this is not a case where possession has been voluntarily parted with. The merchant has simply allowed his customer to pick them up for the temporary purpose of examining them. Legal possession has not passed. If A. were to leave the store with the goods without paying the price, this act probably would be larceny. So, also, where the goods are shipped to the buyer under a negotiable document of title running to the order of the seller, and such bill of lading is accompanied by a bill of exchange or trade acceptance, as it is frequently called, and both the bill of lading and the bill of exchange are sent to some third party, usually a bank, for presentment for payment or acceptance, title remains in the holder of the bill of lading until the bill of exchange is actually paid or accepted, accordingly as the bill of exchange demanded payment or acceptance. Cases involving ne-

[1] Williston on Sales, p. 549.

gotiable bills of lading will be discussed more completely in a later chapter.

Confining cash sales to these types of transactions, there is left a great many sales where the delivery of the goods and the payment of the price are to occur at some subsequent date. Here the presumption is that title passes when the contract was entered into, the seller reserving a lien only to secure payment of the price.

In determining whether a particular transaction is a cash sale, as that term has been used in this discussion, too much importance must not be attached to the use of the words "terms cash," or "cash sale," as these words are used in the contract. Business men sometimes call a sale a cash sale when in reality they contemplate that credit be given for a short space of time. If such be the case, the parties have not entered into a cash sale, as that bargain is regarded in the law, but they have entered into a different kind of contract. A contract will not derive its legal characteristics from the use of any particular words. Words are, after all, only indications as to what the parties meant. Their conduct and other circumstances are equally important. A man may say that he can run one hundred yards in nine and two-fifths, but his statement of his ability and intention to do so does not break any records. So the parties may say, "We will enter into a cash sale," but the fact that they formed this decision is not conclusive that this sort of contract was the legal result of their conduct. One cannot but be impressed with the fact that in the study of the law, that legal relationships and legal effects cannot be permanently linked to any one word, series of words, or phrases. Language is too unstable to bring about this much desired, but wholly impossible, result. The notion that the law is all carefully and neatly arranged in books, readily accessible and definite in meaning, is sadly untrue. The knowledge of the law's real nature, and of the inherent difficulties involved in its construction and in its application, is perhaps of more value, ultimately, than a certain degree of acquaintance with specific rules and doctrines.

The "cash sale" may also be described as a "contract to sell." In fact, the latter expression more accurately indicates the legal effect of the transaction heretofore called a cash sale. A **sale** and a **contract to sell** are not the same thing. As defined in the Sales Act:

Section 1, Subsec. 1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

A sale is defined:

Section 1, Subsec. 2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

The distinction between a sale and a contract to sell is, therefore, that in a sale title to the property passes to the buyer at the time the contract is entered into. It is executed to this extent.

The seller has partly performed. Title has passed. It may be a sale on credit, or a sale with the reservation of a lien, or that type of a conditional sale wherein title passes to the buyer, but subject to a condition that title may be revested in the seller upon the election of the buyer not to keep the goods—a type of transaction yet to be discussed. In all these cases the bargain is a real sale, because title has passed. But, as we have seen, buyer and seller may be bargaining concerning ascertained goods in a deliverable condition, under circumstances where the intention shown is that title shall not pass until the price is paid. This has been called a cash sale, but it is also one kind of contract to sell.

There are types of contracts to sell other than cash sales. For example: (1) The parties may agree, irrespective of the time when the price is to be paid, that the title to the goods shall pass at some specified future date; or (2) they may agree that title shall pass at such time in the future as the buyer may elect to take the goods; or (3) where the bargain relates to goods not in a deliverable condition, the presumption is that a contract to sell results. As we have noted, however, if at the time the contract is made the goods are ascertained and in a deliverable condition, the presumption will be that a sale and not a contract to sell, was intended. Before the transaction will be construed as an executory contract to sell, strong evidence must appear that the parties intended to postpone the passage of title until some future time, or until some event occurred. Notice that in the above cases the transaction is construed as a contract to sell, solely because the parties intended it to be such. The law would permit them under the circumstances to enter into a sale. There is one kind of transaction which will always be construed as a contract to sell, as distinguished from a sale, even though the parties have unequivocally manifested their intention to make a sale. A seller cannot pass title to goods which at the time the contract was made were not ascertained. A rule of law forbids it. This type of case will be taken up in the next chapter.

SECTION 8.—CONTRACTS ON SALE OR RETURN AND CONTRACTS TO SELL ON APPROVAL

Sales Act, Section 19, Rule 3 (1). When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time was fixed, within a reasonable time.

Sales Act, Section 19, Rule 3 (2). When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer: (a) When

he signifies his approval or acceptance to the seller or does any other act adopting the transaction. (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

A great deal of business is done on the basis of contracts on sale or return and contracts to sell on approval. A manufacturer or wholesaler may find it difficult to put his product on the market. In order to induce the trade to display and attempt to sell his goods he may be willing to ship them to a retailer upon the understanding that he is not to pay for them until he elects to keep them. Likewise, between individuals, the seller, in a last attempt to make a sale, will agree and insist upon the buyer taking the goods home with him for further examination or trial; the buyer not being bound to pay for them until he elects to take or keep them, or unless he keeps them beyond the time fixed by the seller. Sometimes such sales are called sales on consignment. But too much importance must not be attached to the use of any particular words or phrases as indicating the character of the transaction. From the business standpoint both these contracts look alike. In each the seller has surrendered actual possession to the buyer, and in each the buyer is not, at the time he takes possession, under any obligation to pay for them. In the law these transactions are very different, and an examination into the distinctions will throw some light upon the business problems as to which type of contract it is desirable to enter into.

The difference all turns on the fact that in the sale on return title passes to the buyer, while in the contract to sell on approval title remains in the seller. The buyer in both cases has possession. In the sale on return the title is in the buyer, but attached to it is a condition that the title may by the voluntary act of the buyer be revested in the seller. In contracts we called this kind of condition a condition subsequent. In the contract to sell on approval the buyer, while he does not have title, may by his own voluntary act take title to the goods; that is, he will obtain title when he elects to take them. This is a transfer of possession, and the condition which must happen before title vests in the buyer is the act of his making an election to keep the goods. Such a condition is a condition precedent to the passing of title. What are the consequences? In the sale on return, title being in the buyer, the risk of loss and other incidents of title are in the buyer. If the goods are lost or damaged without his fault, the buyer will be held liable for such loss, even though he elects not to take the goods. If the sale is on approval, the buyer is a mere bailee until he elects to take the goods. Risk of loss is not in the buyer. The incidents of title remain in the seller.

D. M. FERRY & CO. v. HALL, Tax Collector.

(Supreme Court of Alabama, 1914. 188 Ala. 178, 66 South. 104, L. R. A. 1917B, 620.)

GARDNER, J. * * * The appellant brought suit against the appellee for the recovery of $203 paid by appellant to appellee, as tax collector for Houston county, under protest; suit having been brought by said tax collector for said sum due as taxes and garnishment issued in aid thereof.

The cause was submitted in the court below upon an agreed statement of acts, in which it was agreed that the facts in said cause were as set out in said agreement, and that the "cause be submitted to the jury upon said statement of facts, and that the liability, if any, of the defendant arises out of said facts." The agreement further stipulates: "It is further agreed by and between the parties hereto that the only question presented for the court for its decision, in this case is whether or not the assessment for the collection of the taxes, due on said seed, should have been made against the said D. M. Ferry & Co., or against the merchants to whom said D. M. Ferry & Co. had shipped the seed, and in whose possession said seed were at the time the assessments were made, under the facts hereinafter set forth; and if the assessments for the collection of said taxes should have been made against said D. M. Ferry & Co., then the defendant is entitled to judgment; but if said assessments for the collection of said taxes should not have been made against D. M. Ferry & Co., then the plaintiff is entitled to recover."

The sole question, therefore, for determination is: In whom, for the purposes of taxation, vested the title or property to the seed in possession of the retail merchants? If the seeds were the property of the appellant, then it is conceded and agreed the defendant is entitled to judgment, and, on the other hand, it is likewise conceded and agreed that, if the seeds were the property of the retail merchants, then appellant is entitled to judgment.

The order of the retail merchant, the letter of acceptance accompanied by the invoice, and the placing of the paster marked in the record "D" on the box when shipped, together with the method or course of dealing with reference to said transactions between the wholesaler and the retailer, as disclosed by said agreed statement of facts, are the matters upon which, according to said agreement, we are to conclude the title to said seed.

The order has on it the word "consignment," and that which is signed by the retailer has the words "to sell on commission," showing the terms as 40 per cent. commission on the papers sold, and 25 per cent. on the packages sold, from the invoice prices; the unsold seed, with boxes, to be returned in good order when called for, and amount due for all seeds not so returned to be paid at the same time.

The invoice which accompanied the memorandum of shipment had thereon, among other things, the following: "Terms: To be settled for when traveler calls. Sold to Mr. John Doe, etc. We agree to buy back all unsold seeds with boxes at prices billed, less discounts, when our traveler calls." * * *

The following extract from the agreed statement of facts explains the method or course of dealing as between the wholesale and retail

merchants, as to such transactions: "At the close of each season in which said seed was so sold, the traveling salesman representing D. M. Ferry & Co., would call upon the retail merchant and adjust the local dealer's account with D. M. Ferry & Co., taking back the unsold seeds in said box or boxes, allowing credit for the seed at invoice prices, and collecting cash for the balance of the seed at invoice prices, less the commission provided for in the original contract. The retailer, in selling the foregoing seed to his customers, would fix the price at which he would sell them, and would also have entire control of the seed, while the seed was in his possession and control, and would also sell the seed and collect for the seed from his customers in his own name. D. M. Ferry & Co. were in no way interested in the price which the retailer obtained for the said seed, but merely took back the unsold seed, allowing credit therefor at invoice prices and collecting, for the seed not returned, the invoice prices, less commissions. The said seed were in packages and papers. D. M. Ferry & Co. printed a price upon said packages, but printed no price upon the papers; but, for the seed not returned by the retailer to D. M. Ferry & Co., the retailer accounted to D. M. Ferry & Co. for each package, not returned, at the price printed on said package, and at the price of five cents for each paper, less the commission. The retailer renders no account to D. M. Ferry & Co. of any sales made by him, and gives no information in regard thereto, but the representative of D. M. Ferry & Co. goes annually to each retailer, makes his own investigation from the seed that the retailer has on hand, and states the account between the retailer and D. M. Ferry & Co. * * *"

Mr. Mechem, in his work on Sales, in volume 1, § 46, has this to say: "The distinction between sale and an agency to sell is ordinarily clear and simple, but, unfortunately, many cases are presented in which the parties, for the purpose of evading the operation of some local statute, of defeating the claims of creditors, or otherwise, have made contracts involving such a confused jumble of the elements of both sale and agency that it is exceedingly difficult to determine their true character. Certain of these contracts have evidently been framed for the purpose of concealing a sale under the guise of an agency, while others have been drawn with a view to having them construed as contracts of sale or agency, as might best suit the convenience or subserve the purposes of their framers. In construing these anomalous instruments, courts look chiefly at the essential nature and preponderating features of the whole instrument, and not at the peculiar form of isolated parts of it. It matters very little what the parties have chosen to call their contract. * * * If the parties have made a contract which really operates to transfer the title, it is a sale, notwithstanding they may have labeled it a 'special selling factor appointment,' or have expressly stipulated that the alleged factor 'shall never purchase such goods for his own account.' So with regard to the use of the term 'consign.' It may express the true state of the case, and, if so, it will be given effect; or it may be a mere subterfuge, and, if it be the latter, 'there is no magic in that word which can take from the transaction its real character.'"

This is peculiarly illustrated by the cases of Arbuckle Bros., whose contracts have been the subject of review in some of the courts of last resort, notably those of Georgia, Tennessee, and Virginia, wherein it

was held that notwithstanding the contract was called, and purports on its face to be, a "special selling factor appointment," stipulates for a retention of title, and that the goods shall be consigned and held by the party, merely as a factor, and that such factor shall never purchase such goods on his own account, and the same to be sold in name of the factor, but only as the factor of Arbuckle Bros., and only at such prices and on such terms as said Arbuckle Bros. may give from time to time. The contract provided also for certain "allowances and commissions." There were other provisions as to payments, etc., and these courts held that the entire contract disclosed a sale and not an agency, notwithstanding the many such expressions to be found therein. Arbuckle Bros. v. Gates & Brown, 95 Va. 802, 30 S. E. 496; Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; Snelling v. Arbuckle Bros., 104 Ga. 362, 30 S. E. 863.

Speaking of this contract, the court in the latter case says: "It appears to have been drawn for the purpose of enabling Arbuckle Bros. to 'run with the hare or hold with the hounds,' according as, in the exigencies of a given case, their interest might dictate."

In reference to the same contract, the Supreme Court of Virginia, in above case of Arbuckle Bros. v. Gates & Brown, said: "The agreement was an attempt to accomplish that which cannot be done—to make a sale of personal property and at the same time constitute the buyer simply an agent of the seller to hold the property until it is paid for. The two things are incompatible and cannot co-exist. The agreement had in it every element of sale. * * *"

While, in the instant case, a portion of the contract has the words "sell on commission" and the word "consignment" written thereon, yet other portions (memorandum of shipment and invoice, etc.) make use of the words "sold to" and agreement to "buy back," and nothing is said as to the title to the seeds or that the retail merchant is in fact the agent of the wholesaler, and, from what is therein contained, it is difficult to determine the real intention of the parties. The agreed statement of facts, however, contains the method of business, the course of dealing in reference to such transactions, and from such agreement it is disclosed that the retail merchant acquires complete dominion and control of the seeds, makes sales to whom he pleases at his own prices and on whatever terms he pleases, and makes no accounting whatever to the wholesaler. Indeed, from the agreed statement of facts it appears the retailer deals with the seed as his own. He need not sell at all, but may give away the seed or use them himself. He is to account to the wholesaler for the seed not returned at the invoice price, less the commission, when the traveling man calls and adjusts the accounts, giving the retailer credit for the unsold seed at invoice price. This settlement is not to be made as the seeds are sold, but the settlement is to be made when the "traveler calls"; that is, on demand, as it were. The retailer sold to his customer in his own name, and the wholesaler was in no manner interested in the price obtained, but merely took back the unsold seeds, allowing credit therefor at invoice prices. When sold by the retailer, the proceeds of the sale were his own, and no duty rested on him to account therefor to the wholesale dealer.

Under the agreed statement of facts as shown by the record, guided by the rules of law as found in the foregoing authorities, we think it

quite clear that the retailer was not a mere agent but was in fact a purchaser of seeds. It is shown that the retailer had the right to return the unsold seeds, and that the wholesaler agreed to buy them back at invoice prices. What, then, is the relation between the parties? * * *

We are of the opinion that the real transaction between D. M. Ferry & Co. and the retail merchants, under the agreed statements of facts, was that of "sale or return," as disclosed by these authorities and definitions. The retailer was to pay for the seeds not returned at a certain price previously fixed by the parties, and at a certain time (that is, when the "traveler calls"), and he had the option of returning seeds not sold. We deem a further discussion unnecessary, and indeed recognize that this opinion is doubtless of undue length, but we trust pardonable on account of the importance of the principles involved. * * *

We therefore conclude that the transactions disclosed by this record, as appears from the agreed statement of facts, are not consignments, creating the relation of principal and agent, but are what are known as "sale or return," and that therefore the property vested in the retailer upon delivery, subject to be defeated by the condition subsequent. For the purpose of taxation, therefore, the seeds under the agreed statement of facts were the property of the retailer, and the appellant was not liable for such taxes.

The court below erred in giving the affirmative charge for the defendant and in refusing that asked by the plaintiff. The judgment of the circuit court is therefore reversed, and, as the cause was tried upon an agreed statement of facts, one will be here rendered in favor of the plaintiff, for the sum sued for.

Reversed and rendered.

NEAL, CLARK & NEAL CO. v. TARBY.

(Supreme Court of New York, Special Term, 1917. 99 Misc. Rep. 380, 163 N. Y. Supp. 675.)

Action by the Neal, Clark & Neal Company against Michael J. Tarby. From a judgment dismissing the complaint, plaintiff appeals.

WHEELER, J. The facts in this case are undisputed, and briefly stated are: That the plaintiff, among other things, deals in Victrolas. One Fertig was the solicitor of advertising, and in that capacity was accustomed to visit the plaintiff's store. On the occasion of one of his visits the subject of the purchase of a Victrola was brought up by one of plaintiff's salesmen. Fertig was asked if he had decided to purchase a Victrola, to which he replied: "No, we haven't reached a point where we will decide on it." The salesman suggested sending one out on approval, to which Fertig replied: "If you want to take a chance, and send it out on approval, with the understanding I don't have to purchase it unless I want it, all right." To this the salesman replied: "All right, I will send it out with a selection of records, and see if we can't later sell you the machine."

They then selected a Victrola of the price of $150, which seems to have been fully understood, and the machine was delivered to Fertig. The salesman testified that some time later he asked Fertig if he had decided to purchase, to which Fertig replied: "We haven't quite de-

cided to purchase the machine." To which the salesman replied: "All right; let us know when you are ready." It further appears that Fertig moved the machine to the Lenox Hotel, where he went to live, and while there sold and delivered the Victrola to the defendant in this action, who paid Fertig $75 therefor. Fertig then left, and has not since been seen.

The plaintiff, learning the facts, and claiming to own the machine, demanded it of the defendant, who refused to deliver it up. The plaintiff then brought this action in the City Court to recover possession. The City Court dismissed its complaint, and the case now comes before this court on appeal.

The plaintiff, in substance, contends there never was any consummated sale; that the title of the property never passed to Fertig, and he could give none to the defendant; that Fertig stole or converted the Victrola to his own use, and the plaintiff should have recovered. The defendant contends he is protected as a bona fide purchaser for value under the provisions of the Personal Property Law, and that the court below did not err in dismissing the plaintiff's complaint.

The defendant stands on the provisions of section 129 of that act, as added by Laws 1911, c. 571, providing: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

It seems to us that this section governs the case here presented for review. If we correctly interpret the transaction between the plaintiff and Fertig, it amounted to this: The plaintiff delivered to Fertig the Victrola in question for trial, with the option to purchase it at the price of $150. This offer was at no time canceled or recalled by the plaintiff. There was evidently, under this arrangement, no actual sale, and no transfer of title to Fertig, until he had accepted the offer, or until he did some act in relation thereto "inconsistent with the ownership of the seller." The instant Fertig undertook to sell the machine as his own, he did an act inconsistent with the ownership of the plaintiff. It was evident that he had, in fact, acted upon the plaintiff's option to sell, and, in the absence of fraud, it became a consummated sale between the parties to it. Under such circumstances, I think there can be no question but what the plaintiff would have had a perfect right to have sued and recovered from Fertig the agreed purchase price of the machine.

Section 100 of the Personal Property Law also provides: "When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction." * * *

It is urged, and with force, that the act of Fertig in selling the Victrola to the defendant was not, after all, an act affirming or accepting the right to purchase at an agreed price, but really a conversion or larceny of the property delivered to him, and therefore ought not to defeat the right of the plaintiff to follow the property into whosesoever hands it may be found.

We think, however, the provisions of the Personal Property Law above quoted were designed, not only to define the rights of parties to such transactions as between themselves, but also to afford protection to third persons who may deal with the buyer on the strength of his apparent ownership of the property possessed, so that any one intrusting another with the possession of property under circumstances such as in this case does so largely at his own risk, while an innocent purchaser dealing with one in possession will be fully protected. * * *

I am of the opinion that the judgment appealed from should be affirmed.

DINSMORE v. RICE.

(Court of Appeals of Maryland, 1916. 128 Md. 209, 97 Atl. 537.)

Action by Marion G. Dinsmore against Nathaniel A. Rice, in which the defendant brings a counterclaim. Judgment for the defendant, and plaintiff appeals.

CONSTABLE, J. * * * The appellant brought suit for the recovery of an amount claimed to be due him for feed furnished the appellee. The appellee admitted the correctness of the account filed with the narr, but claimed by way of set-off that the appellant was indebted to him in a sum less than the amount sued for, the same being the purchase price of a horse alleged to have been purchased by the appellant from him, and paid the appellant the difference between the account and the purchase price of the horse. The only question involved in the trial was whether or not the appellee was entitled to an allowance for the purchase price of the horse. * * *

The appellant's contention was that the horse died in his possession under such a set of circumstances that he was under no obligation to pay for it. Those circumstances were, according to the appellant's testimony, that the appellant, Dinsmore, went to the stables of the appellee and looked at a horse that Dr. Nolan, a veterinary surgeon, had recommended to him. The horse, apparently, being suited for the purpose for which it was wanted and the price agreed upon, was ordered by Dinsmore to be sent to his place, on trial, but no definite time was fixed for its acceptance or rejection. The horse was delivered on Thursday. The following Friday and Saturday were stormy days, and the horse was worked for about five hours on the latter day. On the afternoon of that day, Dinsmore called Rice over the telephone and told him he had not been able to report as to the horse, and said to him: "I have been detained downtown and I will either accept or reject the horse by Monday, 12 o'clock."

The next day, Sunday, the horse was slightly ill with a cold, and Dinsmore again called Rice and told him that the horse was ill, but that Dr. Nolan had reported it as not anything serious, and that Rice had answered: "That is all right, Marion; he can do as much for him as I can." On Wednesday, it for the first time was apparent that the horse was very ill, and shortly afterwards on the same day it died from congestion of the lungs.

The contention of the appellee was that it was not a sale on trial, but that the horse had been purchased outright on the day it was delivered; and he denied that he had had the conversation testified to by Dinsmore as to reporting on Monday whether or not he would take

the horse. The appellant offered no prayers, but the appellee offered several, two of which were granted by the court, and it is the first of these which the appellant urges is erroneous and should be the basis of a reversal. The prayer is as follows: "Even though the jury find that the horse mentioned in the evidence was delivered by the defendant, Rice, to the plaintiff, Dinsmore, on trial, yet, nevertheless, their verdict should be for the defendant, if they further find that under all the circumstances of the case, the plaintiff retained the horse for an unreasonable time without giving notice of his rejection of said horse to the defendant." * * *

Assuming the truth of the testimony of the appellant that the appellee agreed to allow him until Monday at 12 o'clock, to either accept or reject the horse, although this testimony may be said to be materially different from the testimony at the former trial, we nevertheless are of the opinion that the above referred to provisions of the Uniform Sales Act are still applicable to this case. * * *

Assuming the appellant's testimony to mean that, although in the beginning of the transaction no time had been fixed for a return of the horse, yet by the Saturday conversation the time for the return was fixed as of Monday at 12 o'clock, still in order to escape liability, it was incumbent upon him to show at or before that time he had given notice of rejection. And as to this, there is not a word in the record that there was a communication of any character between the parties after Saturday's conversation, except the notice on Sunday, that the horse was suffering from a cold until some little time after the death of the horse. That he merely communicated to the seller the fact that the horse was slightly ill and was being attended by the buyer's veterinarian could not be considered by the jury as operating as a performance of his agreement to notify him of his acceptance or rejection. The appellant clearly explained that it was his understanding that if he did not notify the seller by Monday at 12 o'clock, the horse was to belong to him.

Admitting all of the testimony of the appellant as to the Sunday notice, we are of the opinion that there is nothing in it that could be construed to relieve him of his obligation to give notice of his rejection. The prayer, therefore, instead of requiring the jury to find whether or not the horse was retained an unreasonable time without notice of rejection, should have directed a verdict for the defendant if the jury found that the buyer retained it without notice of rejection after Monday at 12 o'clock. In the absolute absence of any such notice, the jury could not have found any other verdict, so, therefore, no injury was done the appellant by the granting of the prayer in the form offered. * * *

Finding no reversible error, the judgment will be affirmed. * * *

SECTION 9.—CONDITIONAL SALES

The transactions which we have just been considering—sales on return and contracts to sell on approval—are conditional sales. In the former, the title in the buyer is coupled with a condition subsequent; in the latter, there is a condition precedent to the vesting of title. These contracts are rarely, if ever called conditional sales. On the other hand, the contract which is the subject of this section, a very common one in business, is not strictly a conditional sale, but everywhere, in business and in the law, is always called a conditional sale.

In short the transaction is this: The seller, being willing to sell the goods on credit, but desiring to retain some hold on the goods, enters into a contract with the buyer, by the terms of which the buyer is allowed to take possession of the goods, but the title thereto is expressly retained by the seller until the buyer pays the price. It is necessary for the seller, if he desires to retain title in a contract wherein he has surrendered possession, and contracted also to pass title upon the payment of the price, expressly to reserve it, because the law would not give him any lien or title under such circumstances. The situation here is different from the case where the seller is in possession of goods sold in a deliverable condition. In such a case the law attaches a lien on the goods, giving the right to retain possession until the price is paid—except, of course, where the bargain shows a cash sale or other executory contract to sell. Liens do not survive voluntary surrender of the possession of the goods.

The buyer, then, having expressly retained title to secure payment of the price, what are the rights and liabilities of the parties?

(1) The general rule is that the risk of loss or damage is on the buyer. Generally the risk of loss accompanies title, but there are some exceptions, and this is one of them. The reason for the exception is that, while the seller does in a sense retain title, his retention of the same is for a special purpose only, to secure payment of the price. The buyer has possession. In the natural course of events he will become the owner. Therefore it is eminently just to allow the risk of loss to rest upon the person who is chiefly interested in the goods. Therefore, if before the price is paid the goods conditionally sold are destroyed or damaged, even without the fault of the buyer, he is still bound to pay the price. This result is reached under the **Sales Act, Section 22 (a):**

"Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of such delivery."

(2) If the buyer makes default in his obligation to pay the price,

the seller may recover possession of the goods. The possibility of just such a contingency is the sole reason for the seller's having sold the goods on contract of conditional sale. Had he merely sold them on credit, the seller would have had no greater rights against the goods sold by him than any other creditor of the conditional vendee. In the event of the buyer's insolvency or bankruptcy, the seller would likely lose some, or perhaps a large proportion, of the price remaining unpaid; but he is protected if he retains a security title. If the buyer refuses to allow the seller to reclaim the goods. the seller may recover possession in a proceeding usually known as an action of replevin.

By way of comparison, it might be mentioned in this connection. that the seller could protect himself to the same extent by selling the goods on credit absolutely to the buyer, and requiring the buyer to execute and deliver a chattel mortgage. For practical purposes the protection of the seller is the same, whether he adopts the conditional sale plan or sells the goods without reservation of title and takes back a mortgage. In some states, where chattel mortgages are required to be recorded, and where contracts of conditional sale are not required to be recorded, there is a difference in the rights of the seller as against the purchasers and creditors of the conditional vendee, a point now to be noticed.

(3) It was stated above that the conditional vendor might reclaim possession of the goods upon the buyer's default. Suppose, however, that the conditional vendee sold the goods to a third party, who had no knowledge that the goods were held by his vendor on a contract of conditional sale. Suppose, further, that the conditional vendee is now insolvent, so that the seller's right to sue him for the price is worth nothing. May the seller recover the goods from the innocent purchaser? Or if, instead of an innocent purchaser, it may be that some creditor of the conditional vendee has obtained a judgment against his debtor, and has levied on the goods so sold, and that the same were sold by the sheriff to satisfy this judgment; may the conditional vendor recover the goods from the purchaser at the sheriff's sale? The two questions are the same. First, let it be supposed that these questions are asked with respect to a conditional sale in a state which does not require recording of conditional sales contracts to make them effective against subsequent purchasers and creditors of the conditional vendee. There are two views on this question. The great majority of courts have held that the conditional vendor may recover his goods from the innocent purchaser or from the purchaser at the sheriff's sale. This rule is expressed by saying that the reservation of title in a contract of conditional sale is good against purchasers and creditors of the conditional vendee. A few states, among them Illinois, Pennsylvania, and Colorado, have held that the conditional vendor is not protected. Under this rule parties dealing with a conditional vendee have the right to assume that he is the ex-

clusive owner of goods held on contract of conditional sale. Of course if such persons had notice of the interest of the seller, they would not be protected.

WHITLOCK v. AUBURN LUMBER CO.

(Supreme Court of North Carolina, 1907. 145 N. C. 120, 58 S. E. 909, 12 L. R. A. [N. S.] 1214, 122 Am. St. Rep. 446.)

Action by Charles M. Whitlock, as a creditor of the Auburn Lumber Company, for the purpose of winding up its affairs, on an allegation of insolvency. Cameron F. MacRae was appointed receiver in the proceeding, and, from a judgment refusing to allow a certain credit on notes of the Auburn Lumber Company, MacRae, as receiver, appeals.

The Acme Machine Works sold to the Auburn Lumber Company certain machinery and personal property for $2,770, of which sum $1,000 was paid in cash and the balance of the purchase money was secured by two notes, due, respectively, February 23 and April 24, 1903. On these notes payments were made, which reduced the balance due on December 15, 1906, including interest, to $973.36. In the contract of sale it was stipulated that if the Auburn Lumber Company should fail to pay the notes, or either of them, at maturity, the entire debt should become due, and the Acme Machine Works might take possession of the property, but, if the notes were paid at maturity, then the title, which, until the payment should remain in the Acme Machine Works, should vest in the Auburn Lumber Company. * * *

WALKER, J. It cannot be well denied that, under the prior decisions of this court, the transaction between the Acme Machine Works and the Auburn Lumber Company constitutes a conditional sale of the property described in their contract. The agreement was that the former should sell, and the latter should buy, the machinery and other property, to be delivered at once for the stipulated price. A part of the purchase money was paid in cash, and for the remainder the lumber company executed its notes, by which it absolutely and unconditionally promised to pay the sums therein specified. All of the property named would have been delivered immediately to the lumber company but for the request that the dry kiln be retained by the Acme Company until the lumber company should be ready to receive it. The receiver of the latter company contends, upon the facts found by the referee, that he is entitled to a credit of $750, which was the value of the dry kiln, upon the notes given for the purchase money of the property bought by the lumber company from the Acme Company, and which are now owned and held by the Bank of Wayne.

We do not perceive upon what ground, legal or equitable, any such claim can be successfully maintained. The lumber company has made an absolute promise to pay a certain sum of money, the consideration of which was the purchase of the property described in the contract. Why, then, should it not be compelled to perform its promise? It is a mistake to suppose that its liability depends upon whether the title did or did not pass unconditionally to it from the Acme Company. Its obligation arises out of the fact that it has promised to pay the money upon a sufficient consideration, and the said obligation is in no way

affected by the state of the title to the property, as between the parties; that is, whether vested conditionally or unconditionally. * * *

It was not necessary to effectuate the intention and purpose of the parties, in making the contract, that there should have been an actual delivery of the dry kiln, as there was of the other property. The kiln was held by the Acme Company, subject to the order of the lumber company, and was therefore constructively in its possession. * * * Here it appears that the lumber company, by its own request, prevented the delivery of the kiln. Will it now be heard to say that the resulting loss should fall upon the Acme Company, who was ready and willing, at all times, even up to the very moment of the fire, to deliver it, when, if the delivery had been made as originally contemplated and agreed, no loss would have occurred? Such a proposition cannot be entertained for a moment. * * *

The real and substantial nature of the transaction, for the purpose of determining who should bear the loss, is that of mortgagor and mortgagee, or lienor and lienee. The contract, it is true, creates technically a conditional sale, but the vendor, in fact, only retains the legal title as a security in equity, and the title otherwise passes to the vendee with a lien for the purpose named. * * *

We find no error in the record. Affirmed.

CHAPTER II

TRANSFER OF TITLE IN CONTRACTS TO SELL UNASCERTAINED GOODS

Section
1. Introduction.
2. Acts of Unconditional Appropriation.
3. Acts of Unconditional Appropriation with Respect to Only a Portion of the Goods.
4. Acts of Unconditional Appropriation Not Necessary in Sales of Fungible Goods.
5. Passing of Title to Goods Which at the Date of the Contract are Not in Existence.
6. Passing of Title to Property Contracted to be Sold upon Its Delivery to a Carrier or Other Bailee.
7. Effect of the Form of the Bill of Lading upon the Passing of Title.

SECTION 1.—INTRODUCTION

The great majority of transactions in modern business which ultimately result in transfers of title to personal property have their origin in executory contracts to sell goods which at the date of the execution of the contract were unascertained. The farmer may contract to sell his cattle and his grain before the subject of the contract can be identified. The manufacturer and wholesaler send out their salesmen, who enter into contracts with the dealer or consumer under circumstances where the subject of the sale is not capable of actual identification at the time. The contracts will simply call for goods of a specified description or of an agreed quality, but until some act be done, either by the seller or by the buyer, the effect of which will be to segregate the goods corresponding to the description and quality, the goods cannot be said to be ascertained. In the natural course of events, and upon the performance of certain specified acts, the goods will become ascertained, and title will pass. The problem in this chapter is to discover the circumstances under which title will pass to the buyer in contracts of this character. Of course, in the great majority of cases, it is unimportant to know at what moment title passed to the buyer, because the entire transaction will be closed just as the parties intended. But accidents occur. The goods are lost or damaged. Some of the numerous parties through whose hands the goods pass on their journey to the purchaser may find themselves plunged into bankruptcy. Dishonesty still finds an occasional fertile field in which to involve the parties in difficulties. Speed invites opportunity for misunderstanding; misunderstanding breeds controversy. Before the era of the industrial revolution, buyer and seller more frequently dealt face to face. The transaction was simple, and quickly terminated. The most casual observation upon the elaborate mechanism of modern exchange reveals countless chances for the unforeseen to occur. When it does

occur, some of the eddies from the stream of business pour into the lawyer's offices and the courtrooms. The balance sheets register a loss, even for the successful litigant.

When will goods be unascertained? (1) When they are not in existence at the date of the contract; (2) when they are to be manufactured; (3) when the goods are in existence, but are so mixed up with other goods that it is not certain what particular goods will finally be delivered to the buyer—when will title pass under such a contract?

Sales Act, Section 19, Rule 4 (1). Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

There are several matters here which require separate consideration, (1) This rule is but a rule of presumption, for the first sentence of section 19 qualifies rule 4, just as it qualifies rules 1, 2, and 3, by declaring that **unless a different intention appears, the following rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.** (2) The section applies to unascertained and future goods. Future goods are also unascertained goods; but, for reasons appearing in section 4, it is apparent that title will not pass at the moment when the goods are put in a deliverable state, but that, in addition to the act of putting the goods in a deliverable state, the goods must be **unconditionally appropriated to the contract.** It is of great importance to note that title will not pass at so early a moment under contracts to sell unascertained goods. When goods are ascertained, we found that title presumptively passes just as soon as they are put in a deliverable state. But we note here that, while presumptively title will not pass **until** the goods are put in a deliverable state, we observe that presumptively title will not pass, even at the time the goods **are put in a deliverable state.** because the act requires something else before title is deemed to pass; that is, the goods must be **unconditionally appropriated** to the **contract.** When are goods unconditionally appropriated to the contract? The determination of this question is the most important part of this chapter. The law might just as well have provided—i. e., it would not be illogical to so provide—that title would pass presumptively just as soon as the goods were put in a deliverable state. But the law did not take this turn, for the additional act of **unconditionally appropriating** the goods to the contract is required before title presumptively passes. It is possible for the parties by express agreement to make title pass just as soon as the goods are in a deliverable condition and without any act of unconditional appropriation, but it requires exceptionally

strong evidence to overcome the presumption that an act of unconditional appropriation is necessary. There are very few such cases. (3) There is one situation where the circumstances of the case uniformly are construed as doing away with an act of unconditional appropriation—i. e., sale of a specified quantity of goods called fungible goods, such as grain or oil. In all other cases goods must be unconditionally appropriated before title passes. Quite frequently the courts employ the expression "an act of subsequent appropriation." Where this term is used, it has the same meaning as the phrase found in the Sales Act. (4) It must be noticed that the act of unconditional appropriation must be assented to by both seller and buyer.

On final analysis, therefore, there are two main problems presented in the next section: (1) What kinds of acts constitute acts of unconditional appropriation? (2) What circumstances will show assent by both parties to this act of unconditional appropriation?

SECTION 2.—ACTS OF UNCONDITIONAL APPROPRIATION

PROCTOR & GAMBLE CO. v. PETERS, WHITE & CO.

(Supreme Court of New York, Appellate Division, 1919. 187 App. Div. 376, 176 N. Y. Supp. 169.)

Action by the Proctor & Gamble Company against Peters, White & Co. On motion by plaintiff for a new trial on a direction of a verdict in favor of defendant.

SMITH, J. (dissenting in part). In January, 1914, the plaintiff made a contract with the Atlantic Phosphate & Oil Corporation, a manufacturer of fish oil, for its entire product for the year 1914, with the exception of 6,000 barrels, or as much thereof as might be demanded, which the said oil corporation had agreed to give to Marden, Orth & Hastings Company. The contract provided that the purchaser should receive the oil in the purchaser's tank cars, to be supplied by the purchaser at the seller's said factory at Promised Land, or, at the purchaser's option, from time to time, in purchaser's barrels to be furnished by the purchaser at the said factory at Promised Land. It was further provided that the purchaser should provide enough tank cars or barrels at the factory as aforesaid to take and receive all said oil as and when produced by the seller, except as thereinafter provided. It was thereinafter provided that when the said oil is produced by the seller at its factory it shall be invoiced to the purchaser by Marden, Orth & Hastings Company, the agent of the seller, and provision is made for the drawing of drafts as against the purchase price.

Later the contract provides: "If at any time there shall not be at the factory sufficient tank cars or barrels furnished by the purchaser to receive all the oil as fast as produced, the seller shall store the said oil in its own tanks at its factory, and Marden, Orth & Hastings Company shall invoice it so soon as stored in said tanks to the purchaser, and shall be entitled to draw on the purchaser at the same rate of 25

cents a gallon for the said oil so stored in storage tanks, as well as for oil placed in said tank cars or barrels: Provided, however, that if at any time the oil so stored in the seller's storage tanks shall reach the amount of 15,000 barrels, and there shall not be enough tank cars or barrels provided by the purchaser to take care of all excess as fast as produced, the seller may ship such excess oil to the purchaser or store the same in any way that may be possible, and the purchaser in that event shall pay to the seller any extra expenses thus incurred by the seller."

The defendant was the factor under an agreement for the sale of this oil of the Atlantic Phosphate & Oil Corporation. The defendant had advanced substantial sums of money to that corporation, and in order to protect the defendant for its commissions and for the advances, the drafts drawn on the plaintiff for the oil shipped were delivered to and collected by the defendant. Thereafter, by the direction of the defendant, the Atlantic Phosphate & Oil Corporation shipped six carloads of the oil to Swift & Co., and it is for the conversion of these six carloads of oil by the defendant that this action is brought.

Of these six carloads, four were taken direct from the tanks of the Atlantic Phosphate & Oil Corporation and put upon the cars of Swift & Co., and thus forwarded to Swift & Co. The other two carloads had been taken from the tanks by the Atlantic Phosphate & Oil Corporation and put upon the cars belonging to the plaintiff, and the oil in these cars belonging to the plaintiff was shipped to Swift & Co. As to the oil taken directly from the tanks of the Atlantic Phosphate & Oil Corporation and put upon the cars of Swift & Co., I do not think the defendant can be held for conversion, although it participated in a diversion of this oil. The defendant can only be held for conversion provided title had passed from the Atlantic Phosphate & Oil Corporation to the plaintiff.

In the manufacture of this oil, the evidence shows that the method of manufacture was to cook the fish which were not otherwise fit for eating, and then through presses the oil was pressed out and turned into tanks, where the oil was further cooked; that thereafter the oil is turned into settling tanks and given a chance to clear, and that after it is cleared the oil is finally pumped into the storage tanks, where it stays until it is loaded upon the car, so that the placing of this oil in the storage tanks was only the last step in the process of manufacture. It would, of necessity, have been run into these storage tanks, whether or not it was sold to the plaintiff, or whether or not it was sold to any one. All of the oil was run into these storage tanks from the settling tanks, in order that the settling tanks might be used for further oil that was in process of manufacture. * * *

Section 19 of the Uniform Sales Act purports to give the rules for ascertaining intention, and by rule 4 it is provided: "1. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made." * * *

In Williston on Sales at Common Law and under the Uniform Sales Act, Professor Williston, in speaking of rule 4, says, at page

380: "As an original question it might be well urged that, when a contract is made for the sale of unspecified goods, the property should pass, unless a contrary intention is manifested, as soon as the goods become specified and put in a deliverable condition by the seller. It is well settled, however, that the property does not pass at so early a moment. Some subsequent act in regard to the goods is necessary as a manifestation of the intent to transfer it. The intention alone is not enough, and certainly, unless clearly so agreed, the completion of the goods is not a sufficient manifestation of intention by outward act. There is not much authority upon the question whether the parties, if they expressly so agree, may vary the rule that the property does not pass on the mere completion of the goods. In other words, it is not clear whether the rule that the property does not pass until some subsequent act of appropriation is one of presumption, based perhaps on supposed intention, or whether it is an absolute rule of law. In theory there seems no reason why the intention of the parties should not prevail, if it is clearly manifested, and some authority supports this view. The completion of the goods itself is an outward act, which it would seem might be agreed upon as the appropriation. As a general rule, however, some act of appropriation of the goods to the buyer, other than mere completion or preparation, is essential for the transfer of the property, and it is necessary that the act of appropriation should be assented to by both parties. But as to the formation of contractual agreements generally it is immaterial that the parties express their assent at different times, nor is it material which party makes the proposition." * * *

At page 161 of his work, Professor Williston, in speaking of the sale of future goods, says: "But the mere acquisition of the goods by the seller does not, it seems, in our law operate as a transfer of title to the buyer even though the parties intend that it should be so." * * *

In Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55, Judge Denio says: "In general a contract for the building of a vessel or other thing not yet in esse, does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery and approved by such party. All the authorities agree in this [citing authorities], and the law is the same, though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly. In Mucklow v. Mangles, which arose out of a contract for building a barge, the whole price was paid in advance, the vessel was built and the name of the person who contracted for it was painted on the stern, yet it was held that the title remained in the builder."

In Comfort v. Kiersted, 26 Barb. 472, it was held: "Where an article agreed to be sold is yet to be manufactured, the title does not pass until there has been some act on the part of the vendor which amounts to a delivery, and some act on the part of the vendee which amounts to an acceptance."

In writing for a unanimous court, Judge Harris there says: "In this case the parties to the contract had agreed that the shingles should be the property of the defendants as fast as they were made. Still the contract was executory. To make a sale complete, so as to vest

the title in the vendee, the thing sold must not only be in existence but it must be identified. The contract itself conveyed no present right of property to the defendants. Though Davis agreed that the shingles he was about to make should, as fast as made, become the property of the defendants, still, as it was an agreement to be executed in future, his right was, not to the shingles, but in action for not executing the agreement. Before the title would vest, even after the shingles had been made, something must have been done which would amount at least to a constructive delivery. The shingles must have been in some way designated and set apart, so as to be capable of being identified as the property of the purchasers [citing cases]."

Under these authorities, I am unable to find any act of the vendor which constitutes an unconditional appropriation of this oil to the plaintiff's contract. Nothing was done with the oil, except what was necessary to do in the completion of the process of manufacture. The oil that was in these tanks belonged in part to Marden, Orth & Hastings Company, if they chose to exercise their option to purchase the same. It is stipulated in the case that they did exercise their option, but by the stipulation it is stated that that option was exercised during "that period." That period is the period provided in their contract with the American Phosphate & Oil Corporation, which was one year from the 15th day of December, 1913, so that in August, 1914, it does not appear that Marden, Orth & Hastings Company had exercised their option to take any part of that oil. For aught that appears, their 6,000 barrels provided for in their contract may all have been in those tanks at the time of the alleged conversion, and thereafter taken.

It is argued, because by plaintiff's contract a draft might be drawn upon the plaintiff for 25 cents a gallon, while the oil was still in the storage tanks, that this provision indicates an intention that title shall pass at once when the property gets into the storage tanks. It will be noticed, however, that these drafts are to be drawn by Marden, Orth & Hastings Company, which firm had its option to withdraw 6,000 barrels of oil at any time from those tanks, so that this clause of the contract is not sufficient to indicate the intention of the parties that title shall pass at once upon production and storage in these storage tanks. In Comfort v. Kiersted, supra, the opinion discusses this very situation and Judge Harris writes: "Suppose Davis had made, with another person, another contract, in all respects like that under consideration, whereby he had agreed to deliver the same quantity of shingles as fast as made; could it be pretended that the defendants would, by the mere operation of their contract, become the owner of all the shingles made by Davis, as soon as manufactured? It would then need, as now, that in some way the shingles should be designated as delivered in execution of the contract, in order to change the right of property; and they would then have become the property of the one or the other of the parties to whom he had agreed to sell them, according to their designation."

So, under the contract here to sell to Marden, Orth & Hastings Company 6,000 barrels of the oil at their option, the placing of the oil in these storage tanks could not in any way be deemed an appropriation to the plaintiff's contract, and much less, with the right of Marden, Orth & Hastings Company to take therefrom 6,000 barrels of oil, could it be deemed to be an unconditional appropriation to the plaintiff's contract, which unconditional appropriation is made by the Personal Prop-

erty Law a requisite to the passing of title of future goods. If placing this oil in these storage tanks could in any event be deemed a delivery, it was a conditional delivery, conditioned upon the election of Marden, Orth & Hastings Company to take 6,000 barrels thereof for their own purposes.

As to the oil which had been placed in the cars of the plaintiff, it seems to me clear that the Atlantic Phosphate & Oil Corporation had so far made an unconditional appropriation of that oil to the plaintiff's contract as to vest title in the plaintff. That the defendant had full knowledge of that contract I have no doubt whatever. It had loaned to the Atlantic Phosphate & Oil Corporation a large amount of money. Confessedly, the contract was shown to one of the officers of the defendant, with every presumption that it was read, as it was to their interest to read the contract and become acquainted with its conditions. Moreover, the defendant discounted drafts drawn by the Atlantic Phosphate & Oil Corporation upon the plaintiff for oil delivered under this contract, and discounted the drafts for the $25,000 advanced by the plaintiff to the Atlantic Phosphate & Oil Corporation, and it is against all probability that this was done without a substantial knowledge of the plaintiff's rights in this oil. In fact, the course of business of the Atlantic Phosphate & Oil Corporation seems, during all this time, to have been dictated by the defendant, which had so large an interest in the company by reason of moneys advanced.

Inasmuch as the title to this oil in these cars had passed to the plaintiff, the defendant was guilty of conversion in directing a diversion of this oil from the plaintiff to Swift & Co.; and as to this oil, the exceptions must be sustained, and a new trial ordered, with costs to plaintiff to abide the event.

LAUGHLIN, J., delivered the opinion of the majority of the court. At the conclusion the court used the following language: "By virtue of the precise terms of this contract and the uncontroverted facts, the case is, I think, brought clearly within the provisions of the Personal Property Law quoted, and the intention of the parties, which governs as to when title was to pass plainly was, I think, that the title was to pass when the oil was pumped into the storage tanks."

BRISTOL MFG. CO. v. ARKWRIGHT MILLS.

(Supreme Judicial Court of Massachusetts, 1912. 213 Mass. 172, 100 N. E. 55.)

Action by the Bristol Manufacturing Company against the Arkwright Mills. There was a verdict for plaintiff, and defendant brings exceptions.

RUGG, C. J. This is an action of contract to recover for goods sold and delivered and for damages for breach of contract for the sale of goods. There was evidence tending to show that the plaintiff agreed, by a broker's "sale note," to make and deliver to the defendant 1,500,000 yards of cotton cloth. The quality, weight, price, terms and rate of delivery were fixed, and the note further contained these provisions: "No marks of any kind on bales except bale numbers. Arkwright will let you know what bale number to begin with." The defendant gave to the plaintiff the bale number with which to begin numbering the bales. After about 500,000 yards were delivered according to the contract, which the defendant resold without examination, it began

selling to the Merrimac Manufacturing Company. The cloth was rejected by it as not being of the required quality. Thereafter examinations were made, and negotiations were carried on between the defendant, the plaintiff and the Merrimac Manufacturing Company, to the end that the goods might be accepted under the contract between the defendant and the Merrimac Manufacturing Company, which continued for about six weeks, beginning with March 16th. These efforts failed, and on or about the 1st of May the Merrimac Manufacturing Company canceled its contract with the defendant, and the defendant in turn its contract with the plaintiff, on the ground that the goods were not of the required quality.

While these negotiations were pending and while it was in doubt whether the Merrimac Manufacturing Company would continue to accept the goods, the defendant wrote to the plaintiff on April 1st the following: "Please hold shipments of 28" goods, covered by insurance, subject to our order. Will let you know the result of our examination as soon as completed;" and on April 28th: "Please ship at once 1,200 pieces billed April 7 held for our account. They are going over the goods at the Merrimac Mfg. Co.'s and expect to let you know the result in a day or two." After April 1st the plaintiff continued its manufacture of the goods according to its contract, baled them and numbered the bales according to the previous directions of the defendant, stored them in its storehouse, insured them, and held them according to the instructions contained in the defendant's letter of April 1st, notifying the defendant in each instance and submitting an invoice. There was no difference in the insurance on these goods and other goods in the plaintiff's storehouse. The case was sent to an auditor. His report and the verdict of the jury were for the plaintiff.

The inquiry is whether this evidence was sufficient to show a delivery of the goods between April 1st and the time when the defendant canceled the contract. * * * The sale note required a delivery by the plaintiff to a common carrier for shipment to the defendant. It is admitted that no such delivery was made. The first question is whether the defendant's letter of April 1st, which was received and accepted by the plaintiff, constituted a modification of the contract as to delivery. The contract between the plaintiff and the defendant was in no wise dependent upon the relations between the defendant and the Merrimac Manufacturing Company. A breach by the latter of its contract with the defendant affords no justification for a cancellation by the defendant of its contract with the plaintiff. The letter of April 1st should be read in the light of all the conditions then known to the plaintiff and defendant. The defendant contends that so read it should be construed to mean a request to withhold or to hold back shipments pending the negotiations with the Merrimac Manufacturing Company and that the contract should remain in abeyance meanwhile.

But the letter is something more than a mere request to suspend shipments. It is a direction that the goods be covered by insurance. This was an act of proprietorship under all the circumstances. If title remained in the plaintiff, there was no occasion for the defendant to be concerned about the insurance. It is only on the theory that the defendant expected title to vest in it that its reference to insurance becomes reasonable. * * * The defendant's further request that

the goods be held subject to its order looks in the same direction. Its letter of April 28th directing shipment of certain goods previously billed "held for our [its] account" tends to indicate a reference to goods owned by it. The fair meaning of the letter of April 1st is a request for a modification of the original contract as to delivery of the goods to a common carrier with an additional stipulation as to insurance. When accepted by the plaintiff, the contract was changed to that extent. The precise form in which the insurance was carried by the plaintiff does not appear, but no exception is taken on this point, and after verdict it must be assumed that it conformed to the letter of April 1st.

The question remains whether there was sufficient evidence of a separation and an appropriation by the plaintiff of the goods to constitute a constructive delivery. The cloth seems to have been a common grade well known in the general market, and such as the defendant also manufactured. It was not a unusual kind made upon special order. The manufacture was completed, and nothing remained in order to execute the contract on both sides, except for the buyer to take the goods and pay for them. A definite quantity of goods was to be shipped or ready for shipment each week. Under these circumstances as between the immediate parties nothing was necessary in order to pass title to the buyer beyond a setting apart of the goods for the buyer. It might have been found that the seller was impliedly authorized to make such appropriation by the buyer. Title may pass although the goods remain in the actual possession of the vendor. * * * The evidence was that the plaintiff placed numbers upon the bales in accordance with the requirement of the sale note and put them in its storehouse. Any visible marks which are sufficient for identification are enough to show an appropriation. Each bale was a physical entity. When it was stamped or marked with a serial number conforming to an initial number furnished by the defendant, it could be identified readily in a storehouse where there were other bales. It was not necessary that all the bales should be set apart in a group by themselves. The appropriation was complete without it. * * *

It follows that the defendant's requests for rulings were refused rightly, and that there was no error in the charge.

Exceptions overrued.

SECTION 3.—ACTS OF UNCONDITIONAL APPROPRIATION WITH RESPECT TO ONLY A PORTION OF THE GOODS

A. goes into B.'s grocery store and calls for a dozen oranges. B. takes a paper sack and places one orange in the sack. Who owns that orange at that instant of time? To present a real situation, suppose at that moment a dog seized the sack containing the orange and ran away with it. B. takes another sack, puts in eleven oranges, and tenders them to A., and demands the price of a dozen oranges. A. claims he is entitled to twelve oranges. Let us see: In the beginning there was a contract to sell one dozen oranges. The oranges were unascertained at the moment the agreement was made. It would be possible for the rule as to fungible goods

to apply here, but it is decidedly unlikely that the parties intend to become tenants in common of all the oranges owned by B.; therefore an act of unconditional appropriation assented to by A. and B. would be necessary to pass the title. The act of putting one orange in the sack, so far as the physical character of the act is concerned, is an act of unconditional appropriation, and since it is done by the seller, the seller very likely assents to the act, and expects the normal legal effect to follow, and expects that title should pass to this one orange. But where is the assent by the buyer? There is clearly no express assent to take title, nor is it at all reasonable to suppose that A. is impliedly consenting to take title to that orange. A. wants one dozen oranges. If, at that instant, something should cause the complete loss to all of B.'s oranges, except the one in the sack, it could not be contended that A. is under any duty to take and pay for one orange. Therefore A. does not assent impliedly to this act as an act having the legal effect of passing title to him. Partial appropriations, or, rather, appropriations as to a portion only of all the goods contracted to be sold, do not pass title.

Notice, however, that if there is evidence showing an assent by the buyer title will pass. Suppose that, just as B. put the orange in the sack, B. said: "It is understood that this is your orange." A. replies: "I agree to that." Then, of course, title to that orange has passed. To avoid the difficulty of forcing A. to pay for this one orange, if something should then prevent B. from placing eleven more oranges in the sack, we need but say that the title which then passed to A. was a defeasible title; that is, the title was accompanied by a condition subsequent, that, in the event that the contract was not completely performed by B., the title to the one orange would, upon B.'s default, revert to B.

Would this result ever be reached where the evidence of B.'s assent to take title lay solely in the circumstances of the case? There are such cases, and sometimes they are of considerable business importance. Suppose that, in the above case, instead of B. placing the orange in the sack, B. had handed the orange to A., and A. took it in his hand. Would title pass then? Probably so, because the act of appropriation by B. has been assented to by A., evidenced by A.'s willingness to take it in his hand. Of course, if A. does not receive the other eleven oranges, A. is under no obligation to pay for the one orange, and he must, upon B.'s default, return the orange. But while he has it in his hands it is A.'s orange, and the risk of loss is on A., and if at that instant A. were adjudicated a bankrupt title to the orange would pass to A.'s trustee in bankruptcy. B. could not recover possession of the orange, but, on the contrary, would be required to file his claim in the bankruptcy proceedings, where he would get less, as a general rule, than the price of the orange.

As commonly expressed, an act of unconditional appropriation of part of the goods will not pass title, unless the act is of such

a character as to amount to an actual delivery to the buyer. It requires evidence sufficient to show a delivery before one may legitimately infer the requisite assent by the buyer to the act of appropriation. The next case illustrates an application of the rule.

ROCHESTER & OLEOPOLIS OIL CO. v. HUGHEY.

(Supreme Court of Pennsylvania, 1867. 56 Pa. 322.)

In the court below the Rochester & Oleopolis Oil Company brought an action of assumpsit in September, 1866, against J. M. Hughey, to recover the price of a quantity of oil alleged to have been sold and delivered by the plaintiffs to the defendant. The oil having been burned, the question was whether the delivery was complete before the burning.

The plaintiffs gave evidence, by the deposition of A. L. Burnett, their agent, that he sold to Owsten, the agent of the defendant, four barge loads of oil, about 2,200 barrels, at $4.50 per barrel, deliverable at Oleopolis, to be measured in the iron tanks of the Pennsylvania Tube Company. The Tube Company receives the oil at the oil regions in their tubes; it is transported through the tubes and received into the tanks of the company at the several shipping points on the Allegheny river. The oil of the respective owners is not kept separate, but is measured when received by the tube company, and is delivered to the order of the owner by measurement at the tanks.

The evidence of plaintiffs, further, was that 495 gallons had been run on the afternoon of June 19, 1866, into a barge furnished by Owsten; another barge was placed under the tanks, and about 450 barrels had passed into it, when the oil took fire, and both barges and the oil were burned.

The court (Stowe, A. J.) charged:

"The first point is as to what the contract was: If it was to be delivered in boat loads, and the purchaser had the right to say when the boat was loaded, and you should find that this boat was not accepted by defendant's agent, and that he was not bound to accept it because it was not a boat load, that is, not filled so that he was bound to take it from the vendor, then there was no delivery in law, and plaintiff cannot recover. If you should find, however, that the first boat was reasonably loaded, so that purchaser was bound to accept, or that the boat was actually taken into his charge, so as to waive the right to have more oil put into it, then plaintiff can recover for that.

"As to the oil running into the boats at the time, there was no delivery of that in law, because, if the contract was for delivery in boat loads, about 2,000 gallons, as stated by the witnesses on both sides, the boat was not filled, so that plaintiff was bound to take it from the vendor. As to this latter it is clear under all the evidence that, if the plaintiff had shut off the oil and requested defendant to pay for what was in the boat, he could not have compelled defendant to receive it, nor to pay for it.

"In reference to the first boat, was there anything further to be done before the plaintiff had a right to require the defendant to take and pay for it? That depends upon whether the barge was sufficiently full, or not being full, whether Owsten, defendant's agent, had already taken possession of it, under such circumstances as to indicate he

was satisfied to take it as it was. As to the latter the plaintiff cannot recover in this action, because it is not pretended that the boat was in a condition to deliver."

The plaintiffs took a writ of error, and assigned * * * that "the court erred in the whole charge and in each part thereof, and especially in the assumption that the plaintiff was not entitled to recover unless the boats were so loaded that the defendants were bound to accept them."

THOMPSON, C. J. The question was submitted to the jury on the trial below, and they found that the contract between the plaintiff and defendant was for the sale and delivery of four barge loads of oil, and not a sale of oil by the barrel. Of course until delivery no specific oil passed to the defendant. Until this took place, he had only a right of action to recover for a breach of contract.

It is unnecessary to say whether the defendant was bound to take, and pay for the number of barrels in each completely laden barge; if there be a question about that, it is not here—but whether the contents of partially laden barges in progress of being filled passed as fast as it entered the barge. The court thought not, and so decidedly think we. The defendant could not be compelled to take a partly filled barge when he had contracted for full ones, any more than if he had contracted for a barrel of oil could he have been compelled to accept one half or quarter full. This would hardly be contended for, yet the principle is the same. Under the finding of the jury there is little room for argument against the ruling complained of. Nor do we see any error in rejecting the offers of testimony. Not one of the assignments of error was according to rule and we might have dismissed them all without notice, but did not, hoping for more accuracy in the future.

Judgment affirmed.

SECTION 4.—ACTS OF UNCONDITIONAL APPROPRIATION NOT NECESSARY IN SALES OF FUNGIBLE GOODS

Sales Act, Section 6. (1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section 76, Clause 8. "Fungible goods" means goods of which

any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

Subsection 2 lays down an apparent exception to the rule that some act of unconditional appropriation is necessary to pass title to goods. But it is apparent only, not actual, because there is no unbending rule of law which absolutely requires an act of unconditional appropriation. The law only presumptively requires such an act. In sales of fungible goods the presumption is simply overcome by an intention actually expressed by the parties, or impliedly expressed because of an established business custom that in certain sorts of sales the parties do intend to dispense with the act of unconditional appropriation.

The rule is not confined to any particular kinds of goods. It is true that in practice a case seldom arises where the rule is applied except in sales of grain, oil, wine, cotton, and similar commodities. If the parties definitely express their intention to do so, the rule can be made to apply to sales of any kind of goods, where each entity of the mass is deemed by the parties to be like all other entities in the same mass. Thus the rule could be extended to include sales of a certain number of cattle, of automobiles, cases of canned goods, etc., out of a mass containing a larger quantity. Stronger evidence will be required in such cases to show that the parties intended this result to follow than is required in the cases of common occurrence.

GOURD v. HEALY.

(Court of Appeals of New York, 1912. 206 N. Y. 423, 99 N. E. 1099.)

Action by Henry E. Gourd against Thomas Healy. From a judgment of the Appellate Division, affirming a judgment of the Trial Term, dismissing the complaint, plaintiff appeals.

WERNER, J. This action, which has been twice tried, was brought to recover the purchase price of 50 cases of wine. The original complaint contained the usual averments where there has been a bargain and sale, but no delivery, and the answer was, in substance, a general denial. * * *

There is no dispute over the fact that on the 26th day of May, 1906, the plaintiff sold to the defendant 50 cases of wine at the agreed price of $740, which was to be billed November 1, 1906, at four months, thus fixing the 1st day of March, 1907, as the day of payment; and that meanwhile the plaintiff was to hold the wine subject to the shipping instructions of the defendant. * * *

It is contended, however, that the title to the wine never passed from the plaintiff to the defendant, because at the time of sale, and until the close of the correspondence in December, 1907, the wine had not been segregated from the larger mass of which it formed a part in an unidentified cellar in Bordeaux, France; and that is the position taken by the Appellate Division. What has been said concerning the tender of the goods seems to answer this contention. Even if it were true that the title to merchandise which forms part of a larger quantity does

not pass to the purchaser until it is separated from the mass, the dealings between these parties were such as to relieve the plaintiff from the duty of segregation. But this property was of a species in which there may be a transfer of title, even when it remains an integral part of a larger bulk. Ordinarily articles of personal property must, if not delivered, be so designated that possession can be taken by the purchaser without any further act on the part of the seller. That is the rule in the sale of a horse, a table, or any other article having a distinct and separate identity as the particular thing sold. It is different, however, when the thing sold is coal, wine, oil, or wheat, which is to be taken in a specified quantity or bulk from a larger mass.

Property may be acquired and held in many things which are incapable of more specific designation than a reference to their kind, quality, or other general description. "Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality." Kimberly v. Patchin, 19 N. Y. 330, 333 (75 Am. Dec. 334). Here the thing sold was wine described as Chateau Yquem of the vintage of 1901, and the quantity was to be 35 cases of quarts and 15 cases of pints. Any 50 cases of this kind of wine in the specified number of quarts and pints would have answered the description in this contract. Upon the last trial it appeared that this wine was in the cellars of Schroeder and Schyler, Bordeaux, when the contract was made, and that it remained there until it was shipped to the plaintiff in April, 1910; and, in view of the nature of the property and the dealings between the parties, we think that is precisely the same as though the wine had been in the cellar of the plaintiff from the beginning. * * *

The judgment should be reversed and a new trial ordered.

SECTION 5.—PASSING OF TITLE TO GOODS WHICH AT THE DATE OF THE CONTRACT ARE NOT IN EXISTENCE

Suppose A. intends to plant a certain number of acres of corn next spring, or suppose he has already planted his corn; may he sell it? That is, may A. then pass title to a crop yet to be grown? Obviously, A. cannot, in the ordinary sense, sell something which he does not have, and which may never come into existence. But will the law enable A. to create in B. rights and powers which will take precedence over the rights and powers of all other purchasers and creditors of A.? If the law will permit this to be done, we may, for convenience sake, call the transaction a sale of future goods, because it is something more than an executory contract to sell future goods.

Before the Sales Act, and in states which have not yet adopted this act, there is a rule of law stated somewhat as follows: There may be a present sale of goods not in existence at the date of the contract, provided such goods were at the date of the contract potentially possessed, but not in any other kind of case.

When are goods said to be potentially possessed? This question is discussed in the following case.

DICKEY et al. v. WALDO.

(Supreme Court of Michigan, 1893. 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449.)

Action by John W. Dickey and Addison Lurvey against George W. Waldo for the conversion of peaches grown on defendant's land, and of which plaintiffs claimed to be the owners under a contract with defendant's grantor. Waldo obtained the land by deed from Schultz with notice of this contract. There was a judgment for plaintiffs, and defendant brings error.

A written contract provided that Dickey and Lurvey should furnish Schultz a certain number of peach trees, which the latter agreed to plant and cultivate for 10 years on a portion of his homestead, consisting of 40 acres of land, occupied by himself and wife, and that, in consideration for the trees, Dickey and Lurvey should be entitled to one-half the peaches grown thereon during any two of such years that they might select.

GRANT, J. The contract and the finding of facts in this case are found in the margin. This contract and the judgment should be sustained, unless there are some inexorable rules of law which stand in the way. Two rules are invoked to defeat the plaintiffs' action: (1) That the land upon which the peach trees were planted is a homestead; that Schultz's wife did not sign the contract; that it interferes with the homstead right, and the contract is therefore void. (2) That the crop which the plaintiffs agreed to take in payment for the trees was not in esse at the time, and therefore not the subject of sale.

We think there is no force in the first proposition. * * * Such contracts are reasonable, and beneficial to both the vendor and the vendee. They are especially beneficial to the vendee. He avoids all expense except his labor, runs no risk, and, if in indigent circumstances, he may obtain gains which would otherwise be beyond his reach. Such contracts are of common occurrence, and, if the rigid rules of law are against their validity, there is a necessity of legislative action to render them valid. The rule of law is well established that things having no potential existence cannot be the subject of mortgage and sale. There are, however, exceptions to this rule, as where a merchant mortgages his stock of goods, and all future additions thereto. It is unnecessary to cite authorities to this proposition. The difficulty seems to arise in determining what comes within the definition of the term "potential existence." The definition of the word "potential" is: "Having latent power; endowed with energy adequate to a result; efficacious; existing in possibility, not in act." Sir W. Hamilton said: "Potential existence means merely that the thing may be at some time; actual existence, that it now is."

In the legal sense, things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. When one possesses a thing from which a certain product, in the very nature of things, may be expected, such product, we think, has a potential existence. The following rule appears to be well established both by reason and authority, viz.: That, while one owns property from which such product natu-

rally arises, such product may be the subject of sale and mortgage. The authorities which thus hold also recognize the other rule above stated. The authorities are by no means uniform, but we think the conflict in them has arisen from a failure to make a proper distinction. In Grantham v. Hawley, Hob. 132, it was held that a grant of that which the grantor has potentially, though not actually, is good, as a grant by the lessee of all the corn that shall be growing on the land at the end of the term. It was there said: "Though the lessor had it [the corn] not actually in him, nor certain, yet he had it potentially, for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the tithe wool that he shall have in such a year yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially." * * *

Justice Redfield, in delivering the opinion in Smith v. Atkins, 18 Vt. 461, said: "It is, without doubt, true that the sale of a thing not in existence is, upon general principles, inoperative, being merely executory; that is, it confers no title in the thing bargained. But when the thing thereafter to be produced is the produce of land, or other thing, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract, and it be entered into merely to defeat creditors." * * * In McCaffrey v. Woodin, 65 N. Y. 464, it is said: "It is well settled that a grant of the future produce of land actually in possession of the grantor at the time of the grant passes an interest in such future crop as soon as it comes into existence." * * *

In the present case the trees were in existence at the time of the contract, were transferred to and became the property of Schultz, the vendee, subject to a share of the crops for the years specified; the contract was executed by the plaintiffs, and operated to the great benefit of Schultz and his grantee, the defendant. This contract is one that the law ought to delight in sustaining. If it cannot be sustained, then no executed contract can be, where a party furnishes seed, and puts in the crop upon shares. The same reason that would defeat the right to recovery for the crop of peaches in this case would defeat the right to recover a crop of corn, wheat, or other grain, or strawberries and other fruits of like character. The defendant purchased with notice, and the purchase price was reduced on account of the plaintiffs' rights in the crop. We think that under the authorities above cited, as well as in reason and justice, plaintiffs and Schultz became tenants in common of the peaches for the years which they should select, and that defendant, having purchased with notice, stood in the same relation to plaintiffs that did his grantor. Defendant's counsel cite Bates v. Smith, 83 Mich. 347, 47 N. W. 249, and insist that it controls this case in their favor. The language of that case is broad, and, if strictly followed, would seem to include the present one; but we think the authorities above cited make a clear distinction between the natural products of the soil, wool from sheep, milk from cows, and the like, from the case that was then under consideration, and we are disposed to follow them. The language of that case must be construed in connection with its facts.

Judgment affirmed. The other justices concurred.

What effect has the Sales Act had upon this rule? Section 5, subsec. 3, provides:

Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

We are already aware of the marked distinction between contracts of sale and contracts to sell. The section lays down a positive rule of law, not a rule of presumption, that, even if the parties do intend to enter into a contract of sale, their intention will not be given effect, because the section says present sales of future goods shall operate as contracts to sell. The intention of the parties is highly important. As has already been said, the question of ascertaining intention is the most important single problem in the law of sales. The emphasis thus thrown upon the intention of the parties, and the very great effort manifested by the courts in attempting to carry out this intention, must not blind us to the possibility of the law's overriding intention. It does so very frequently. Individuals cannot be allowed to do everything they choose to do, because the rights of other people suffer to too great an extent. So in this case the rule of policy adopted in the Sales Act defeats intention.

But does the phrase "future goods" include sales of goods potentially possessed? Could it be urged that the section is meant to apply in all cases where it did apply at common law, but that the exception in favor of sales of goods potentially possessed were to be treated as exceptions under the Act? Probably not. Section 76, clause 9, provides:

"Future goods means goods to be manufactured or acquired by the seller after the making of the contract of sale."

The natural meaning of these words includes goods potentially possessed and it would seem clear, therefore, that the common-law doctrine of potential possession as applied to sales of goods has been abolished by the Sales Act.

This section of the Sales Act does not apply to mortgages of future goods. Section 75 provides:

The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

It is possible, therefore, to mortgage after-acquired property, but the extent to which this may be done—that is, the fixing of the precise nature of the rights acquired by the mortgagee prior and subsequent to the acquisition of the property as against judgment creditors and subsequent purchasers of the mortgagor—is a matter upon which the courts are not entirely agreed.[1] It may be mentioned that, when after-acquired property may be mortgaged at all, the rule is not confined to the mortgaging of property

[1] See the article by Professor Williston in 19 Harvard Law Review, 557, for a full discussion of these questions.

potentially possessed. The rule applies to all property, whether potentially possessed or not.

SECTION 6.—PASSING OF TITLE TO PROPERTY CONTRACTED TO BE SOLD UPON ITS DELIVERY TO A CARRIER OR OTHER BAILEE

The most common transaction which calls for an application of the presumption that title passes when there has been an unconditional appropriation assented to by both parties arises where goods are delivered to a railroad, express, or shipping company, or other carrier, for shipment to the buyer. In the light of previous cases let us examine into the situation with a view of ascertaining what the law ought to be. Let us suppose a contract to sell goods of a certain description. Buyer and seller have their respective places of business in different cities. (1) The contract may result either from negotiations carried on by mail or telegraph or through salesmen sent out by the seller. The contract is one for unascertained goods. The goods are to be sent by freight to the buyer. (2) Upon receiving the order, the seller will have his clerks select the goods. (3) They will be sent to the packing room, boxed, and the name of the buyer will be written on the packages. (4) The goods will then be taken to the loading platform, and orders will be issued to the truck drivers to take the goods to a designated freight office and to procure bills of lading. (5) The goods will then be loaded on the seller's trucks, taken to the freight shed, and unloaded on the railroad company's platform. (6) The driver reports the delivery to the freight agent, and bills of lading are made out, running to the buyer as consignee. (7) The goods are loaded into a car. (8) The car is sealed and taken to the switchyards. (9) The train is made up and leaves the terminal. (10) The goods arrive at destination and are unloaded on the company's platform. The consignee is notified of the arrival of the shipment.

At what moment did title pass? This is by no means an idle or an easy question. When goods are lost or damaged, the event occurs at a particular moment. The holder of the title at that moment sustains the loss. If the buyer or seller be adjudicated bankrupt, the order of adjudication is entered at a particular moment, and the trustee's title to the bankrupt's property for the benefit of his creditors is acquired at a particular moment. Property which at that moment belonged to the bankrupt goes to the trustee. If in the normal course of events title would have passed to the bankrupt five minutes later, the trustee gets no title to the goods. Again, if either buyer or seller undertakes to resell the goods, that sale is consummated at a particular instant of time. If the seller then had title, it passed on to his purchaser. If he did not have title, the purchaser will not obtain the goods.

Let us return to the illustration. When did title presumptively pass? Notice that when act (3) was done—i. e., the goods packed and marked with the buyer's name—we have an act which, under other circumstances, unquestionably would be an act of unconditional appropriation, and title would then pass, if there was the requisite assent by both parties. But in this case is it reasonable to suppose that the parties intended to pass and receive title at so early a moment? Hardly. It is much more reasonable to suppose that the parties intended that title should not pass until the seller had performed the last act with respect to the goods which, under the contract, it was his duty to perform. This act consisted in (1) the actual delivery and unloading on the company's platform, coupled with (2) the act of obtaining from the freight agent a recognition that from that instant the railroad company regarded itself as having the possession of the goods and the responsibility for their safe keeping. And so the law is, as now codified in the Sales Act:

Section 19, Rule 4. (2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "Collect on Delivery" or their equivalents.

It may not be out of place again to call attention to the fact that we are dealing only with a rule of presumption, not an unbending rule of law. Title may pass at an earlier date, and it may pass at a later time. The above rule merely provides that, in the absence of other evidence manifesting a contrary intention, title will pass at the moment the goods are delivered to and accepted by the carrier's agents.

No cases have been inserted where title did pass at a time earlier than that at which the goods were delivered to the carrier, but these cases are not uncommon. Suppose that a buyer goes to a distant city to purchase an automobile. He finally selects one, tries it out, and buys it, let us suppose, in this case, on credit. The car is to be shipped to him. That night, and before the car is taken out of the seller's sales room, the car is stolen or destroyed by fire. The buyer will be obliged to pay the price. It was his car that was lost. Even this result could be changed by evidence showing that, in spite of the fact that this was a sale of ascertained goods, the title was not presumed to pass until the seller delivered the car to the carrier.

Quite a number of cases follow where title was held to pass at a time subsequent to delivery to the carrier. This kind of case is

the more common situation, where the general presumption that title passes on delivery to the carrier is overcome.

No case has been inserted for the purpose of establishing the general rule which we have been discussing. We shall presume that that is fairly well understood at this point. But we do want to find out, especially, the circumstances where the presumption is deemed to be inapplicable. Perhaps the idea has already been grasped that in the study of law, and the study of its application to varied states of fact, the real understanding of the rules results from the discovery of the outer limits of the rule; that is, we want to discuss these cases which are just barely within the rule and those cases which are just slightly outside of the rule, for it is just this sort of study that enables us—to employ a mathematical term —to plot the curve made by the principle. One of the most important things to learn about the law is the uncertainty which invariably attends its application to the infinite variety of the facts of business. Business transactions change in character, and so does the law, because the legislatures and the courts change it. It is conceivable that a legislature could, by sweeping changes in the law, wipe out in an instant all the law that one knew; but no series of new statutes or repealing acts can take away from one who has struggled with a substantial number of actual cases the deep appreciation of the nature of legal relationships, the source of controversy, and of the knowledge of some things that may be done to avoid the losses consequent upon the failure to note the legal aspects of business. The first case, therefore, simply presents a border line case.

GEHL v. PEYCKE BROS. COMMISSION CO.

(Supreme Court of Wisconsin, 1914. 158 Wis. 494, 149 N. W. 275.)

Action by N. V. Gehl, sole trader as N. V. Gehl & Co., against the Peycke Bros. Commission Company, to recover the purchase price of a shipment of two car loads of cabbage from Milwaukee to Kansas City. The suit was begun in the civil court for Milwaukee county, and resulted in a judgment in favor of the plaintiff. An appeal was taken to the circuit court, and an order was therein entered reversing the judgment of the civil court and awarding a new trial in the circuit court. Plaintiff appealed from such order.

The questions raised by the appeal on the merits involve the determination of where, under the agreement between the parties, the delivery of the cabbage took place. It was damaged by frost in transit. Plaintiff claims, and the civil court found, that the place of delivery was Milwaukee. The defendant contends, and the circuit court held, the place of delivery was Kansas City. The following facts determine the solution of the question involved:

On January 2, 1912, the defendant, a commission company located at Kansas City, Mo., telegraphed the plaintiff, a dealer in Milwaukee, as follows: "Wire lowest strictly first class Holland free from frost, prompt shipment." To which plaintiff on the 3d replied by telegraph: "Offer U. R. T. five forty two, shipment to-morrow weather permit-

ting. Twenty four ton here." The same day defendant wired plaintiff: "Ship car offered, wire routing, prefer routing Dogwood"—"Dogwood" meaning Chicago, Milwaukee & St. Paul Railway Company and "U. R. T." meaning Union Refrigerator Transit Company's car. On the 5th plaintiff wired the defendant: "Below zero yesterday and to-day; offer another car at same price, empty car on hand both shipment first weather permitting loading." To which on the same day the defendant answered by wire: "Book another car first quality. Ship both earliest possible." January 9th plaintiff wired defendant: "Car five forty two leaves to-day fast train other possibly to-morrow." And on the 10th he sent this message, "Car U. R. T. still here under shelter. Can ship both to-morrow. Will furnish stoves, fuel and a man in charge if you pay two dollars a ton extra. Railroad will not accept billing or forward otherwise. Must advise early to complete arrangements." Defendant's reply by wire was: "Start cars to-day with man and heat. Will pay extra"—and by letter dated the 11th: "We wired you in answer to yours of yesterday to ship two cars of cabbage in charge of a man with stoves and we hope he will reach us with same by Monday morning at the latest. It seems to us, however, as if the expenses should not quite reach $2 per ton when shipping two cars at the same time. Thus, if after the deal has been closed the expenses should be less we hope you will give us the benefit of the same."

The cabbage was free from frost and in good merchantable condition when it left Milwaukee, and plaintiff furnished an experienced man, who exercised ordinary care in looking after the shipment en route. Union Refrigerator Transit cars do not have openings for stove pipes, and plaintiff furnished salamanders, which are the practical equivalent of stoves. Defendant knew that stoves could not be used in Union Refrigerator Transit Cars. The cars arrived at Kansas City January 14th, after having been in transit about 60 hours, the usual time required for such shipments. The weather during that time was extremely and unusually cold; the thermometer at Kansas City registered 13° below zero on the 11th, 20° below on the 12th, and 12° below on the 13th of January, during the most of which time the cabbage was en route.

VINJE, J. * * * Were it not for the arrangement with reference to furnishing a man and stoves, no serious question could arise as to where delivery was made. The offer by plaintiff was to sell cabbage for $24 per ton here, meaning Milwaukee, and that offer was accepted. It is the settled law of this state that, in the absence of contract provisions or circumstances showing a different intent, where there is a contract for the sale of chattels to be placed on cars by the vendor at a particular place, the title passes to the vendee when they are so placed. * * *

The defendant contends that the vendor's agreement to furnish man and stoves for $2 per ton extra takes the case out of the general rule, and that the contract as finally concluded was that for $26 per ton the vendor agreed to deliver the cabbage at Kansas City. We have been unable to so construe the transactions. When the agreement to furnish man was made the first car had already been delivered to the railway company and title had passed to the vendee under the rule above stated. Owing to the severity of the weather the railway company refused to forward the shipment except upon conditions stated by

it. The contract of the plaintiff was to deliver at Milwaukee. This he had done as to one car and was ready to do as to the other. Under the contract it was the vendee's duty to comply with the requirements of the railway company. The fact that the vendor agreed to do so at an additional cost per ton to the vendee did not change the original contract as to place of delivery. That it was understood by the vendee not to change it is evident from its letter wherein it says that, should the expense of sending man with both cars be less than $2 per ton, it expected to have the expense adjusted at actual cost. When a definite contract is made as to the chattels sold, the price, and place of delivery, such contract is not necessarily changed as to the place of delivery or the time of the passing of title by the fact that the vendor for extra compensation or gratuitously agrees to perform services relative to them after they have been delivered or have left the place of delivery, or that the contract in some other respect has been modified. * * *

There is nothing inconsistent with the original contract in the later agreement, and it does not purport to modify such contract in any respect, except as to the cost of the cabbage to the defendant, which increased cost was rendered necessary by the severity of the weather—surely not the fault of the plaintiff. He stood ready to deliver and did deliver according to his agreement. * * *

Order reversed, and cause remanded, with directions to affirm the judgment of the civil court.

Section 19, Rule 4 (2), expressly provides that the presumption is that title passes upon delivery to the carrier, even though the goods are sent "collect on delivery." The rule which represented the weight of authority was here adopted by the act. The effect of the words "collect on delivery" is merely to reserve possession of the goods as a means of obtaining payment of the price before actual delivery to the buyer. We have seen, in other types of cases, that the seller may pass title and reserve possession. There is nothing inconsistent in such reservation. The next case shows some of the consequences of the rule.

UNITED STATES v. ADAMS EXP. CO.

(United States District Court, S. D. Iowa, E. D., 1902. 119 Fed. 240.)

McPHERSON, District Judge. This case is by indictment, charging the defendant as * * * within this district "carrying on the business of a retail liquor dealer without having paid the special tax as required by law." * * * At the dates covered by the indictment the Dallas Company delivered at Dallas, Ill., to the defendant, for carriage and delivery at Birmingham, Iowa, jugs containing each less than five wine gallons of such liquors, addressed and consigned to certain and divers parties at said Iowa town, orders therefor for said liquors having been received by and for said Dallas Company from its agent, who took said orders from the consignees. All of said consignments were shipped C. O. D.; that is, the defendant carried said liquors from Dallas, Ill., to Birmingham, Iowa, and was to and did collect from

the consignee the carrying charges and the selling price or value of the liquors, and, after collecting the two sums, was to and did deliver the liquors to the consignee. Neither the Dallas Company nor the defendant has paid the special tax as a retail liquor dealer at Birmingham, Iowa. * * *

The only question, in my judgment, is, where and by whom were the liquors sold? If in Illinois, this court is without jurisdiction. * * * Did the Adams Express Company carry on the business of a liquor dealer in Iowa? * * * The title to the liquors did not pass from the Dallas Company when the orders were taken by the agent. The company could ignore the orders, and refuse to ratify the act of the agent, for any reason, good or otherwise. Did the title pass from the Dallas Company to the consignees when the liquors, properly addressed, were deposited in the office of the defendant at Dallas, Ill., with directions to defendant to carry them to Iowa, and deliver them to the consignees, after first collecting the selling price? I believe, and so hold, that the title did then and there pass; and also hold that, the title thus passing, that it is decisive of this case against the government. That the authorities are in irreconcilable conflict is beyond question. But that the great weight of authority sustains the above holding is equally true. * * *

The weight of authority, both state and federal, is to the effect that the title passes to the consignee when the goods are delivered to the carrier, I have no doubt. And that the fact that the goods are carried C. O. D. does not change the rule I am equally clear. And, this being so, the liquors in question were sold in Dallas, Ill.; and, the sales having been made there, there is no pretense that the liquors in question were again sold by any one.

The express company was the agent of the vendees in carrying the liquors, and the agent of the vendors in collecting and returning the money; and, as the express company did not sell the liquors, it was not engaged in the business of a liquor dealer.

Suppose a dealer in southern Florida should order a carload of fresh meat from one of the Chicago packers, and that the shipment is delivered to a carrier under a contract of shipment which freed the carrier from all obligation of iceing the car. The meat is in perfect condition when accepted by the railroad company but spoils during transit. If the usual presumption applies here the buyer loses. Does it apply?

Sales Act, Section 46. (1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in Section 19, Rule 5, or unless a contrary intent appears. (2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of

transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages. (3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Before taking up the cases which directly concern our general inquiry as to the circumstances under which title passes upon delivery to a carrier, we should note here a matter which is somewhat outside the general theme. (1) A seller is always under a contract obligation to pass title to the buyer. (2) The seller may be under an additional contract obligation to deliver the goods to the buyer. This is an independent obligation. The purpose of the subsection is to declare what shall constitute a delivery to the buyer in all those cases not covered by Section 19, Rule 5. Section 46 (1) applies (1) to contracts to sell, and (2) to sales; while Section 19, Rule 5, applies only to contracts to sell.

Passing, then, to the question in which we are primarily interested here, we note the very important qualification that title is not presumed to pass upon delivery to the carrier, when the seller has made a contract of shipment with the carrier which, under the circumstances of the case, is not a reasonable one. When will such a contract be unreasonable? There are probably a great variety of such instances. The following case presents one instance of considerable practical importance.

MILLER v. HARVEY.

(Court of Appeals of New York, 1917. 221 N. Y. 54, 116 N. E. 781, L. R. A. 1917F, 559.)

Action by Charles E. Miller against George Harvey. From a judgment of the Appellate Division, affirming a judgment for defendant, plaintiff appeals.

CARDOZO, J. The plaintiff sold to the defendant in the city of New York automobile tires which were to be sent by express to Allenhurst, N. J. The price, $95.43, was paid by the defendant in advance. The seller intrusted the tires to an express company without declaring their value. The waybill states that the value was asked and not given. By the contract of carriage the liability of the carrier was limited to $50, unless a greater value was "declared and paid for or agreed to be paid for at the time of shipment." The tires were lost in transit. The defendant notified the plaintiff of the loss and requested a duplicate shipment, which was made. The question to be determined is whether payment must be made again.

The general rule is that delivery to a carrier is delivery to the buyer. Sales of Goods Act, § 127, subd. 1. * * * But the rule has its exception. * * * By section 127, subd. 2, of the Sales of Goods Act, it is provided: "Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as

may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages." The statute is declaratory of the rule at common law. The seller must not sacrifice the buyer's right to claim indemnity from the carrier. That rule was declared more than a century ago in Clarke v. Hutchins, 14 East, 475. * * *

Tested by these principles, the plaintiff's case must fail. He limited the carrier's liability to $50. He sacrificed the defendant's right of indemnity to the extent of almost one-half of the value of the shipment. He did this when full indemnity could have been procured by an additional payment of ten cents. That was not a reasonable protection of the interests of his principal. The plaintiff's argument, if sound, would require us to hold that the acceptance of a like limitation would be reasonable if the value had been $1,000. Precedent and reason forbid that conclusion. The seller who puts the buyer at the mercy of the carrier must procure the buyer's approval or assume the risk himself. * * *

The judgment should be affirmed.

The preceding case stands for the important general proposition that if the seller, at the time he delivers the goods to the carrier, is then guilty of a breach of contract that title to the goods will not pass to the buyer. It would be possible for the law to provide that title did pass, thus imposing upon the buyer the burden of suing the seller for the damages, but the law has taken the other view of the matter. The particular obligation of the seller in that case was implied in the contract and the difficulty always will be in ascertaining what obligations are to be implied in the contract.

The next case illustrates the same general rule: That a breach of contract by the seller prevents title from passing to the buyer upon delivery to the carrier. One should keep in mind, however, that any breach of contract of a material character will have the same effect. It so happens that in the following case we may make use of an additional section of the act. This section, it should be noticed, will be involved in cases where there is no shipment of goods by carrier to the buyer.

Sales Act, Section 44. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the

whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) When the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

The case following involves the application of subsection 3.

ROCK GLEN SALT CO. v. SEGAL.

(Supreme Judicial Court of Massachusetts, 1918. 229 Mass. 115, 118 N. E. 239.)

Action by the Rock Glen Salt Company against Jacob N. Segal. There was a finding for plaintiff, and defendant claimed report to the appellate division of the municipal court of the city of Boston, which ordered judgment for defendant, and plaintiff appeals.

PIERCE, J. "This is an action of contract to recover the purchase price of 300 burlaps of table salt * * * amounting in all to $403 less freight, $80.44, net amount $322.56." A "memorandum of agreement" for the purchase and sale of "a supply of salt numbering five to ten cars" * * .* f. o. b. Boston, Mass. The shipment in question was the last to be made under this contract. * * * The defendant had previously * * * received * * * nine carloads of salt. * * *

February 8, 1913, the plaintiff purchased of the Watkins Salt Co., Watkins, N. Y., the salt in bags ordered by the defendant. Two days later it purchased 15 barrels of salt ordered by another customer of the plaintiff. The salt in bags and barrels was placed in a car and shipped at plaintiff's request from Watkins, N. Y., to the Rock Glen Salt Co., Boston, Mass. The plaintiff took from the carrier a nonnegotiable bill of lading. The salt was not consigned to the defendant, but on the contrary was consigned to the plaintiff itself, and was described in the bill of lading as 15 Bbls. 400 Sax. Weight 64600#." * * * This bill of lading was indorsed "Deliver to order of Segal Bros. Rock Glen Salt Co. F. W. Relyea, Tres." It was then sent to and received by the Boston & Maine Railroad at Boston, Mass., but it was never delivered to or accepted by the defendant. * * * On February 19, 1913, the Boston & Maine Railroad notified the defendant in writing of the arrival of freight consigned to the Rock Glen Salt Co. and stated that it was ready for delivery. * * * Neither the bill of lading nor the notice stated the different kinds of salt that made up the 400 bags nor the quantity of each kind. Nor did the defendant know that the 15 barrels of salt had been put into the car with the 400 bags to fill an order of another customer of the plaintiff.

Defendant * * * compared the notice with the memorandum of his order, found that the salt stated in the notice did not correspond to the order given by him to the plaintiff, noticed that the freight

charges were excessive for the quantity of salt ordered by him, and that they covered the whole quantity of salt contained in the car. He thereupon returned the notice to the "railroad's messenger." Without contradiction, so far as the record discloses, he testified "that there was no way in which the freight charges could have been apportioned or separated and if [he] the defendant had accepted any part of this car of salt he would have been obliged to pay the full amount of the freight charges on said car." * * * February 26, 1913, the car of salt was damaged by fire at the Boston & Maine freight house and the defendant refused to receive the salt. * * *

We think the forwarding of the salt to Boston at the seller's expense, the taking of a bill of lading running to itself as consignee, and the provision in the contract "sells * * * at the following prices f. o. b. cars, Boston," indicate an intent of the seller to reserve to itself the jus disponendi of the salt until the railroad company in Boston on behalf of the plaintiff, and in the exercise of the authority conferred by the indorsement upon the bill of lading, should appropriate and deliver to the defendant from the mass the quantities and kinds ordered by the defendant. * * *

In this regard it is to be noticed that the railroad company was not instructed by the bill of lading or otherwise of the kind or quantity of salt required to fill the defendant's order. Nor, so far as appears, was there anything about the bags or barrels to indicate the quality of their contents. What the railroad did was to tender the contents of a car—a quantity of goods larger than the defendant agreed to purchase and on which the defendant would have been obliged to advance freight charges in excess of the amount he agreed to advance. [Court quotes section 44 of Sales Act.] These sections express the effect of Rommel v. Wingate, 103 Mass. 327. * * *

In the case at bar the defendant, upon receiving the notice and invoice, could have assumed properly that the 15 barrels of salt had been sent by the seller to be delivered by the railroad to him; the bill of lading in terms directed the railroad to do so. Upon this assumption, if he did not intend to pay for the whole car, he must have determined whether to take a part and reject a part, or reject the whole. If he desired to have the part only which he had ordered, it remained to determine whether he would become responsible for the entire freight charges and look to the purchaser of the 15 barrels or to the seller for his repayment. If it were a fact that the defendant could have paid the proportionate charges, that fact does not appear in the report and cannot be assumed. We are of opinion that the severance of the 400 bags from the 15 barrels involved pecuniary "trouble or risk" to the defendant. * * *

It follows that the title never passed to the defendant.

Judgment for defendant affirmed.

Many important classes of situations where the presumption that title passes upon delivery to the carrier are provided for in Section 19, Rule 5, as follows:

If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property

does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

This section calls for careful examination. The section discloses that the presumption that title passes on delivery to the carrier does not govern in four kinds of cases. (1) Where the seller agrees to deliver the goods to the buyer. (2) Where the seller agrees to deliver the goods at a particular place. (3) Where the seller agrees to pay the freight or cost of transportation to the buyer. (4) Where the seller agrees to pay the freight to a particular place. The section not only states that title does not pass on delivery to carrier, but proceeds to designate the particular time, in these four cases, when the title will pass.

Every case will call for the solution of four problems: (1) What words will have the legal effect of imposing upon the seller the obligation (a) to deliver; or (b) to pay freight. (2) What physical acts will amount to a performance of the obligation to deliver or to pay the freight? That is, after we have definitely decided that a particular contract does impose an obligation to deliver, or to pay the freight, we then must turn our attention to the physical acts done by the seller, to see whether or not he has performed this duty. (3) The third question is usually a simple question of fact: What particular geographical point on the surface of the earth is the point at which there must be a delivery or to which the freight must be paid? (4) The last question, also a question of fact: At what geographical point were the goods actually situated when the event—such as damage, loss, or resale by, or bankruptcy of, one of the parties—occurred which had the effect of projecting the parties into litigation.

The first two questions are sometimes difficult of solution. Language is so indefinite that there may often exist considerable doubt whether it does impose upon the seller the duty of delivering or of paying the freight. Even in those cases where the parties actually employ the words "the seller hereby agrees to deliver," etc., or, "the seller hereby agrees to pay the freight to," etc., we cannot always be certain that these words mean the same thing that is contemplated in the statute. This is so, for one reason, because the conduct of the parties in this, and in their former dealings, may have the effect of putting an entirely different meaning upon these words than is usually conveyed by them, or even of depriving them of all legal effect. Again, the usual meaning of the words "I agree to deliver," or "I agree to pay freight," when used in a contract by way of specifying the duties of the seller, may be deprived of this usual meaning because there appears in the same contract other language which destroys the effect of the former words. This situation has analogies in the field of chemistry. A compound will have certain properties. Introduce a new element or compound, and the properties of the first may disappear. In the cases following we have a few situations where the apparent meaning of the language is not applicable to the facts, because of

other elements. Stated in other words, the question in a few of the cases is: Which of two inconsistent presumptions, as to the time when title passed, is applicable to the case? Not all the questions which have been suggested above are touched upon in the cases here collected, but they illustrate some of the more important ones.

WESTMORELAND COAL CO. v. SYRACUSE LIGHTING CO.

(Supreme Court of New York, Appellate Division, 1913. 159 App. Div. 323, 145 N. Y. Supp. 420.)

Action by the Westmoreland Coal Company against the Syracuse Lighting Company. From a judgment for defendant, plaintiff appeals.

Plaintiff sought to recover in this action the purchase price of two canal-boat loads of coal shipped by it to the defendant. * * *

ROBSON, J. The parties to the contract * * * contemplated that plaintiff in fulfillment of the contract would ship the coal therein mentioned by rail from plaintiff's mines to Watkins, N. Y. It was to be there loaded on canal boats, and thence taken by boat to Syracuse, N. Y.; and there delivered alongside defendant's dock as theretofore, plaintiff having furnished defendant with coal under prior contracts between the parties. The two boats with their loads of coal, which are the subject of this action, reached Syracuse and approached to within 300 or 400 feet of defendant's dock, which was on the north, or towpath, side of the canal. They could not at once be docked and unloaded because two other boats then occupied the dock. These latter boats contained coal theretofore delivered by plaintiff under its contract; and their cargoes were then being unloaded by defendant. For this reason and also (as the evidence shows and the trial justice finds) "because the rules governing traffic upon the canal required it, the two boats in question were moved over to the south side of the canal, nearly opposite the defendant's dock to await their turn for being unloaded, until the unloading of the boats already at the dock was completed."

Notice of the arrival of the boats was given to defendant, the circumstances of which and of the casualty, which thereafter ensued causing the total loss of the coal, are succinctly stated in the findings, as follows: "That upon the arrival of the said two boats carrying the coal in question in this action at said point, 300 or 400 feet west of the defendant's dock, as above stated, the captain and man in charge of the boats notified the defendant of their arrival, and the defendant entered said boats as having arrived at the dock at 12 o'clock noon on July 30, 1907, in its books kept for that purpose. That at about 2 o'clock on the same day, a break occurred in the banks of the Erie Canal a short distance west of the defendant's dock, and, without any fault on the part of the plaintiff, the boats with the cargoes of coal in question were drawn into said break and lost." * * *

If the coal in question had not been in fact delivered to the defendant before it was lost, then the carrier still remained the agent of plaintiff for the purpose of making delivery of it under the contract. It is clear that the carrier's duty in making the delivery had not at that time ended. He still had to place the boats alongside defendant's dock. This he had not in fact done, though the boats at one time had approached within a few hundred feet of the dock. It is true that had

the dock, at the time, not been completely occupied with other boats, which were then unloading, he would have done so. But defendant was not responsible for this delay in laying the boats alongside the dock. The boats already at the dock were discharging their cargoes of coal, which plaintiff, by its carrier in control of those boats, had previously delivered to defendant under the contract. Plaintiff was fully advised before the contract was made that the capacity of the dock was limited, so that only two boats could be there unloaded at the same time. There is no question that defendant was diligent in unloading the boats then at its dock. The arrival of the two boats, concerning which this controversy has arisen, before the dock was cleared for their reception, was due only to the carrier's management of their transportation. The carrier for this purpose was plaintiff's, not defendant's agent. Taking them to the side of the canal opposite defendant's dock and tying them up where they were afterwards lost was the carrier's act. Defendant gave no direction as to their management, or what should be done with them.

The entry on defendant's books of arrival of the boats did not in fact indicate actual delivery to nor receipt by the defendant; but was, as the evidence shows, simply a concession to plaintiff's interest for the sole purpose of fixing a time from which subsequent possible claims of boat captains against plaintiff for demurrage could be corrected and verified.

It is suggested that when plaintiff placed the coal on these boats there was an appropriation of it in fulfillment pro tanto of the executory contract for delivery of coal. While this may have been an actual appropriation by plaintiff to that end, yet it did not complete what it had agreed to do before title passed to the defendant. Delivery of the coal was as much a part of its duty as actual selection and appropriation of it. Delivery of the coal at the place specified in the contract was required to be made, and then only would the defendant's assent to such appropriation in part fulfillment of the contract be established. Delivery was not made. Therefore title had not passed to defendant. * * *

By subdivision 5 of section 100 of the Personal Property Law (Consol. Laws, c. 41), added by chapter 571, Laws 1911, the effect of a provision in a contract of sale requiring the seller to deliver to the buyer the goods sold is declared to be, presumptively at least, that the property therein does not pass to the latter until the goods have been delivered to him, or reached the place agreed upon.

The judgment should be affirmed, with costs. All concur, except KRUSE, P. J. (dissenting). The practical question here is which of the parties shall bear the loss of the two boat loads of coal, which were lost owing to a break in the canal occurring while the boats were waiting to be unloaded, the plaintiff, the seller, or the defendant, the buyer. The solution of that question does not depend so much upon whether the plaintiff had delivered the coal alongside the dock, within the meaning of the contract. That is a mere circumstance to be taken into account in determining the controlling question as to whether the title to the coal had passed to the defendant before it was lost, or still remained in the plaintiff. If there was an appropriation of the specific coal to the contract, assented to by the defendant after the coal reached Syracuse, as I think should be found as a fact from the evidence, the title passed to the defendant, and the loss must fall

upon it. Even if the evidence is sufficient to make that question one of fact, I think it should be found in favor of the plaintiff.

It may be, as defendant's counsel contends, that the record of arrival of boats was kept by the defendant to protect the plaintiff against unfounded claims for demurrage; but the record and surrounding circumstances also establish that the defendant knew that this particular coal had been set apart to it under the terms of the contract and was clearly identified by both the buyer and the seller. Not only did the defendant know the precise time and place of arrival of the coal, but a record of the quantity, as well, was made by it. The identification of the coal as the subject of the sale was complete.

Although the contract was originally executory, it was as to the coal in question so far executed before it was lost as to pass the title. As regards the passing of the title, it was in effect the same as though the coal had been set apart and identified as the subject of the sale at the time of the making of the contract. The subsequent appropriation of the coal to the contract was sufficient to pass the title to the defendant. * * * Although the coal may not have been delivered alongside the dock within the meaning of the contract, that was made impossible by a cause for which the plaintiff was not responsible, and if the title thereto had passed before the break in the canal, as I think it had, the loss of the coal should fall upon the defendant. * * *

MURRAY v. MORRIS.

(Supreme Court of Vermont, 1917. 91 Vt. 541, 102 Atl. 99.)

Replevin by C. W. Murray against G. L. Morris. There was verdict directed for plaintiff, and defendant excepts.

MILES, J. Only two questions are raised in this case, viz.: First, Had Townsend, Townsend & Co. any attachable interest in the die of the monument in question, which was attached in the suit of Parry & Jones Company on the 26th day of September, 1914, at the time the attachment was made? And, second, was there anything in the case to submit to the jury? * * *

The plaintiff ordered from Townsend, Townsend & Co. a monument, consisting of a die and some other parts, and also a marker, all to be thereafter delivered f. o. b. Barre, Vt., to be shipped to Brazil, Ind. On June 19, 1914, Townsend, Townsend & Co. ordered the same monument and marker from the Central Granite Company of Barre, Vt., to be "delivered f. o. b. cars at your station" to be shipped carload later, no place of shipment nor consignee being stated in the order. Subsequently and on September 23, 1914, the Central Granite Company loaded the monument at their yard onto a car of the Central Vermont Railroad Company, set by that company on the 22d day of September, 1914, in the yard of the Central Granite Company upon the order of the local agent of Townsend, Townsend & Co., and shortly after the monument was loaded upon the car, the car with the monument and marker was taken by the railroad company to a siding in their yard, about half a mile from the Central Granite Company's yard, where other granite material was to be loaded upon the car to complete the carload and while the car, with the monument upon it, was there standing, the defendant, a deputy sheriff, attached the die upon a writ in favor of Parry & Jones Company against Townsend, Townsend & Co. as their property. Before the die was attached, the

local agent of Townsend, Townsend & Co. delivered to the billing agent of the Central Vermont Railroad Company at Barre, Vt., a bill of lading of the monument and marker to be shipped to the plaintiff at Brazil, Ind., in which Townsend, Townsend & Co. were designated as the shippers and the plaintiff as consignee. * * *

"Ordinarily a delivery of goods by the seller to the carrier designated by the purchaser, or to one usually employed in the transportation of goods from the place of the seller to that of the purchaser, is a delivery to the purchaser." * * * No question is raised but that the Central Granite Company had title to the monument before it was loaded upon the car, and that it parted with its title when the monument was thus loaded, and that then title passed to either the plaintiff or Townsend, Townsend & Co. The plaintiff claims that the title passed to him, and the defendant claims that it passed to Townsend, Townsend & Co. at that time.

Under the general rule above stated when the monument was loaded upon the car and the bill of lading delivered by the local agent of Townsend, Townsend & Co. to the billing clerk of the railroad company, the title to the monument passed to the plaintiff subject only to stoppage in transitu and the right of rescission by the plaintiff if the monument failed to be in accordance with the order, neither of which rights were exercised in this case, unless something more appears in the case showing the contrary.

The defendant argues that the fact that the box inclosing the die was marked "T. T. & Co." shows that the delivery was to that company; but we think that this does not have the tendency claimed for it, in the light of the other facts in the case. It was quite proper to mark the box with something identifying it as the property sent by Townsend, Townsend & Co., the shipper, to the plaintiff, in view of the fact that it was sent with other granite material furnished by other parties. * * *

The plaintiff ordered the monument in question from Townsend, Townsend & Co. to be delivered f. o. b. on the cars, Barre, Vt., and Townsend, Townsend & Co. procured the Central Granite Company to fill that order, which that company did on the 23d day of September, 1914. When the Central Granite Company loaded the monument upon the cars nothing further remained for Townsend, Townsend & Co. to do under their contract with the plaintiff, and the contract on their part was then fully performed, and so far as anything appears in the case Townsend, Townsend & Co. then became entitled to payment for the monument. We think and so hold that when the monument was loaded upon the cars by the Central Granite Company and the bill of lading delivered to the carrier's billing agent, the title to the monument passed to the plaintiff, and that at the time of the attachment by the defendant Townsend, Townsend & Co. had no attachable interest in it. * * *

Judgment affirmed.

PITTSBURGH PROVISION & PACKING CO. v. CUDAHY PACKING CO.

(Supreme Court of Pennsylvania, 1918. 260 Pa. 135, 103 Atl. 548.)

Assumpsit by the Pittsburgh Provision & Packing Company against the Cudahy Packing Company to recover the price paid for merchandise. Verdict for plaintiff for $4,036.70, and judgment thereon, and defendant appeals.

FRAZER, J. Plaintiff and defendant are both engaged in the wholesale meat and provision business in the city of Pittsburgh and on June 21, 1913, plaintiff sent to defendant's office in that city an order as follows: "Please ship the following articles and send invoice and shipping receipt or bill of lading to above address, stating how shipped, route, etc., and giving car numbers and initials: 16,000 pounds fresh boneless beef chucks, 12½c c. a. f. Pittsburgh; 5,000 lbs. fresh beef trimmings, 12c c. a. f. Pittsburgh, packed in sugar barrels, lightly salted. Guaranteed fresh. * * * Ship to Pittsburgh Provision & Packing Co., Union Stockyards, Pittsburgh, Pa."

In compliance with this order defendant shipped the meat mentioned from its packing house in Kansas City, Kan., in refrigerator cars by way of the Wabash Railroad, under bill of lading consigned to its own order at Pittsburgh, with direction to notify plaintiff company at that city. The bill of lading with draft attached to invoice was forwarded to a Pittsburgh bank, and, upon presentation to plaintiff, the draft, calling for the cash price less freight charges, was paid by plaintiff without awaiting arrival of the meat. The car was delivered at defendant's siding at Pittsburgh on Saturday, June 28, 1913, and on the following Monday defendant gave the Wabash Railroad directions to reconsign the car to plaintiff's siding at the Union Stockyards. Upon reaching this latter point plaintiff's examination of the meat found it unfit for food, and its representative at once notified defendant by telephone of the condition. The following day plaintiff advised defendant by letter that the meat was not as guaranteed, and requested defendant to have the car removed promptly. Upon failure of the latter to do so the railroad company subsequently disposed of the contents. This action was then brought to recover the purchase price, together with an item of expense for re-icing the car at defendant's request. The trial resulted in a verdict for plaintiff for the full amount of its claim.

The single question submitted to the jury was whether the meat was in the condition required by the guaranty at the time of its delivery at its destination, where plaintiff had an opportunity to make inspection. That the meat was not in proper condition for use was practically conceded, the principal dispute being whether under the terms of the order, the title of the goods passed upon delivery to the carrier at Kansas City, or whether the sale was not consummated until delivery on plaintiff's siding at Pittsburgh. In the former case proof of delivery to the carrier at Kansas City in good condition and properly packed would entitle defendant to the purchase price, and if the shipment was lost through delay or improper care in transit, the loss would be a matter of adjustment between the purchaser and the carrier.

The general rule is that a delivery of goods to a carrier, pursuant to a contract of sale, is a delivery to the vendee sufficient to pass title to the goods, and the carrier at once becomes the agent of the vendee, * * * to whom the latter must look for resulting damages while the goods are in transit. * * * Consequently, in absence of circumstances indicating a contrary intent, if defendant in the present case delivered the meat to the carrier in good condition, properly packed and refrigerated, in view of the distance it must travel, and gave proper instructions as to re-refrigeration if needed in the course of transit, defendant's duty was fully performed, and its responsibility

ended on such delivery, and it was no longer concerned in the question of delay or damage on delivery. * * * Where, however, the contract requires delivery at the place of destination, title remains in the vendor until that point is reached and the risks of transportation are assumed by him. * * *

The facts here are not in dispute; hence the question as to the place of delivery and when title passed is for the court. Both parties conducted places of business in Pittsburgh. The order was to ship to "Union Stock Yards, Pittsburgh, Pa.," that being the business address of plaintiff, and the designation as to price "c. a. f. [cash and freight] Pittsburgh," meant in this case that the price quoted included the freight to destination, the abbreviation apparently having substantially the same significance as "f. o. b. Pittsburgh." * * *

The judgment of the lower court is affirmed.

TWITCHELL-CHAMPLIN CO. v. RADOVSKY.

(Supreme Judicial Court of Massachusetts, 1910. 207 Mass. 72, 92 N. E. 1038.)

Action on contract for goods sold and delivered by the Twitchell-Champlin Company against Joseph S. Radovsky. A finding was returned for plaintiff, and defendant brings exceptions.

BRALEY, J. The defendant contends that, as the goods when packed were to be shipped to him by rail at a price from which the cost of transportation was to be deducted, title did not pass until their arrival at his place of business. But there was no express clause in the agreement that this expense was to be borne by the seller, and while the amount undoubtedly measured what the buyer would have to pay for carriage, the stipulation could be found to have been intended by the parties as a discount from the seller's regular prices, and not as a prepayment of the freight. The question was one of fact, and the finding for the plaintiff, having been warranted by the evidence, cannot be revised. * * * It being settled that, unless there is an agreement or usage of the trade to the contrary, delivery to the carrier is a delivery to the buyer, when the sale becomes complete, the case at bar falls within the familiar rule, and the title having passed, the refusal of the defendant to accept the clams was unjustifiable, and furnishes no defense to the suit for the price. * * *

The requests were rightly refused, and the exceptions must be overruled.

SMITH CO., Limited, v. MARANO.

(Supreme Court of Pennsylvania, 1920. 267 Pa. 107, 110 Atl. 94, 10 A. L. R. 697.)

Action by Smith Company, Limited, against Antonio Marano. Judgment for plaintiff, and defendant appeals.

BROWN, C. J. The facts in this controversy are agreed upon in a case stated. Smith Company, Limited, is a corporation, with its place of business in the city of St. Johns, Newfoundland. The defendant is a resident of the city of Philadelphia, this state, and is engaged in business there. In September, 1916, the plaintiff and defendant, by letters and telegrams, endeavored to complete a contract for the sale of

codfish to the latter. As a result of preliminary negotiations, on September 26, 1916, plaintiff made the following offer to the defendant, by telegram: "Will give you first quality at nine dollars, second quality at eight dollars per drum of one hundred pounds c. i. f. Philadelphia."

On the following day the defendant wired his acceptance of 1,000 drums of the fish, first quality, and by letter of the same date directed the plaintiff to send with the first shipment of that quality 25 drums of the second quality. On or about October 4, 1916, the plaintiff shipped 300 drums of the fish of first quality and 25 of second quality, in accordance with the terms of the contract. The goods were shipped by a steamer from the city of St. Johns, consigned to the plaintiff's agent at New York, for transshipment to Philadelphia, to be delivered to the order of plaintiff, the bill of lading being indorsed by the plaintiff in blank. Under the terms of the contract, the plaintiff paid for the customary marine insurance on the goods shipped and the freight charges on them to Philadelphia. It immediately forwarded to the Girard National Bank of Philadephia, through a bank in New York, the insurance policy, indorsed in blank, the invoice and a through bill of lading, also indorsed in blank, all attached to a sight draft on the defendant, in accordance with the contract between them, the draft being for $2,900, covering the value of the fish shipped. About two days later the ship carrying the fish shipped by the plaintiff to the defendant was sunk by a submarine of the Imperial German government, on the high seas, while en route to the port of destination, and the goods in question were totally destroyed. The bill of lading and the sight draft were duly tendered to the defendant after the cargo had been destroyed. He refused to accept the draft, and subsequently refused to pay any part thereof. The parties agree that the expression "c. i. f." means that the price quoted by the plaintiff to the defendant, and accepted by him, included the cost of the goods, the cost of obtaining customary insurance thereon, and the freight charges to the city of Philadelphia. On the foregoing state of facts the court below entered judgment in favor of the plaintiff for the full amount of its claim.

The letters "c. i. f." are abbreviations of the words "cost, insurance, and freight," and when used in connection with commercial quotations signify that the price to be paid for goods will include all charges to the port of destination. * * * The case now under consideration calls upon us for the first time to construe what may be termed a "c. i. f." contract for the purchase of goods, and to determine when, under such contract, there is delivery to the buyer. As just stated, plaintiff and defendant agree that the term "c. i. f." means that the price quoted to the latter and accepted by him included "the cost of said goods, the cost of obtaining the customary insurance thereon, and freight charges to the city of Philadelphia." In recognizing that such is the true meaning of the abbreviations, the English courts hold that property purchased under a contract in which they are used passes to the buyer upon the seller's delivery of it to a carrier. * * *

A concise statement of the rule is thus made by Mr. Justice Hughes in Thames & Mersey Marine Insurance Co., Limited, v. U. S., 237 U. S. 19, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087: "The requirements of exportation are reflected in the familiar 'c. i. f.' contract (that is, at a price to cover cost, insurance, and freight), which has 'its recognized legal incidents, one of which is that the shipper

fulfills his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and a policy of insurance with a credit note for the freight, as explained by Lord Blackburn in Ireland v. Livingston.' L. R. 5 H. L. 395–406. * * *"

Counsel for appellant admit that the judgment of the court below is in accord with the English decisions, followed in this country by the two cases cited, but their contention is that, under the Pennsylvania Sales Act of May 19, 1915 (P. L. 543), the property purchased by the defendant was never delivered to him, and the plaintiff is therefore not entitled to recover. The pertinent parts of that act are as follows: * * *

"Sec. 19. Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: * * * Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The appellant agreed to pay to the appellee a fixed price for the goods to be shipped to him. The price quoted to him, and which he agreed to pay, included not only the actual value of the fish to the seller, but insurance and freight charges to Philadelphia. If the price had not included insurance, it might be well urged that, under rule 5 of section 19 of our Sales Act, the goods were never delivered to the appellant; but, reading the contract as a whole—as it must be read—with the item for insurance included in it, "a different intention" on the part of the buyer is disclosed, * * * and that he must now be held to have understood that the delivery of the goods to the common carrier was a delivery to him, are clearly demonstrated by the court below in the following from its opinion directing judgment to be entered against him: * * * "No matter what is to be inferred from the reference to freight, the inference from that to insurance must also have weight. The contract must be interpreted as a whole. Both provisions must be explained, interpreted, and given their due force. A provision for the payment of freight by the seller or its inclusion in the price might indicate an intention to deliver at the end of the voyage, or it might be a consideration affecting the price merely, and the cost and uncertainty of the freight charge might be a burden accepted by the seller to expedite the sale. On the other hand, the provision with regard to insurance was either fully intended, and reasonable because of the risk the buyer intended to assume, or, if he did not so intend, it was entirely meaningless and mere surplusage." * * *

The bill of lading, made out to the appellee or its order, was indorsed immediately by it in blank, and attached to the draft drawn upon the appellant. This merely meant that the appellee intended to retain property in the goods to secure performance by the defendant of his promise to pay for them, and did not, by the express words of the Sales Act, relieve him from the risk that was upon him from the time the goods were delivered to the carrier.

Judgment affirmed.

The next case presents a situation where there are a number of conflicting presumptions, each of which is fairly involved by the facts. Many difficulties in the law are of just this kind—the question being which rule of law, out of several rules involved, really controls the issue. In the following case we have: (1) The presumption that title passed on delivery to the carrier. (2) Evidence to show that this presumption is overcome, and that title was to vest on delivery. (3) Circumstances then show that this second presumption has been overcome. The recognition of the legal effect of the third presumption puts us back exactly where we were at the point of delivery to the carrier. (4) Finally, we find an additional term in the contract, which has the effect of destroying the third presumption, and it is this presumption which the court adopts as determining.

The particular facts of the case are not so important as is the opportunity of noting the complexity inherent in the application of legal principles to the ever varying facts of business.

AGRI MFG. CO. v. ATLANTIC FERTILIZER CO.

(Court of Appeals of Maryland. 1916. 129 Md. 42, 98 Atl. 365. Ann. Cas. 1918D, 396.)

Action by the Agri Manufacturing Company against the Atlantic Fertilizer Company. Judgment for defendant, and plaintiff appeals.

URNER, J. A carload of ground tankage, for use in the manufacture of fertilizer, was sold and shipped by the appellant, the Agri Manufacturing Company, to the appellee, the Atlantic Fertilizer Company, and was destroyed by fire before being removed from the car and while awaiting official analysis and weighing at the appellee's works. The question raised by this suit is whether the loss thus occasioned should be borne by the vendor or by the vendee, neither of whom was at fault in regard to the destruction of the property.

The terms of the agreement relating to the sale are set forth in a letter from the appellant to the appellee under date of October 21, 1913, as follows: "Gentlemen: This will serve to confirm sale to you of about four hundred (400) tons of our regular production of ground tankage for approximate equal monthly shipments for months of January, February, March, and April, 1914, at $2.67½ per unit of ammonia per ton of 2,000 lbs. cif. your works, Curtis Bay, Md. Delivered weights and sampling by Stallings, analysis by Wiley & Co. at seller's expense. Bags to be furnished by buyer as far as possible; if furnished by sellers they are to be returned promptly at buyer's expense. Terms, three-fourths cash upon presentation of pro forma invoice and B/L, balance upon completion of weights and analysis. "These goods are sold upon the representation by sellers that the availability of the nitrogen they contain will show at least 70 per cent. by a permanganate method. In the event buyers should have any goods analyzed for available nitrogen, an official sample to be used, and they should prove to contain less than the 70 per cent. availability above mentioned, the expenses of said analysis shall be paid by sellers,

and buyers shall have the privilege of refusing said goods. In all disputes, the sampling and weighing of Stallings and the analysis of Wiley & Co. to govern."

In the course of the deliveries under this contract, a carload of ground tankage, estimated to contain about 30 tons, was shipped on April 20, 1914, over the line of the Baltimore & Ohio Railroad, from Mt. Claire, Baltimore, to the appellee's factory at Curtis Bay. The car reached the siding of the Atlantic Fertilizer Company on the afternoon of Friday, April 24, and upon an order issued by the superintendent of the company it was placed in position the following day for unloading. Notice was sent by the company to Mr. Stallings and to Wiley & Co. to be at its works on Monday morning, April 27, to weigh and analyze the contents of the car as provided by the agreement. On the intervening Sunday, a fire occurred at the appellee's plant and the flames consumed the carload of fertilizer in question as it stood on the siding adjacent to the factory. The bill of lading for the shipment, in which the Atlantic Fertilizer Company was named as consignee, had been previously delivered to it by the sales manager of the vendor company, together with a pro forma invoice, upon which he received a payment of $661, representing three-fourths of the estimated value of the material on the basis of the ammonia content assumed by the contract of sale. In this suit the vendor seeks to recover from the vendee a balance of $240.86 for the shipment referred to, and the sum of $203.88 on account of a carload which was delivered after the fire and upon which also a three-fourths payment was made on presentation of the bill of lading and pro forma invoice. * * * [Court quotes Section 19, Rules 4 and 5, of the Uniform Sales Act.]

In the case before us the seller contracted to deliver 400 tons of fertilizer, of the kind and quality described, at the buyer's works. The term "cif. your works," as used in the agreement, is shown by the testimony to mean that the seller should pay the cost, including freight, incurred in the transportation. The material shipped and destroyed by the fire was appropriated by the seller to the contract, but as it was the duty of the seller, under the terms of the sale, to make delivery, at the buyer's factory, and to pay the freight on the shipment, the rule last quoted precludes any question as to the transfer of the title before the delivery at the designated place was accomplished. It is therefore unnecessary to consider what, in the absence of such a stipulation, is the ordinary effect upon the title of delivering goods to a common carrier and of consigning them to the buyer upon a bill of lading issued in his name, and of the payment of part of the purchase money. Whether the title to the specific carload of fertilizer under inquiry passed to the buyer as soon as it reached the place of destination depends upon the question as to whether the parties to the sale intended the transfer of the title to occur at that point of time or to be deferred to a later period. The intention of the parties is the controlling factor in the determination of such an issue. This is the plain import of the provisions we have reproduced from the Uniform Sales Act, which simply declare in this respect the settled rule of the common law. * * *

Upon the question of intention in regard to the time when the title should pass, we have nothing in the record of any special significance beyond the written terms of the sale. There were no acts of the par-

ties reflecting upon this subject, except such as the agreement evidently contemplated. The issue to be decided is therefore one of law and involves the inquiry as to whether there are any conditions of the contract which had the effect of postponing the transfer of the title to the defendant beyond the time of the arrival of the shipment at its plant. It is clear that this effect would not necessarily be produced by the provision for weighing and analysis to ascertain the quantity of the material and the units of ammonia it contained for the purpose of correctly determining the amount of the price. * * *

The sale was made, however, upon the representation that * * * the buyer should have "the privilege of refusing said goods." * * * Consequently, the fact that a particular carload had arrived on the buyer's siding, and had been placed by its order in a position to have the cargo discharged, can have no important bearing upon the question as to the effect upon the title of the provision in reference to testing and rejection. The decisive inquiry is whether the right to refuse the shipment, if a stipulated analysis at the time of delivery demonstrates that it does not conform to the contract, is consistent with the theory that the title has already passed to the purchaser. * * *

A sale on terms permitting rejection of the goods if they do not pass a prescribed test of quality is somewhat analogous to a sale on trial, in reference to which the Uniform Sales Act provides, in section 19, rule 3 (2): "When goods are delivered to the buyer on approval, or on trial, or on satisfaction, or other similar terms, the property therein passes to the buyer: (a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction; (b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time."

This provision was applied in Rice v. Dinsmore, 124 Md. 276, 92 Atl. 847. In Farmers' Phosphate Co. v. Gill, 69 Md. 537, 16 Atl. 214, 1 L. R. A. 767, 9 Am. St. Rep. 443, where an agreement that a shipment of rock phosphate should be weighed and its quality tested upon arrival at the buyers' works was held not to defer the passing of the title until these acts were performed, it was pointed out that the buyers were given by the contract "no right to reject the rock if it did not come up to the prescribed standard," but were simply allowed in that event a proportionate abatement of the price. The absolute right conferred upon the buyer in this instance to refuse the material delivered if it did not meet the test agreed upon is a conclusive indication that the title was not intended to pass to the buyer until the customary opportunity for making the test was afforded. There is nothing in the evidence tending to show that there was any undue delay on the part of the buyer in arranging for the weighing and analyzing of the contents of the car on the occasion in question, and as the property was destroyed without fault of either party, before the buyer's unqualified right to test, and his conditional right to refuse the shipment, could be exercised, we must hold that the instruction of the trial court placing the loss on the seller was properly granted. * * *

Judgment affirmed.

SECTION 7.—EFFECT OF THE FORM OF THE BILL OF LADING UPON THE PASSING OF TITLE

The presumption that title passes upon delivery of the goods to the carrier for shipment to the buyer may also be controlled by the form of the bill of lading. There are two kinds of bills of lading, called, respectively, straight bills of lading and negotiable bills of lading. A negotiable bill of lading is one which provides for the delivery of the goods to the order of some person therein designated, or to bearer. A straight bill of lading provides for the delivery of the goods to a named consignee only; words of negotiability being omitted. The various aspects of negotiable documents of title are taken up in Chapter IV; but, in connection with the present section, the Introduction to Chapter IV should be read in further explanation of the distinctions between negotiable and non-negotiable documents of title. It will there appear that a negotiable bill of lading may be used to prevent an act which would normally constitute an act of unconditional appropriation from operating as such. The provisions of the Sales Act bearing on these matters are as follows:

Sales Act, Section 20. (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, to a carrier or other bailee for the purpose of transmission to the buyer.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3) Where goods are shipped, and by the bill of lading, the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the or-

der of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

What is the effect of these sections? As regards subsection (1) this language asserts, what we already have found to be true, that goods may be delivered to the buyer under circumstances where the title may remain in the seller. The conditional sale, the sale on approval and the contract on sale or return furnish instances of this right. These are instances of a reservation of title in the contract between buyer and seller. This section provides that a similar result may be accomplished by a shipment of the goods under a negotiable bill of lading. Subsections (2), (3), and (4) present various detailed aspects of this right.

Subsection (2) deals with two distinct situations, though each includes two subordinate situations: (1) The clause reading, "Where goods are shipped, and by the bill of lading the goods are deliverable (a) to the seller, or (b) his agent," refers to a case where, although there was a contract for the sale of the goods, the seller chooses to ship them under a **straight bill of lading** to himself or to his agent. (2) The clause reading: "Where goods are shipped and by the bill of lading the goods are deliverable (a) **to the order of the seller,** (b) **or to the order of the agent of the seller,**" refers to a shipment of goods under a **negotiable bill of lading.**

The remaining portion of the subsection deals with the legal effect of these two situations, and we note that the legal effect is stated to be that the seller thereby—that is, in either of the above-mentioned situations—reserves the property in the goods; that is, title to the goods. We know, however, that the words "title" or "the property" are used to describe more than one kind of interest in the thing said to be owned; hence the section proceeds to declare what kind of title is thus reserved. This it accomplishes by asserting that the property thus reserved by the seller shall be deemed to be only for the purpose **of securing performance by the buyer of his obligations under the contract.**

The further detailed effects of the reservation of title may be stated as follows: (1) The buyer cannot obtain possession of the goods, until, in the case of the straight bill, the seller voluntarily consents to a delivery to him, and, in the case of the order bill, the buyer cannot obtain possession until the bill of lading has been indorsed to him. (2) The buyer has no power to sell the goods to other parties until he obtains possession of the goods. (3) Creditors of the buyer cannot seize the goods in satisfaction of their claims against the buyer. (4) The seller may sell the goods to

other persons, in the case of the straight bill, without dealing with the bill at all, and in the case of the order bill, by indorsing it to the new purchaser. Such purchaser gets a good title to the goods. Of course, the seller, in reselling to the new purchaser, will probably be liable for a breach of contract with the first buyer; but that fact does not prevent him from dealing with the goods as his own. (5) As regards the risk of loss, we might expect, perhaps, since so much of the beneficial interest in the property is thus reserved to the seller, that the risk of loss would also fall upon the seller; but this is not true. After all, the title reserved is but a security title, as in C. O. D. shipments and in conditional sale contracts, where the risk of loss is upon the buyer. And so here this analogy is carried out, and the risk of loss or damage while the goods are in transit is upon the buyer. This effect is brought about by Section 22 (a), which provides:

Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

This section casts the risk of loss upon the buyer "when the title has been reserved **"merely to secure performance by the buyer of his obligations under the contract."** And we have just seen that under Section 20 (2) the buyer, by sending the goods to himself or agent by a straight bill of lading, or by sending the goods under a negotiable bill running to the seller's order, or to the order of the agent of the seller, does reserve just this kind of title; therefore there can be no question but what the risk of loss in such case is transferred to the buyer at the time of delivery to the carrier.

The form of the negotiable bill of lading referred to in subsection 3 differs from the form of the negotiable bill referred to in subsection 2, in that in subsection 3 the bill runs to the order of the **buyer** or to the order of the **buyer's agent**, instead of to the order of the seller or the **seller's agent**. The legal effect differs from that produced by subsection 2, in that under subsection 3 the retention of the bill running to the order of the buyer reserves a **right of possession** of the goods, whereas under subsection 2 a **security title** was reserved. If the right of possession alone is reserved, the title obviously must be in the buyer. The further effect of the section is very similar to that where the bill runs to the order of the seller: (1) The buyer cannot obtain possession until he acquires possession of the bill of lading, just as was the case under subsection 2. (2) The buyer could not effectively transfer the title to a third party, unless he first obtained the bill of lading. If the carriers should deliver the goods to the buyer, an event not likely to occur, no doubt the buyer could transfer a good title to his purchaser, and the seller could not recover the goods, though the holder of the bill of lading could hold the carrier liable for thus wrongfully surrendering the goods without requir-

ing the surrender of the bill of lading. (3) The rights of creditors of the buyer and of the seller are about the same as they are under subsection 2, but this matter will be adverted to later. (4) The seller cannot transfer a title to a third party which would defeat the right of the buyer. In fact, since the bill runs to the order of the buyer, it is possible to say that the indorsement by the seller of the buyer's name would not be effective to pass title; but it might be argued that the act of the seller in indorsing the buyer's name has the same kind of effect as the indorsement of the name of a fictitious consignee would have; that is, perhaps, the indorsement of the buyer's name would convert the bill into a bearer bill. Looking at it in this way, and this seems a reasonable view, the seller would be liable for a breach of contract to the buyer, but the innocent purchaser would get a title good against the first buyer. It would also seem that the seller could surrender the bill of lading to the carrier and obtain a bill running to his own order, and could thereby obtain the power to transfer a good title to a third party. Risk of loss is clearly on the buyer from the time of delivery to the carrier, under the general rule that risk of loss follows title.

It thus appears that the outstanding effect produced by negotiable bills of lading, whether the bill runs to the order of the seller or to the order of the buyer, is that it enables the seller to retain an effective hold upon the goods during the period of the transit. This power in the seller pre-supposes that title had not passed before the delivery to the carrier. If title has passed to the buyer before such delivery, then, of course, the buyer may obtain his goods without production of the bill of lading. This matter will be further adverted to in Chapter IV.

ALDERMAN BROS. CO. v. WESTINGHOUSE AIR BRAKE CO.

(Supreme Court of Errors of Connecticut, 1918. 92 Conn. 419, 103 Atl. 267.)

BEACH, J. * * * Section 20 deals with the reservation of the right of possession of, or the property in, goods shipped to the buyer. It makes the distinction that if the bill of lading is drawn to the order of the buyer or his agent, and is retained by the seller or his agent to secure payment of the price, the seller reserves only the right of possession of the goods; but if the bill of lading is drawn to the order of the seller or his agent "the seller reserves the property in the goods." This last statement is, however, qualified by the next succeeding words "but if, except for the form of the bill of lading, the property would have passed to the buyer on the shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract" Manifestly, the intention is to make some kind of a distinction between a reservation of title with intent to remain the owner of the goods for all purposes, and a reservation of title for the sole purpose of securing payment of the price. The legal effect of this distinction is pointed out in section 22. * * *

It makes no difference to a buyer who has agreed to pay the freight whether a sight draft is presented to him attached to a bill of lading drawn to his own order, or, to a bill of lading drawn to the order of the seller and indorsed in blank. In either case he must pay his draft in order to get possession of the goods, and in either case his rights on paying the draft are the same. The risk of loss unquestionably passes to the buyer in the former case as soon as the goods are delivered to the carrier, and section 22 of the Sales Act provides that it shall pass to the buyer at the same time in the latter case, provided the seller's purpose in drawing the bill of lading to his own order was merely to secure payment of the draft. This resolves for us any conflict of opinion on the point, and gives to the maxim res periit domino an interpretation which makes the risk follow the beneficial interest according to the intent of the parties and not the legal title held merely as security for the payment of the price. * * *

COLLIN COUNTY NAT. BANK v. HARRIS & JAGGERS.

(Supreme Court of Arkansas, 1909. 90 Ark. 439, 119 S. W. 662.)

Action by Harris & Jaggers against the Browne Grain Company; Collin County National Bank, interpleader. From a judgment for plaintiffs, the interpleader appeals.

McCULLOCH, C. J. * * * The facts concerning the attached property are as follows: On July 7, 1908, the Browne Grain Company entered into a written executory contract with appellees to sell and deliver to them two car loads of oats at a stipulated price. On the same day the grain company caused to be shipped from Belleview, Tex., the car load of oats in controversy, and the same was billed to the shipper's order. The car arrived at Monticello on July 20th, but was not received by the appellees, a controversy having arisen between the parties concerning the inspection of the oats, and later concerning a charge made by the railroad company for demurrage on account of delay in unloading. On August 12, 1908, the grain company entered into a contract with H. M. Wilson, of Monticello, for the sale of this car, and on the same day drew a draft on Wilson for the agreed price, which was delivered to appellant bank at McKinney, Tex., with bill of lading indorsed in blank, attached. The bank placed to the credit of the grain company on its books the amount of the draft, less a small discount, and the amount was immediately checked out by the grain company. One of the partners composing the grain company, and also the cashier of the appellant bank, testified that the draft, with bill of lading attached, was delivered to the bank as an actual cash sale for the full amount thereof, less discount, and this is the only testimony on that subject. The day following the delivery of the draft to appellant bank the car of oats in this action was attached at Monticello. * * *

The contract of sale between the grain company and appellees was executory, and title had not passed. There had been no delivery of the oats, and the contract was for the sale of no particular car load of oats. The particular subject-matter of the sale was not specified and identified, and the contract, therefore, up to the time of delivery, was purely executory. * * * The title to the specified property remained in the grain company until appropriated to the performance

of the contract and delivered in completion of the sale. The assignment of the bill of lading attached to the draft passed the title as collateral security to the bank, where the title remained until the payment of the draft and delivery of the bill of lading. * * *

At the time of the delivery of the draft and bill of lading the title to the property remained in the grain company; and, according to the uncontradicted evidence, the draft was delivered to the bank as an absolute sale, and the proceeds thereof were immediately checked out by the grain company. There is no evidence whatever of any fraud or collusion between the appellant bank and the grain company, nor of insolvency or inability on the part of the latter to meet its obligations. There is nothing in the evidence to indicate or to warrant a conclusion otherwise than that this was a transaction in the ordinary course of business, whereby products of this kind are sold and the sales thereof consummated. * * *

Reversed and remanded for new trial.

Some few aspects of a very common and most important commercial transaction are made the subject of subsection (4). For the moment this subsection may be viewed from a standpoint of its business importance. Occasionally, perhaps, a seller will find it convenient to ship goods under a negotiable bill of lading, without accompanying the bill of lading with a bill of exchange drawn upon the buyer for the purchase price; but the more common situation, calling for the use of the negotiable bill, arises where the seller's chief desire is to make a delivery of goods sold to a buyer at a distant point under circumstances where the seller will be assured that the price will be paid before delivery.

Of course, the seller could require the buyer to pay for the goods before shipment; but the plan from a business standpoint is often not desirable. On the other hand, if the seller sends the goods to the buyer under no restriction whatever, except that imposed by a contractual duty of the buyer to remit the price upon receipt, the seller thereby assumes considerable risk. The buyer may refuse to pay for the goods. The seller may accordingly be forced to exert considerable effort to make collection, or the seller may even find it necessary to sue the buyer. Again, the risk of insolvency or of actual bankruptcy of the buyer is borne entirely by the seller. Once the goods become a part of the general assets of the buyer, the seller possesses no longer any interest in them, even though he has not been paid the price. In a bankruptcy proceeding the seller would be a general creditor. Of course, where the relations between the buyer and seller are of such a nature that the seller feels perfectly safe in selling goods on credit, there is no occasion for the use of the negotiable bill with the bill of exchange. But in those cases, and they are quite frequent, where the seller desires to make the sale and yet desires to protect himself adequately, the instrumentality afforded by the use of the negotiable bill and the bill of exchange cannot be over-

emphasized. In addition to the security thus afforded to the seller there are other collateral advantages.

The normal procedure is for the seller to draw a bill of exchange upon the buyer for the price. Sometimes this document is called a "trade acceptance." The negotiable bill of lading, usually drawn to the order of the seller and then indorsed, either specially or in blank, will be attached to the bill of exchange, and both instruments transferred to a bank at the seller's place of business. The bank may merely agree to collect the amount called for by the bill of exchange, or it may be that the bank will discount the bill; that is, the bank will credit the seller with the amount of the bill of exchange, and will allow the seller to check against the credit during the time required to make presentment of the bill to the buyer at the point of destination. Of course, if the bill be dishonored, the credit will be withdrawn. But in the meantime the seller has a bank credit subject to check, and in the usual case no occasion will arise for its withdrawal. The capital represented by the value of the goods is accordingly converted into actual working capital from the moment of discount by the bank. The bank feels safe in extending the credit, because it holds the goods as security for the amount credited to the seller. Were it not for the doctrine that the bill of lading represents the goods, there would be no satisfactory procedure for a seller safely to carry out transactions like these, nor would it be possible for him to keep in his working capital the amount represented by the value of the goods during the time they were in transit or until the period of credit expired.

It should also be noted that the practice of sending goods under a negotiable bill of lading accompanied by a bill of exchange is perfectly proper, and often highly desirable, even where the seller is willing to sell the goods on a prescribed period of credit. In such a case the bill of exchange would not be drawn so as to be payable on demand, but would be drawn payable in thirty, sixty, or ninety days, as the parties might agree. But the bill would be drawn so as to require an immediate acceptance, and the right of the buyer to obtain the bill of lading, without which he could not get the goods, would be conditional upon the buyer's actually accepting the bill of exchange. Here the buyer does lose all hold on the goods after acceptance and delivery of the bill of lading, but the hold given the seller upon the goods by reason of the bill of lading insured his actually obtaining the buyer's acceptance. Had the goods been sent direct to the buyer, and the seller had simply written to the buyer, inclosing a bill of exchange drawn upon him, and required the buyer to accept and return the bill, it would not be certain in many cases that the buyer would comply with the seller's request. When the seller obtains the acceptance of the buyer, he is then in possession of a commercial instrument which is of considerable value. Such a bill may be discounted at the Federal Reserve Banks. It is prime commercial paper. Since

the establishment of the Federal Reserve System, such instruments as have just been described are commonly called "trade acceptances."

There can be no question but what the rules which we are now considering, which fix the rights and liabilities of parties to negotiable documents of title, including bills of lading and warehouse receipts, taken in connection with the rules governing the rights and liabilities of parties to negotiable instruments payable in money, operate as a powerful stimulus to trade and commerce, and a degree of safety to the parties concerned is thereby attained, not possible without such instruments. Especially is this true as regards the export and import business.

In our further discussion of the detailed rules which govern negotiable documents of title in Chapter IV, and in our study of the cases, we shall feel more or less drawn away from our observation of the normal business transaction, because our attitude will be directed to the accidents which now and then occur—the destruction of the goods, the bankruptcy or fraud of some of the parties; but these risks, however rare they may be, must always be taken into account. It is never certain that a particular cargo will be lost, or that a particular business enterprise will be forced into bankruptcy, or that a certain individual will commit a fraudulent act; but it is absolutely certain that all of these things will happen at some time. The important point is that the manner in which the law extracts the parties who unfortunately find themselves in these situations has a great deal to do with the buying and selling policies of commercial establishments.

Returning to the more detailed examination of subsection 4, it is to be noticed that the first sentence states that, if the bill of lading and the bill of exchange are sent direct to the buyer, with the direction to the buyer to return the bill of exchange accepted, or, if drawn for immediate payment, the buyer does not comply with this demand, such buyer acquires no right to the bill of lading or to the goods, as regards the seller; that is, the seller could recover possession of the bill or of the goods by appropriate proceedings, but this right to the seller is of no great value, because the next sentence provides that the buyer thus wrongfully in possession of the bill of lading does have the legal power to pass a good title to an indorsee innocent of the buyer's breach of contract. If a buyer is so deaf to business ethics as to refuse to return the accepted bill or the draft for the price as directed, the probabilities are that he will negotiate the document to an innocent party. It is therefore apparent that the practice of sending the bill of lading and the bill of exchange direct to the buyer, instead of sending them through customary banking channels, is dangerous. Doubtless in many cases the seller may safely do so, but he should be aware of the risk therein involved. The detailed legal aspects of negotiable documents of title is more completely presented in Chapter IV.

CHAPTER III

POWERS OF PERSONS NOT OWNERS OF GOODS TO TRANSFER TITLE TO INNOCENT PURCHASERS

Section
1. Introduction.
2. Estoppel of the Owner to Deny Custodian's Power to Transfer Title.
3. Sale by One Having a Voidable Title.
4. Sale by a Seller in Possession of Goods Already Sold.
5. Rights of Creditors Against Goods Sold in Seller's Possession.
6. Rights of Creditors Against Goods Sold in Violation of Bulk Sales Acts.

SECTION 1.—INTRODUCTION

If every one were absolutely honest, and if every one always knew the exact scope and nature of his legal rights, the subject-matter of the more important parts of this chapter would disappear from the law. As it is, people are sometimes dishonest, but much more often they are merely mistaken as to the scope of their legal rights, with the result that they attempt to do things which prove unfortunate for themselves and for others. In the study of negotiable instruments it appeared that the most difficult case to decide, both as regards matters of legal policy and as regards the application of established policy to specific facts, was the case where a loss had to be thrown upon one of two or more innocent parties. And so we discover the same situation in connection with sales of property. Of course, as long as the machinery of exchange is functioning smoothly, we are not troubled by such questions. But sooner or later some fraudulent party, some one in financial distress, or some careless workman on the road traveled by the goods from producer to consumer, throws the machinery out of gear, and the tremors are heard and felt all along the line. The individual who was thus responsible for the accident should sustain the loss, and in the majority of cases no doubt the law imposes legal liability upon him; that is, ultimately it will be upon him. But this party may be in New York, and the two innocent parties in Portland. A lawsuit is very likely to develop between the two innocent parties, and it must be decided. And, again, it so often happens that the person who was the cause of the loss is now insolvent, so that, even if it were convenient to compel him to repair the damage, the legal right to do so is valueless.

The problem of discovering which of two innocent persons must bear a loss is one which ramifies all through the law. In the law of negotiable instruments we studied a series of rules which experience has shown bring about a result which is about as fair for all concerned as we may expect. So, also, in the law of real property, though this is a branch into which we shall not enter here.

The specific rules are not the same, but they are grounded upon the same fundamental conception of justice. In transactions concerning tangible personal property we have another series of rules, forged from the mills of business experience, which, though differing in many respects from the analogous doctrines of the law of real property and of commercial paper, leads to a fair average of just results.

The problem in this chapter therefore is: Under what circumstances will a person who is not the owner of goods have the power, although not the legal privilege, to transfer title to an innocent purchaser? The following case contains a discussion of the general principles involved, after considering which we may direct our attention to the provisions of the Sales Act, to note how these general principles have there been carried into effect.

SALTUS v. EVERETT.

(Court for the Correction of Errors of New York, 1838. 20 Wend. 267, 32 Am. Dec. 541.)

SENATOR VERPLANCK. * * * The main question depends upon and involves the general rule that ought to govern between the conflicting rights of bona fide purchasers of personal property, bought without notice of any opposing claim, and those of the original owner, divested of the possession or control of his property by accident, mistake, fraud, or misplaced confidence. The original owner now claims his lead against purchasers who bought for a fair price, in the usual course of trade, from persons holding the usual evidence of such property (a bill of lading indorsed to them), and in actual possession of the goods. Of these two innocent parties, which of the two is to bear the loss arising from the wrongdoing of the third?

The universal and fundamental principle of our law of personal property is that no man can be divested of his property without his own consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor. That "no one can transfer to another a better title than he has himself" is a maxim, says Chancellor Kent, "alike of the common and the civil law, and a sale, ex vi termini, imports nothing more than that the bona fide purchaser succeeds to the rights of the vendor." The only exception to this rule in the ancient English jurisprudence was that of sales in markets overt, a custom which has not been introduced among us. "It has been frequently held in this country that the English law of markets overt had not been adopted, and consequently, as a general rule, the title of the true owner cannot be lost without his consent." 2 Kent's Comm. 324, and cases there cited.

To whatever and however numerous exceptions this rule of our law may be subject, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. The chief justice of the superior court has said, in his opinion on this case, that "it must be conceded that a purchaser for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim or any suspicious circumstanc-

es to awaken inquiry, or to put him on his guard, will, as a general rule, be protected in his purchase, and unaffected by any latent claim. But there are exceptions to this rule." Now, I cannot agree with the learned justice that this is the general rule. On the contrary, I think it obvious that it is but the broad statement of a large class of exceptions to the operation of a much more general principle, and that statement of exceptions is subject again to many limitations. I have stated the general and governing law; let us now see what are precisely the exceptions to it.

The first and most remarkable class of these exceptions relates to money, cash, bank bills, checks, and notes payable to the bearer or transferable by delivery, and in short whatever comes under the general notion of currency. It was decided by Lord Chief Justice Holt, at an early period of our commercial law, that money and bills payable to bearer, though stolen, could not be recovered after they had passed into currency; and this "by reason of the course of trade which creates a property in the holder." "They pass by delivery only, and are considered as cash, and the possession always carries with it the property." Anon., 1 Salk. 126. A long series of decisions, beginning with Miller v. Race, 1 Burr. 452, has now settled the law that possession of such paper is presumptive proof of property, and that he who received it in the course of trade, for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker, and other parties, even if the paper had been stolen from or lost by the former holder; such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances. These decisions have been argued upon as authorities (at least in the way of analogy) both at bar and in opinions of the courts, in cases involving the same question as to goods or other movable property. Hence it was inferred that goods bought or received "in the course of trade stand on the same footing with bank notes or checks so received." But an examination of the cases will show that this part of the law of negotiable paper rests on grounds quite peculiar to itself, for the following reasons:

1. The protection of the bona fide holder of paper, transferable by delivery, extends even to cases where the paper has been lost or stolen. But it has been often decided that loss by accident, theft, or robbery does not divest the title of the owner of goods, nor give a title in them to a fair after purchaser.

2. The rule is put by all the authorities on the express and separate ground of the necessity of sustaining the credit and circulation of the currency. Thus Lord Chief Justice Hardwicke: "No dispute ought to be made with the holder of a cash note, who came fairly by it, for the sake of currency, to which discrediting such notes would be a great disturbance." See, too, the reasoning of Lord Mansfield, in all cases on this head decided before him. Thus, he says, in the case of a stolen note, Peacock v. Rhodes, 2 Doub. 636: "An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule was applied to bills, it would stop their currency." Similar reasons are assigned for the same decision by American judges.

3. The analogy between notes and movables, or goods, is expressly denied in the leading cases on this head. Thus, in reply to an argu-

ment founded on that similarity, Lord Mansfield answers (Miller v. Race, 1 Burr. 457): "The whole fallacy of the argument rests upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz., goods, or securities, or documents for debts. Now, they are not goods, nor securities, nor similar to them; they are treated as cash to all purposes," etc.

Setting wholly aside, then, this part of the law as to cash, bank notes, and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in other instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this state, that have been cited or referred to, I come to this general conclusion: That the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law, but that the honest purchaser, who buys for a valuable consideration, in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has by his own direct voluntary act conferred upon the person from whom the bona fide vendee derives title, the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more.

I. The first is, when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But, if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit under a forged recommendation and guaranty, and then sold to a bona fide purchaser in the customary course of trade, the second buyer was protected in his possession against the defrauded original owner. Mowrey v. Walsh, 8 Cow. 243. So, again, where the owner gave possession and the apparent title of property to a purchaser, who gave his worthless note, in fraudulent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner. Root v. French, 13 Wend. 572, 28 Am. Dec. 482. See, also, McCarty v. Vickery, 12 Johns. 348. In all such cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of property, though such consent might be temporary only, obtained by fraud or mistake, and there revocable against such unfair first purchaser.

II. The other class of cases in which the owner loses the right of following and reclaiming his property is where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal, or, to use the language of Lord Ellenborough, when the owner "has given the external indicia of the right of disposing of his property." Here it is well settled that, however the possessor of such external indicia may abuse the confidence of his principal, a sale to a

fair purchaser divests the first title, and the authority to sell, so conferred, whether real or apparent, is good against him who gave it.

Thus the consignee, in a bill of lading, is furnished by his consignor with such evidence of right of disposal, according to the custom and law of trade, so that the bona fide holder of the bill indorsed by the consignee is entitled to all the rights of property of the consignor in those goods, if bought fairly in the course of business, although the actual consignee, under whose indorsement he holds, has no right to the goods as against the former owner. If such goods were not paid for, they might be stopped in transitu by the owner, unless his consignee has already assigned his bill of lading; but that assignment divests the owner of his right of stoppage against such assignee.

The famous series of decisions in the various courts in the case of Lickbarrow v. Mason (2 T. R. 63; 2 H. Black. 211; 5 T. R. 367), which led to the establishment of the doctrine of this qualified negotiability of bills of lading, memorable alike in legal and commercial history, strongly illustrates the whole question before us. There, Buller and his associate judges, trained up at the feet of the great father of English commercial jurisprudence, maintained and established the law as we now hold it, under the influence of Mansfield's genius, upon his reasoning and on his authority, against those of Lord Loughborough and others, the most learned lawyers of their times. All the arguments and admissions of both sides show how deeply the general principle is rooted in the law of England that (to use Lord Loughborough's words) "mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery must take the hazard of the title of its author."

It is only as an express exception to this rule that it was maintained, and finally established, that the custom of merchants, evidenced and sanctioned by legal decisions, and founded on those conveniences of trade, so admirably stated by Buller, had compelled the courts to consider the owner as giving his consignee evidence of the power of disposal, which it was not for him to dispute when the goods had fairly passed into other hands, on the faith of that evidence. But there is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently, as in this present case. The assignment of the bill of lading conveys, not an absolute right to goods, but the right and title merely of the actual consignor, who alone is bound by it.

Again: The owner may lose the right of recovering his goods against purchasers, by exhibiting them to the world, a third person, as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances. "If a man," says Bayley, J., in Pickering v. Busk, 15 East, 44, "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell," and the cause was decided on that ground. But this implied authority must arise from the natural and obvious interpretation of

facts, according to the habits and usages of business; and it never applies where the character and business of the person in possession do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, to use an illustration of Lord Chief Justice Ellenborough, in the case just cited, a person intrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as an owner or agent, and credit is not given as such; because he has possession of the watch, the owner, therefore, would not be bound by his sale. When these exceptions cease, the general rule resumes its sway; and the law is therefore clear that an agent, for a particular purpose, and under a limited power, cannot bind his principal if he exceed his power. "Whoever deals with an agent constituted for a special purpose deals at his peril, when the agent passes the precise limits of his power. 2 Kent's Comm. 621, and the authorities there cited.

Beyond the precise exceptions I have above stated, I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner's misplaced confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property, or is robbed of it, or it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed on it, the owner can follow and reclaim it in the hands of any person, however innocent.

Let us apply these conclusions to the present case. Collins, the person whose sale it is asserted must divest the original owner of his rights in favor of the bona fide purchaser, stands, it is said by the superior court, in a double relation of a "master, who is at the same time the consignee of the goods, and who himself filled the character of shipper, and has therefore an undoubted power to sell, and his bona fide transfer will be effectual to purchasers against any secret trust for others with which his apparent title might be affected." Had the lead been consigned to Collins from the intermediate port, by the owner or his agent, this would be true. But it is shipped by Myers, of whom neither the owner, nor any one with full power to represent him in this matter, had any knowledge as an agent, and under whose care the vessel and cargo were placed by Collins, so that he appeared only as his representative, and thus he styles himself in the bill of lading.

The plaintiff below comes in no wise within the rule I have stated. He has neither given to Collins documentary and mercantile evidence of property in a bill of lading from himself or his own agent with competent power, nor the evidence customary in business, such as to hold him out as an agent authorized to change the title of his property in his goods. The assumed authority of shipping goods in his own name and to his own order, at Norfolk, and the documentary evidence of it in the bill of lading, can have no more effect as to the title of the property, than if he had forged such a bill of lading at New Orleans.

Neither does the selection of a ship and its master vest in the master any implied authority to sell the ship, or any part of her cargo. His business is to carry the goods, and nothing more, with some other clearly defined and very limited powers, to be exercised only in cases

of absolute necessity. He stands in the same legal relation to his cargo with the watchmaker, in the case supposed by Lord Ellenborough, who has in his hands a watch to be repaired. He is not exhibited to the world as the owner, or agent for selling; and if he does sell it, the sale is void against the true proprietor.

Such, then, being the well-settled and generally known law, the selection of a master or any other carrier, by sea or land, does nothing to exhibit such a carirer to the world as having the power of disposing of the goods he carried. The owner does nothing to enable him to commit a fraud on third persons. He gives merely a qualified possession, and if that is turned into an assumed right of ownership, it is tortious conversion, and will not divest the owner's title.

It is true that the rule will sometimes, as was urged by Chief Justice Jones, "involve purchasers in great perils"; but that peril can scarcely be called "unreasonable," since there is a reason of public policy of at least equal weight to counterbalance this inconvenience. It is the same which is the ground of the absolute prohibition to a master or carrier to sell the goods he transports, except under insurmountable necessity; it is to prevent, in the language of the court in the case just quoted (5 Barn. & Ald. 623), "fraudulent sales of ships and cargoes in foreign ports." Now the fraudulent consignments or change of the apparent evidence of property, for the purpose of selling elsewhere, is but another form of the same evil. I may add that this same rule, however rigid and occasionally hard in its operations, is no small safeguard to the protection of the owner's rights in goods and other property, in active commerce necessarily placed under the temporary control, and in the legal, though qualified, possession of agents, sailors, carriers, boatmen, servants, and clerks, as well as of those who may have them stored for safe-keeping, and their clerks, porters, and servants.

Judgment unanimously affirmed.

SECTION 2.—ESTOPPEL OF THE OWNER TO DENY CUSTODIAN'S POWER TO TRANSFER TITLE

The Sales Act contains three sections which deal with the rights of innocent purchasers from persons who are not the owners of the goods:

Sales Act, Section 23, Subsec. (1). Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

This section does three things: (1) It declares, as the general rule, that a person who attempts to buy property from one who is not the owner will obtain no right to keep the goods. In such a case we know that such person will be under a legal duty of permitting the owner to take them back into his possession, and will be liable to him for any damage done to the goods even though innocently inflicted.

(2) The section recognizes the apparent exception, which we already know from our study of the principles of agency, that an agent to whom has been given by his principal the possession of goods and the authority to sell them, may transfer a good title, if he acts within the scope of express or implied authority. Indeed, most sales are made through agents. This is not an exception to the general rule at all, for the owner is really selling the goods, but through the medium of another person.

(3) The section lays down one real exception to the general rule. The last clause asserts that the general rule does not apply where the owner of the goods is by his conduct precluded from denying the seller's authority to sell. To state the exception affirmatively: A person who is not the owner of goods will have the power to transfer a title to another person if the true owner by his conduct is precluded from denying the seller's authority to sell.

The prominent word in the exception is the word "conduct," and it is only that kind of conduct which precludes the seller from denying the seller's authority to sell. What kinds of conduct fall within the meaning of this rule?

CANALES v. EARL.

(Municipal Court of City of New York, 1918. 168 N. Y. Supp. 726.)

OPPENHEIMER, J. The plaintiff claims he is the owner of an automobile, which he alleges was converted by the defendant. On September 30, 1916, he gave the machine to his chauffeur, Arturo Carona, to be sent to him at Havana, Cuba. Instead of shipping the automobile, the chauffeur sold it to the Broadway Used Car Company for $225 and pocketed the proceeds. On the same day this company sold the machine to one Martin Beikert, who sold it to George Jones, and the latter sold the car to the defendant for the sum of $412.50. At the time of the sale the chauffeur had in his possession duplicate receipts from the plaintiff's vendors and also a consular invoice.

The plaintiff claims that no title passed to the Broadway Used Car Company and consequently none to the defendant. The defendant alleges that he is now the owner of the machine, because the plaintiff furnished to Carona the indicia of ownership and is estopped from asserting his title as against an innocent purchaser.

Section 104, c. 571, of the Laws of 1911, known as the "Sales of Goods Act," states that: "Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." * * *

The relation between the plaintiff and the defendant was merely that of owner of a car and a chauffeur. He who deals with an agent does so at his peril. The defendant contends that the plaintiff must suffer the loss sustained by him because he placed Carona in a position to perpetrate the wrong. I do not think that the plaintiff did anything inconsistent with his ownership of the machine. * * *

A little investigation on the part of the Broadway Company or any subsequent purchaser would have revealed the fact that the certificate of registration issued by the secretary of state, attached to the deposition offered in evidence, was in the name of the plaintiff. The receipts for the payment of storage of the car must also be taken into account. They were also in the name of the plaintiff.

These considerations, I believe, dispose of the doctrine of "equitable estoppel," invoked by the defendant's attorney. The conclusions seem to me to be irresistible that Carona was guilty of larceny, that the plaintiff still has a proprietary right to the automobile (which is not now in the state of New York), and that there be judgment for the plaintiff, on the merits, for the value of the car, viz. $500. * * *

O'CONNOR'S ADM'X v. CLARK.

(Supreme Court of Pennsylvania, 1895. 170 Pa. 318, 32 Atl. 1029; 29 L. R. A. 607.)

Replevin by John O'Connor's administratrix against John Clark. Judgment for plaintiff, and defendant appeals.

STERRETT, C. J. If there is nothing more in this case than the facts recited by the learned trial judge in the excerpt from his charge quoted in the first specification of error, the instructions therein given to the jury to find for the plaintiff if they believed the testimony would be substantially correct. The only facts of which this instruction is predicated are (1) that the wagon in question was the property of John O'Connor, the original plaintiff; and (2) that Tracy, without his permission, took it, and sold it, or attempted to sell it, to the defendant as his own. But these are not the only facts of which there was evidence before the jury. On defendant's behalf, it is contended that the testimony tended to prove, and the jury, if they had been permitted, would have been warranted in finding, that defendant purchased the property in question from Tracy in the honest belief that he was in fact the owner thereof; that the name and occupation of Tracy—viz. "George Tracy, Piano Mover"—were on the wagon when he offered it for sale, and that fact was referred to as indicating his ownership of the property, etc.; that, Tracy being a stranger, defendant was specially careful to inquire and inform himself that the person who was in possession of and offering to sell the wagon was the George Tracy whose name and occupation were painted thereon; that Tracy's name and occupation were put upon the wagon with the knowledge of O'Connor, the original plaintiff, and himself, and by direction of the former, for the purpose of creating the impression and inducing the public to believe that the property belonged to Tracy, and was being used by him in his business as a piano mover, in which he had theretofore been engaged. Without attempting to summarize the testimony relied on by the defendant, it is sufficient to say that it tends to prove substanially the state of facts above outlined, and especially that the original plaintiff, for his own gain and benefit, was a party to the arrangement whereby Tracy's name was put on the wagon for the purpose of misleading the public into the belief that the property was his, and that defendant, acting with due caution and in good faith, was thus misled as to the ownership of the property, and purchased the same from Tracy.

While the soundness of the general rule of law that a vendee of per-

sonal property takes only such title or interest as his vendor has and is authorized to transfer cannot for a moment be doubted, it is not without its recognized exceptions. One of these is where the owner has so acted with reference to his property as to invest another with such evidence of ownership, or apparent authority to deal with and dispose of it, as is calculated to mislead, and does mislead, a good-faith purchaser for value. In such cases the principle of estoppel applies, and declares that the apparent title or authority, for the existence of which the actual owner was responsible, shall be regarded as the real title or authority, at least so far as persons acting on the apparent title or authority, and parting with value, are concerned. Strictly speaking, this is merely a special application of the broad equitable rule that, where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud.

Assuming, in this case, that a jury, under the evidence, should find —as we think they would be warranted in doing—that such marks of ownership were placed on the property by direction of O'Connor, the real owner, as were not only calculated to deceive, but actually intended to deceive, the public, and that by reason thereof, and without any fraud or negligence on his part, the defendant was misled into the belief that Tracy was the real owner, and he accordingly bought and paid him for the property, can there be any doubt, as between the real owner and the innocent purchaser, that the loss should fall upon the former, by whose act Tracy was enabled to thus fraudulently sell and receive the price of the property? We think not. In Barnard v. Campbell, 55 N. Y. 456, 14 Am. Rep. 289; Id., 58 N. Y. 73, 17 Am. Rep. 208—a well-considered case, involving substantially the same principle—it was held that to create an estoppel by which an owner is prevented from asserting title to and is deprived of his property by the act of a third person, without his assent, two things must concur: "(1) The owner must have clothed the person assuming to dispose of the property with the apparent title to or authority to dispose of it. (2) The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real."

Judgment reversed, and a venire facias de novo awarded.

Section 23 of the Sales Act above quoted is qualified by the following subsections.

Section 23, Subsec. (2). Nothing in this act, however, shall affect (a) the provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof. (b) The validity of any contract to sell or sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction.

SECTION 3.—SALE BY ONE HAVING A VOIDABLE TITLE

Sales Act, Section 24. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith, for value and without notice of the seller's defect of title.

In the preceding cases the innocent purchaser was protected not because his vendor had any title or authority to sell the goods, but solely because it was unjust to permit the owner to deny that the seller had authority to sell or to deny that the seller was the owner.

Under section 24 we are dealing with a case where the vendor did in law and fact have the title but the circumstances under which he obtained and held that title were such that his vendor had a legal right to get that title back. In the law such a title is called a voidable title. So the question is: When will a person have a voidable title?

In re ALLEN.

(United States District Court, E. D. Arkansas, W. D. 1910. 183 Fed. 172.)

In the matter of John Q. Allen, bankrupt. On review of order of referee sustaining the petition of the Heim Brewery Company to reclaim property.

The Heim Brewery Company filed its intervention for a number of casks and cases containing empty beer bottles in the possession of the trustee of the estate of the bankrupt, claiming to be the owner thereof and entitled to the immediate possession. The trustee denied that the intervener was the owner of the property, but insists that the property claimed belongs to the bankrupt's estate.

The cause was submitted upon an agreed statement of facts, which shows that under that contract the bankrupt bought large quantities of beer from the intervener; that the beer was delivered in cases containing bottles and in casks containing bottles bearing the individual brand and registered copyright of the intervener; that a part of said casks, cases, and bottles have been returned; but that the trustee is now in possession of a number claimed by the intervener. Upon a hearing before the referee, he found in favor of the intervener. The cause now comes before the court on petition for review by the trustee.

TRIEBER, District Judge. On behalf of the intervener it is claimed that, until the articles claimed are paid for by the vendee, it is merely a bailment, and he is entitled to a return of them, or, at most, that it was an option to purchase. On the other hand, it is claimed on the part of the trustee that it was a contract of "sale and return."

A "bailment" is properly defined as being a delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored by the bailee as soon as the purpose of the bailment shall be served.

On the other hand, a "contract of sale" is when there is an agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and pay the agreed price. An "option to purchase" is merely an agreement whereby the vendee may, upon compliance with certain terms and conditions, become the owner of the property; the vendor giving him that option.

The leading case upon which the intervener relies is Wescott v. Thompson, 18 N. Y. 363. In that case the contract was for the sale of beer and provided for the sale of the beer to the vendee at a certain price. The beer was to be shipped in barrels and the barrels to be returned to the plaintiff when emptied of the beer, and if not returned the vendee was to pay for every barrel not returned the sum of $2, and thereupon became the owner thereof. On the other hand, in the case at bar, the contract provides that the vendee is to be charged and pay for the cases and bottles, but in case he wishes to return any of the cases and empty bottles he is to be allowed a rebate on his bill of $1.50 for each case of empty bottles returned to the intervener.

Is this an option to purchase or a contract of sale and return? The distinction between these two forms of agreement has been aptly pointed out in Hunt v. Wyman, 100 Mass. 198, as follows: "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title would not pass until the option is determined; on the other hand, the property passes at once, subject to the right to rescind and return."

Applying this rule to the contract between the intervener and the bankrupt, it clearly appears that it was not an option to purchase, but a contract of sale and return, while, on the other hand, the contract in Wescott v. Thompson was merely an option to purchase. In the latter case it was optionary with the vendee to keep the empty barrels and pay the sum of $2 for each barrel kept by him or to return them. In the case at bar the bankrupt was charged and promised to pay for the cases and bottles unless he desired to return the same, and if he did he was to be paid or given credit on his account therefor the sum of $1.50 for each case and bottles therein.

Great stress is laid upon the fact that under the contract the bankrupt was to pay the net price only on the bottled beer, still the charge was made against him, and until he returned them he was liable to the intervener who had a cause of action against him. In Heryford v. Davis, 102 U. S. 235, 26 L. Ed. 160, the contract between the parties spoke of the cars sold as being leased until paid for, but notes were executed by the vendee for the full purchase money. The cars, before they were paid for, having been seized under execution, the vendor claimed them as his property, but the court held that calling it a lease did not make it so, nor was it a conditional sale, but merely an attempt to retain a lien for the purchase money, and, the same not having been recorded as required by the laws of the State of Missouri, it was void as against creditors.

In Re Rahilly v. Wilson, 3 Dill. 420, Fed. Cas. No. 11,532, grain was stored in a warehouse with the understanding that it should be sold by the warehouseman, and when the depositor would surrender the receipt therefor the warehouseman had the right to return an equal amount of grain of equal quality or pay the then market price of the grain. Upon these facts it was held by Judge Dillon that it was a sale and not a bailment. The distinction between bailments and

sales is clearly shown by the opinion of that eminent jurist, who carefully reviews the authorities on that subject.

In Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093, the court held that "a transaction is a 'sale,' as distinguished from a 'bailment,' when there is no obligation to return the specified article." In this case there was no obligation on the part of the bankrupt to return the property claimed by the intervener; but, if he saw proper, he had the right to do so and receive a credit for the amount specified in the agreement. If the property had been destroyed by fire or by any other cause, even if without any fault or negligence on the part of the bankrupt, the loss or destruction would still have fallen on him. This is the rule applicable to contracts of sale and return.

As this was a contract of sale and return and not a mere option to purchase, nor a bailment in any sense, the title passed to the bankrupt, and the trustee is entitled to the possession of the property.

The finding of the referee will be set aside, and judgment entered dismissing the intervention, with costs.

PHELPS et al. v. McQUADE.

(Court of Appeals of New York, 1917. 220 N. Y. 232, 115 N. E. 440, L. R. A. 1918B, 973.)

Action by William R. Phelps and another against Dennis Charles McQuade. From a judgment of the Appellate Division, directing judgment for defendant, plaintiffs appeal.

[The statement of facts is taken from the opinion in the same case in the Appellate Division of the Supreme Court. 158 App. Div. 528, 143 N. Y. Supp. 822.]

CLARKE, J. The plaintiffs were jewelers. On February 15, 1911, one Walter C. Gwynne falsely represented himself to the plaintiffs to be Baldwin J. Gwynne, a resident of the Lincoln Hotel in Columbus, Ohio, with a satisfactory rating in the reports of the Dun and Bradstreet Mercantile Agencies, and later on the same day, the manager of Jules S. Bache & Co., bankers, identified the said Walter C. Gwynne to plaintiffs' manager as being Baldwin J. Gwynne of Columbus, Ohio. That was brought about in this way: Gwynne had become acquainted with one of Bache's customers in an uptown hotel and had told this customer that he had had a falling out with his sweetheart, that he had some jewelry he wished to dispose of, and asked this gentleman if he would be willing to purchase any of these goods. He said he could not take them back to the parties that he had purchased them from. After some conversation, the gentleman decided to purchase one of these pieces and asked him what the name was. He told him Baldwin J. Gwynne, and so this customer of Bache's wrote out a check for the amount agreed upon. After this the supposed Baldwin J. Gwynne went down to Bache's office to cash the check and was told that as he was not known he would have to identify himself. He replied that would be very easy; he would call the maker of the check. This was satisfactory to Bache & Co. The maker did call and told the bankers that this was the person the money was intended for.

The plaintiffs, relying upon the representations of Gwynne and said identification, sold him a ring, a gold mesh purse, and a diamond

and pearl scarf pin of the aggregate value of $838, and delivered the articles to him under the belief that they were delivering the same under the terms of a sale on credits to Baldwin J. Gwynne of the Lincoln Hotel of Columbus, Ohio, and whom they found to be satisfactorily rated in the said Mercantile Agencies' reports. Thereafter Gwynne sold the jewelry to the defendant, McQuade, for a valuable consideration. It is admitted that McQuade was a bona fide purchaser for value, without any notice of any defect in the title. Due demand was made and refused. * * * The question is presented as to which of the two innocent parties, the original owners, or the bona fide purchaser, will have to stand the loss. * * *

ANDREWS, J. * * * The learned Appellate Division rested their decision upon the definition of common-law larceny, holding that where such larceny had been committed the thief acquired no title by his crime; where it had not, at least a voidable title passed. We agree with that statement of the law. But we should prefer to define the rule in another form. Where the vendor of personal property intends to sell his goods to the person with whom he deals, then title passes, even though he be deceived as to that person's identity or responsibility. Otherwise it does not. It is purely a question of the vendor's intention.

The fact that the vendor deals with the person personally rather than by letter is immaterial, except in so far as it bears upon the question of intent. Where the transaction is a personal one, the seller intends to transfer title to a person of credit, and he supposes the one standing before him to be that person. He is deceived. But in spite of that fact his primary intention is to sell his goods to the person with whom he negotiates. Where the transaction is by letter the vendor intends to deal with the person whose name is signed to the letter. He knows no one else. He supposes he is dealing with no one else. And while in both cases other facts may be shown that would alter the rule, yet in their absence, in the first, title passes; in the second, it does not. * * *

In Cundy v. Lindsay, 3 App. Cas. 463, one Blenkarn, signing himself Blenkiron & Co., bought goods by letter of Lindsay & Co. The latter shipped the goods to Blenkiron & Co. They knew of the firm of Blenkiron & Son; believed the letter came from that firm and that the goods were shipped to it. Blenkiron & Son were the persons with whom Lindsay & Co. intended to deal and supposed they were dealing. Under those circumstances it was held that, although Blenkarn obtained possession of the goods, he never acquired title thereto. * * *

Another class of cases such as Hentz v. Miller, 94 N. Y. 64, and Consumers' Ice Company of Buffalo v. Webster, Son & Co., 32 App. Div. 592, 53 N. Y. Supp. 56, illustrate the rule under different circumstances. In them, persons falsely stating that they are the agents or representatives of others fraudulently obtained possession of goods under a pretense of sale to such others. There is no intention on the part of the vendor to sell to the pretended agent or representative and no title passes. * * *

The judgment of the Appellate Division must be affirmed, with costs. * * *

SECTION 4.—SALE BY A SELLER IN POSSESSION OF GOODS ALREADY SOLD

Sales Act, Section 25. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

If A. sells goods to B., and B. leaves the goods in A.'s possession, and subsequently A. sells the same goods to C., who had no notice of the prior sale to B., under this section C. will be protected in his claim of ownership as against the claims of B. The rule that one who merely has possession of goods does not thereby gain a power to transfer a title to the goods to an innocent third person has already been adverted to. For example, an agent who has been intrusted with property belonging to his principal, or a bailee, such as a warehouseman, does not, by reason of his lawful possession, acquire power to cut off the rights of the owner by an unauthorized sale to a bona fide purchaser. There must be something in addition to the fact of lawful possession to give the possessor the power to pass title to a third party. The situation referred to in Section 25 is one where the party in possession is given the power to extinguish the claims of the first purchaser, not solely because he is in lawful possession of the goods, but because of this fact plus the fact that he was a former owner of them and because he has never done any overt act with respect to the goods which would indicate that a change of ownership had occurred.

Three facts must concur before the legal effect of the section is applicable: (1) There must have been a contract, the result of which passed the title to the buyer. (2) The seller must have remained in possession of the goods. A reacquisition of possession after delivery to the first purchaser would prevent the application of the rule. (3) The second sale must have been made to one who had no notice of the prior sale. Another way of putting the rule would be to say that the law requires delivery of goods to perfect a sale as against the claims of subsequent purchasers. This is probably the original rule, although in a great many cases under the common law the result is worked out by regarding the act of retention of possession after sale as a fraud on subsequent purchasers. The difficulty in working out the result in this way is that it involves the holding that retention of possession is always fraudulent as against claims of subsequent purchasers. As a matter of fact retention of possession may or not be fraudulent in fact. The acts do not necessarily involve affirmative misconduct.

Perhaps in a great majority of cases no fraud is intended. Of course there are many illustrations in the law where a particular group of facts is given the same legal effect as though they were fraudulent; as, for example, a voluntary conveyance of property by an insolvent, although accompanied by delivery to the donee is held to be fraudulent as against the creditors of the donor. To call a particular group of facts fraudulent, when they are not such in fact, tends to confusion, however beneficent the result. The rule asserted in the above section represents the conviction that it is better policy to protect the purchaser who has obtained actual possession than to protect the purchaser who has allowed possession to remain in the vendor; but it is not based upon the assumption that the act of retaining possession is fraudulent.

WILSON v. WALRATH.

(Supreme Court of Minnesota, 1906. 103 Minn. 412, 115 N. W. 203, 24 L. R. A. [N. S.] 1127.)

Action by Mark E. Wilson against A. Parker Walrath. Judgment for defendant, and plaintiff appeals.

ELLIOTT, J. This was an action in replevin, in which the plaintiff sought to recover possession of an automobile. * * * One Spargo sold the automobile in question to the appellant, Wilson, who paid full consideration therefor, but agreed to allow Spargo to retain possession of the property for certain purposes and under certain conditions for a specified time. While in possession, Spargo mortgaged the machine to Walrath, who had no knowledge of the sale to Wilson. The court found as a fact that the evidence does not prove that the sale to Wilson "was made in good faith and without intent to injure, delay, or defraud creditors and subsequent purchasers in good faith from Spargo." If the evidence sustains this finding of fact, the respondent must prevail in this court.

There is a line of cases which holds that, while delivery is not essential to pass title as between the vendor and vendee of personal property, it is necessary for such purpose as against every one but the vendor. Under this rule, when the same goods are sold to different persons by conveyances equally valid, he who first lawfully acquires the possession will hold them as against the other. The motives and intentions of the parties are immaterial, as the doctrine rests upon the general principle that, where one of two innocent persons must suffer, the loss should fall on him whose acts or omissions have made or contributed to make the loss possible. * * * Closely connected with this doctrine, but resting on other principles, is the rule which makes the retention of possession by the vendor conclusive evidence of fraud. This doctrine also rests upon grounds of assumed public policy. It prevails by virtue of statutes or decisions based on the common law in a number of states. * * * In the greater number of states, however, the rule is established that the mere retention of possession by the vendor is presumptive evidence only of a fraudulent and colorable sale, and the vendee is permitted to overthrow

this presumption by evidence which establishes his good faith and want of knowledge of any fraudulent intent on the part of the vendor. * * *

In the thirteenth year of Elizabeth there was enacted the famous statute which made all conveyances not made bona fide and for value, with intent to injure and delay or defraud the creditors, void as to such creditors. St. 13 Eliz. c. 5. A later statute extended this protection to subsequent purchasers as well as creditors. St. 27 Eliz. c. 4. These statutes did not in terms apply to personal property, but from the time of Sir Edward Coke's decision in Twyne's Case, 3 Co. Rep. 80b, 5 Eng. Rul. Cas. 2, sales of personal property made with intent to delay and defraud creditors or subsequent purchasers have been regarded as within the provisions of the statutes. The question soon arose whether, under these statutes, possession by the vendor was fraudulent per se, and therefore conclusive, or merely presumptively fraudulent. In Twyne's Case, in speaking of the indicia of fraud, it was said that "continuance of the possession in the donor is the sign of trust for himself." In Edwards v. Harben, 2 T. R. 587, it was held that, "if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent." For some time thereafter this was the established rule in the English courts, but it was finally held that the proper construction of the statute made such a conveyance presumptively fraudulent only. Hale v. Metropolitan Co., 30 L. J. Ch. 777; Gregg v. Holland, [1902] 2 Ch. 360. To clear up the difficulty which arose under the statute, Parliament enacted the various bills of sale acts, which are fully discussed and explained by Lord Blackburn in Cookson v. Swire, 9 A. C. 653–670 (1884). * * * In the United States Edwards v. Harben was followed by Chancellor Kent in Sturtevant v. Ballard, 9 Johns. (N. Y.) 337, 6 Am. Dec. 281, and by the Supreme Court of the United States in Hamilton v. Russell, 1 Cranch (U. S.) 309, 2 L. Ed. 118. But in Warner v. Norton, 20 How. (U. S.) 448, 15 L. Ed. 950, Mr. Justice McLean stated that "for many years past the tendency has been in England and the United States to consider the question of fraud as a fact for the jury under the instruction of the court." This is now the established doctrine of the court. * * *

Section 3496, Rev. Laws 1905, and the previous statutes which are embodied therein, were enacted for the purpose of removing any doubts as to whether the retention of possession by the vendor is conclusive or only presumptive evidence of fraud. It provides in express terms that such possession shall be presumed to be fraudulent and void as against subsequent purchasers in good faith, unless those claiming under such sale make it appear that the sale was made in good faith and without any intent to defraud such purchasers. The effect is to cast upon the vendee the burden of rebutting the statutory presumption of fraudulent intent by proving his own good faith and want of knowledge of fraudulent intent on the part of the vendor. * * * The statute controls this case. If Wilson proved that he purchased the machine in good faith without knowledge of any intent on the part of Spargo to defraud his creditors or subsequent purchasers, he was entitled to the possession of the property. It is conceded that on April 5, 1906, Spargo owed Wilson $250, the proceeds of an old machine which had been sold by Spargo for Wilson. The money had been retained for some time with the consent of Wilson.

Spargo then owned a Jackson machine, which he used for demonstrating purposes. Wilson wished to purchase a new machine, and after various negotiations he purchased the Jackson machine for $1,000, which was substantially its actual value. In payment he at the time gave Spargo $700 in cash and satisfied the debt for $250 and accumulated interest. Wilson was interested in country banks, and his business called him away from home a great deal of the time. It was necessary that the machine should be stored in some garage. Spargo, being agent for the Jackson automobile, and having no other machine of that make on hand, wished to retain possession of this machine for a time and use it for demonstrating purposes. It was therefore agreed and stated in the bill of sale that Spargo might retain possession of the machine for 30 days and in the meantime use it for demonstrative purposes, in consideration of which he was to store the machine and keep it in repair. Spargo's business and personal standing was good, and Wilson had no reason to suspect, and did not suspect, that Spargo was insolvent. It appears from all the evidence that if he had made special investigations he would have found that Spargo's standing was good. Spargo kept the machine in his garage after the expiration of the 30 days and continued to use it in his business. During this time he mortgaged it to the respondent, Walrath, who had no knowledge of the previous sale to Wilson and acquired his lien in good faith for value. Neither Wilson's bill of sale nor Walrath's mortgage was recorded. Walrath finally took possession of the machine, and in this action Wilson sought to recover possession from him.

A careful examination of the evidence compels the conclusion that Wilson was entitled to a finding of fact to the effect that he purchased the automobile in good faith and without any intent to hinder, delay, or defraud Spargo's creditors, or subsequent purchasers from Spargo. Wilson certainly acted in good faith in the matter, if such a thing is possible when the vendor is allowed to retain possession of the chattel. He paid full value for the property, and this in itself is persuasive evidence of his good faith. * * * It is not contended that there was any actual bad faith on the part of Wilson. In his brief the respondent thus states his position. The sale was not accompanied with immediate delivery and followed by an open and continuous change of possession, within the meaning of section 3496, Rev. Laws 1905; and hence, "while it may be true that on April 5, 1906, appellant in the utmost good faith purchased the automobile, yet from that time on the action of the appellant in permitting and allowing Spargo, the vendor, to keep and use that machine in exactly the same manner as before, was a fraud per se upon any person who might either purchase or take the same as security without notice of the rights of a prior purchaser." This is the doctrine of Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119, and the other cases of the group to which reference has been made. As an abstract principle of law, that doctrine is sound and controlling when applied to appropriate facts and conditions. But the effect which shall be given to possession under the particular circumstances disclosed in this record is declared by the statute, and the statute should not be disregarded and annulled by the application of the doctrine of equitable estoppel. Upon the evidence Wilson sustained the burden which the statute imposes upon him, and the finding of the trial court was thus erroneous. * * *

The judgment is therefore reversed, and a new trial granted.

SECTION 5.—RIGHTS OF CREDITORS AGAINST GOODS SOLD IN SELLER'S POSSESSION

Sales Act, Section 26. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

This section is an incorporation, by reference, of the re-enactments in this country of the English statute on fraudulent conveyances. Under these statutes, as appears from the preceding case. there is a good deal of conflict on the question as to whether retention of possession is conclusive proof of fraud, or whether it is but prima facie evidence of fraud. The above section does not attempt, therefore, to adopt either view, but is so phrased as to permit a state which enacts the Sales Act to continue the local rule on this matter. It appears, therefore, that the Sales Act does not place rights of creditors on the same basis as those of subsequent purchasers of a vendor in possession of goods already sold.

SECTION 6.—RIGHTS OF CREDITORS AGAINST GOODS SOLD IN VIOLATION OF BULK SALES ACTS

GLANTZ v. GARDINER.

(Supreme Court of Rhode Island, 1917. 40 R. I. 297, 100 Atl. 913, L. R. A. 1917F, 226.)

Action by Max Glantz against Samuel E. Gardiner, Deputy Sheriff. Certified from the superior court on an agreed statement of facts.

BAKER, J. This is an action of replevin, brought by the plaintiff * * * to recover possession of certain goods attached by the defendant as deputy sheriff of said county, * * * and held in custody by the said defendant under and by virtue of a writ of attachment issued out of the superior court" in said county "at the suit of Alphonso Brickett against said Frank S. Lockhart alias." * * *

The agreed statement of facts shows that on the 19th day of December, 1916, the plaintiff, Max Glantz, paid to said Frank S. Lockhart the sum of $100 and received from Lockhart the following written instrument:

"Received of M. Glantz one hundred ($100.00) dollars, deposited on sale of all household furniture contained in stores Nos. 605-613 Westminster street; also in storehouse in rear; also Columbia truck. Balance due, thirty-nine hundred dollars ($3,900.00), to be paid in full December 22, 1916. [Signed] Frank S. Lockhart.

"In presence of William A. Reiner." * * *

On the said 20th day of December, 1916, the plaintiff demanded from the said Lockhart a written list of the names and addresses of his creditors, and on the same day received from him a written list, giving names, addresses, and amounts, signed and sworn to by said

Lockhart as "a true, full, accurate, and complete list" of his creditors "and the amounts due each of them," "to the best of his knowledge and belief." The list included six names and addresses, and amounts of indebtedness aggregating $796.21. * * * On said December 20th the plaintiff sent by registered mail a letter to each of said creditors named in said list, giving notice that said Frank S. Lockhart had entered into an agreement with said Max Glantz for the sale of all his stock of furniture and house furnishings, that the transfer of title would take place on December 27, 1916, at 9 o'clock a. m. * * * Said Alphonso Brickett was a creditor of said Lockhart prior to and at the time of said transfer, but his claim was not included in the list delivered by Lockhart, and was not filed with said Glantz or his attorneys prior to said transfer, and neither of them had any knowledge of such claim until several days after December 27th.

Chapter 387 of the Public Laws was passed April 14, 1909, and is entitled "An act to prohibit sales of merchandise in bulk in fraud of creditors." * * *

The precise question presented by the agreed statement and as argued by the counsel of both parties in their briefs is whether the transfer of said goods and chattels by said Lockhart to the plaintiff on December 27, 1916, was under the provisions of section 1 of said chapter 387 of the Public Laws fraudulent and void as to said Alphonso Brickett.

Within the last 20 years nearly all, if not all, of the states have enacted statutes regulating the sale of merchandise in bulk. This widespread legislation at least implies a general belief in the existence of a widespread evil requiring legislative control. While these statutes are similar in general purpose, they differ in phraseology, both in their requirements of the parties to such sales and particularly in the language which declares the effect of noncompliance with the provisions of these acts. "That evil is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors." Wright v. Hart, 182 N. Y. 330, 346, 75 N. E. 404, 410, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263. A convenient classification of these laws into five groups, based upon the different requirements imposed upon the parties to such sales, may be found in Kidd-Dater Co. v. Musselman Grocer Co., 217 U. S. 461, 467–469, 30 Sup. Ct. 606, 54 L. Ed. 839. These requirements vary from the simple one by which a prospective vendor is compelled to have recorded from five to ten days previous to the actual sale in the town clerk's office of the town in which he conducts his business a notice of his intention to make such sale, describing the property to be sold, the condition of such sale, and the parties thereto, to the more onerous ones of the preparing by the vendor and vendee together of an inventory of the property and its cost, and of requiring the vendee to demand and receive sworn lists of the vendor's creditors, with their addresses and the respective amounts due them, and to notify these creditors of his intended purchase, and in a few instances to see that the purchase price is applied, so far as necessary, to the payment of the vendor's creditors.

As to the effect of a failure to comply with the requirements of these statutes, they fall into two classes: First, those acts in which the sale is declared fraudulent and void; second, those acts in which the sale is declared presumptively fraudulent and void. It is reasona-

ble to infer that these different acts vary much as effective instrumentalities in checking actual fraud. The courts differ in their construction of the acts in the second class, some holding that they simply prescribe a rule of evidence, throwing the burden of showing good faith on the purchaser with the right to introduce any evidence pertinent to this question as in Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229, and Fisher v. Herrmann, 118 Wis. 428, 95 N. W. 392, while others restrict the evidence to the showing of a compliance with the requirements of the statute. Moore Dry Goods Co. v. Rowe & Carithers, 99 Miss. 30, 54 South. 659, Ann. Cas. 1913C, 1213; Cantrell v. Ring, 125 Tenn. 472, 145 S. W. 166.

The statute of this state belongs to the first class. It provides in effect that the transfer of "the whole of a stock of merchandise and fixtures" in bulk in one transaction "shall be fraudulent and void as against all persons who are creditors of the transferor at the time of such transfer unless the transferee" does certain things; that is to say, without any regard to the solvency of the vendor, or the fairness of the purchase price to be paid, or the good faith of the vendor and vendee, and although the transaction may not be fraudulent in fact, it will be fraudulent and void in law so far as the vendor's creditors are concerned unless the vendee or transferee does the things required of him by the provisions of the statute. In other words, in order to guard against the commission of actual fraud in the class of sales with which it deals, the law regulates them by requiring the performance of certain acts in the carrying out of such a sale and declares that the failure to perform these acts will render the transaction fraudulent in law. It is obvious that this is not the enactment merely of a rule of evidence but a declaration of substantive law that the nonobservance of certain statutory provisions constitutes fraud in law.

* * *

Such laws have generally been upheld as a justifiable use of the police power. As such statutes declare sales in bulk fraudulent and void if the regulations governing such sales are not complied with, it is clearly implied and must inevitably follow that, if these regulations are complied with, the sale or transfer is not fraudulent and void under these statutes. As already appears, said chapter 387 makes a transfer or sale of a stock of merchandise in bulk fraudulent and void as to the transferor's creditors unless the transferee or purchaser "demands and receives from the transferor a written list of the names and addresses of the creditors of the transferor and certified by him, under oath, to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors; and unless the transferee shall, at least five days before such transfer, notify personally, or by registered mail, every creditor whose name and address are stated in said list of the proposed transfer." Did the plaintiff in this case demand and receive from Lockhart a written list of the names and addresses of the latter's creditors, certified by Lockhart under oath, to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors, and did the plaintiff at least five days before the transfer notify in the manner required by the statute every creditor whose name and address were stated in said list of the proposed transfer? The agreed statement of facts clearly shows that he did all of these things, and apparently satisfied the requirements of the statute.

It is urged, however, that inasmuch as the list of Lockhart's creditors

received by the plaintiff was not in fact "a full, accurate, and complete list of his creditors," and as the plaintiff afterwards learned this, but before the transfer was made, the sale, in consequence, was void. So far as chapter 387 is concerned, we do not think this fact affects the situation. The statute declares the sale void only on the failure of the purchaser to do what is required of him. It does not declare the sale void if the list of creditors furnished by a vendor under oath is not in fact "full, accurate and complete." It does not in any way make the purchaser responsible for any incorrectness in the list. We think it would be unreasonable to so construe it. * * *

In Coach v. Gage, supra, 70 Or. on page 188, 138 Pac. on page 849, the court in interpreting these last provisions said: "The act in question, in our judgment, imposes upon the purchaser (1) the duty to demand a written statement, under oath, of the vendor of the names and addresses of his creditors, and (2) upon the receipt of such list to notify the persons named therein of the proposed purchase. For an intentional breach of either of these duties, it was entirely competent for the Legislature, by way of penalty for such breach, and to secure the faithful performance of such duty, to declare that their nonperformance should constitute conclusive evidence of fraud, and render the sale void as to creditors; but it is not in the power of the Legislature to make a breach of duty by the vendor evidence of fraud in the vendee. To hold the law means that an omission of the name of a creditor by the vendor without the knowledge of the vendee renders the transaction void as to him would be to hold that it was the intent of the Legislature to ordain that a fraud committed by the vendor upon the vendee by falsifying the list of creditors should be conclusively presumed to be the fraud of the person so defrauded and deceived. Such a construction would be so contrary to every principle of law and good morals that it is inconceivable that the Legislature intended it." * * *

It may be urged that under the statute as thus interpreted opportunity is afforded a vendor to successfully practice fraud. That is entirely possible. We think the remedy for this situation lies with the lawmaking body and not with the courts. It is noteworthy that, while common observation shows that it is the dealer in merchandise who for one reason or another attempts to defraud his creditors by the sale of his stock, our statute, like some others, declares such a sale fraudulent and void only on a failure of the purchaser to do certain things. Chapter 387 is in effect an addition to section 1 of chapter 253 of the General Laws relating to conveyances in fraud of creditors. Of course this transaction, like others, is open to inquiry as to the existence of fraud in fact. There is opportunity for collusion in making up the list of creditors, and apart from any active participation in actual fraud the purchaser might have knowledge of a fraudulent intent of the vendor, so that the question of the purchaser's good faith might be material. We think the words "good faith," as used in some opinions in cases under acts regulating the sale of merchandise in bulk, have reference to this aspect of the case, namely, the existence of fraud in fact. * * *

In these circumstances, it is our judgment that the sale by Lockhart to the plaintiff should not be held to be in fact fraudulent and void as to said Alphonso Brickett as a creditor of Lockhart. Our decision

accordingly is that the plaintiff acquired a good title to the goods and chattels transferred to him by Frank S. Lockhart on December 27, 1916, and that he is entitled to the entry of judgment for their possession. * * *

LINN COUNTY BANK v. DAVIS et al.

(Supreme Court of Kansas, 1918. 103 Kan. 672, 175 Pac. 972, 9 A. L. R. 468.)

Action by the Linn County Bank against O. L. Davis, with garnishment against R. L. Glascock. Judgment for the garnishee, and plaintiff appeals.

MASON, J. On March 20, 1917, O. L. Davis, a merchant, executed a bill of sale on his stock to R. L. Glascock, who took possession thereof. On March 24, 1917, the Linn County Bank, a creditor of Davis, brought an action against him upon its claims, and caused a garnishee summons to be served upon Glascock, who filed an answer denying any liability to Davis. The plaintiff took issue on this answer on the ground that the transaction between Davis and Glascock involved a violation of the Bulk Sales Law, inasmuch as it had been given no notice thereof. A trial resulted in a judgment in favor of the garnishee, and the plaintiff appeals.

At the time of the execution of the bill of sale, the seller gave to the buyer a list of his creditors, complete except for the omission of the plaintiff. The buyer (the garnishee), having no knowledge of the existence of the plaintiff's claim, paid off all the other creditors. He contends that these facts protect him from liability, assuming that the Bulk Sales Law is applicable to the transaction.

There is some conflict of judicial opinion as to the effect of the omission of one or more creditors from a list otherwise properly furnished in accordance with the Bulk Sales Law, at the time of a sale of a stock of goods. In some jurisdictions it is held that in such a case the omitted creditors have no remedy against the buyer (Coach v. Gage, 70 Or. 182, 138 Pac. 847; International Silver Co. v. Hull, 140 Ga. 10, 78 S. E. 609, 45 L. R. A. [N. S.] 492), even if he learns of their claims before making payment (Glantz v. Gardiner, 40 R. I. 297, 100 Atl. 913, L. R. A. 1917F, 226). A view more in keeping with the spirit and purpose of the statute is that the buyer is bound to hold any part of the price still under his control when he is advised of the existence of a creditor not mentioned in the list. In re Thompson (D. C.) 242 Fed. 602. See, also, Rabalsky v. Levenson, 221 Mass. 289, 108 N. E. 1050.

Here the transfer of stock was made in consideration of a preexisting debt, and it seems that (inasmuch as a release procured by the debtor's furnishing an incomplete list of creditors, in violation of the law, would be ineffective) the buyer would have parted with nothing in the transaction, and would therefore be answerable to the omitted creditor. That, however, need not be determined, for the same result follows from another circumstance. The statute requires the list of creditors given to the buyer to be certified by the seller under oath to be complete. * * * No such verification was made in this case. If the buyer had insisted upon the law being followed in this regard, it is conceivable that the seller would have used more diligence in assuring himself of the completeness of the list. At all events, the buyer, having closed the deal without requiring a compliance with the statute,

acted at his peril, and the title he received is subject to the claims of the omitted creditor. * * *

So far, it has been assumed that the Bulk Sales Law applies to the transaction involved. A doubt on this question arises from evidence that the bill of sale referred to was given as security, and from the circumstance that at the time of its execution the buyer agreed in writing to reconvey the property upon the repayment of the purchase price within a fixed time. If, however, the bill of sale is deemed to have been in legal contemplation a chattel mortgage, we still regard it as constituting a "sale or disposal" of the stock within the meaning of the statute. If the owner of a stock of merchandise, while allowed to sell it only upon notice to his creditors, could mortgage it effectively without such notice, the evasion of the statute would be so easy as to deprive it of all practical force. In this state the title to chattels passes by the execution of a mortgage, * * * which therefore amounts to a sale, or at least to a disposal. This view finds support in decisions elsewhere. Baker v. Nipper (Tex. Civ. App.) 198 S. W. 596; Semmes v. Stecher Brewing Co., 195 Mo. App. 621, 187 S. W. 604. In some jurisdictions what might seem to be a contrary conclusion is reached, but this is by reason of local statutes under which the mortgagor of chattels continues to be their owner. * * *

It results from these considerations that error was committed in denying the plaintiff all relief. The extent of his recovery, however remains to be determined. The goods in a sense constituted a trust fund for the benefit of all creditors alike. and as the purchaser was free from intentional wrong, he may justly be subrogated to the rights of the creditors whose claims he has paid off. * * * Nor is any reason apparent why his own claim should not be as favorably treated as those of others. We conclude therefore that the plaintiff should recover the proportion of the value of the stock that the amount of his claim bears to the total sum owed by the vendor at the time of the sale, including the debts paid off by the buyer and that originally owing to him. * * *

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. * * *

COONEY, ECKSTEIN & CO. v. SWEAT et al.

(Supreme Court of Georgia, 1909. 133 Ga. 511, 66 S. E. 257, 25 L. R. A. [N. S.] 758.)

Action by Cooney, Eckstein & Co., against F. B. Sweat and others. Judgment for defendants, and plaintiff brings error.

EVANS, P. J. Cooney, Eckstein & Co., sued out an attachment in the superior court of Wayne county against Sweat, alleging that he was indebted to them in the sum of $219.17 for money advanced; that for some time prior thereto he was the lessee of a sawmill, at which trees were manufactured into lumber and sold to various purchasers; and that a few days prior to filing the suit he had sold to the Waynesville Trading Company substantially all the lumber he had on hand. * * * It was further alleged that the notice referred to in the Bulk Sales Act of 1903 had not been given. The attachment was issued, and the lumber levied upon. * * * Subsequently the judge of the superior court dismissed the attachment, on the ground that the Bulk Sales Act of 1903 does not apply to a transaction of the

kind set forth in the petition. The correctness of this judgment is the sole question presented by the writ of error.

The act of 1903 is applicable to a sale of "any stock of goods, wares and merchandise in bulk." The object of the Legislature in passing the statute was the protection of persons who had been extending credit to merchants on the faith of apparent prosperity, indicated by a stock of goods, wares, and merchandise, which would not be sold in bulk to one person, but which would be sold out gradually, and replenished from time to time. When merchants sell their entire stock of goods to one person, without notice of any kind to their creditors, a fraud is frequently perpetrated upon the creditors; and it was the intention of the Legislature to afford a remedy to the victim of these fraudulent sales. The act is in derogation of the common law, and of a person's right to alienate his property without restriction, and is therefore to be strictly construed. * * * In the construction of statutes of this kind, it is always well to consider the evil intended to be reached. That evil, says Vann, J., in his dissenting opinion, in the case of Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263, "is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors. Common observation shows that, when a dealer has reached a point in his business career where he cannot go on, owing to the claim of creditors, the temptation is strong and the practice common of making fraudulent sales."

The act of 1903 bears internal evidence of a legislative intent to confine its operation to merchants or dealers in merchandise. The first section thereof, in prescribing the preliminary acts necessary for the validity of a sale authorized by the act and the duty of the vendor, declares that "it shall further be the duty of said vendor to give the vendee a statement of his assets and liabilities, and the cost price of the merchandise to be sold, said cost price to be arrived at by an inventory taken at the time by the seller and purchaser." And the same section makes it the duty of the purchaser, in giving notice of the sale to the vendor's creditors, to also send "a copy of the statement of the assets and liabilities as furnished him by the vendor." The word "merchandise" is, however, not to be taken in such a restricted sense as to exclude the usual and customary accessories of a mercantile or trading establishment, when a sale in bulk is made of the whole. Thus, bar fixtures, safes, desks, cash registers, cigar cases, pool tables, refrigerators, and the like, used in connection with a business in which they are appropriate in facilitating the operation of such business and the sale of the goods connected therewith, have been held to be included in the sale of the business, within the meaning of the Sales in Bulk Act. * * *

Though in many of the states statutes of a similar character have been enacted within the last 10 years, there are to be found only a few cases defining the meaning of the phrase "goods, wares, and merchandise." In the state of Washington it was held, in Plass v. Morgan, 36 Wash. 160, 78 Pac. 784, that a sale of all goods, wares, and merchandise in a restaurant was a sale within the contemplation of the statute; but later in the same state it was held, in Everett Produce Co. v. Smith, 40 Wash. 566, 82 Pac. 905, 2 L. R. A. (N. S.) 331, 111 Am. St. Rep. 979, 5 Ann. Cas. 798, that a sale of the horses, wagons, and harness comprising the stock in a livery stable was not a

stock of goods, wares, or merchandise within the meaning of the statute. In Massachusetts it was held that biscuits and crackers put up in boxes or barrels by a wholesale biscuit company for the wholesale market was within a statute regulating the sale of goods, wares, or merchandise in bulk. Hart v. Brierly, 189 Mass. 598, 76 N. E. 286. And in a later case it was there held that the sale in bulk statute was intended to prevent a trader from disposing of his stock of merchandise in a manner outside of his usual course of business. Gallus v. Elmer, 193 Mass. 106, 78 N. E. 772, 8 Am. & Eng. Ann. Cas. 1067. A person operating a sawmill, at which trees are manufactured into lumber and then sold, is not within the purview of the act, though he sells substantially all the lumber he has on hand at a particular time to one person. * * *

Judgment affirmed. * * *

OWOSSO CARRIAGE & SLEIGH CO. v. McINTOSH & WARREN.

(Supreme Court of Texas, 1915. 107 Tex. 307, 179 S. W. 257, L. R. A. 1916B, 970.)

Action by the Owosso Carriage & Sleigh Company against C. K. Sweet, with McIntosh & Warren, garnishee. A judgment in part for plaintiff against the defendant garnishee was reversed and remanded by the Court of Civil Appeals and plaintiff brings error.

YANTIS, J. This case involves * * * what is commonly known as the "Bulk Sales Law," * * * and the effect of the service of the writ of garnishment upon the proceeds of the sale of merchandise which was purchased by McIntosh & Warren, defendants in error, at private sale, and not in the ordinary course of trade, but in bulk, and in violation of all the provisions of said bulk sales statute, and afterwards resold by them and converted into cash prior to the service of the writ of garnishment upon them, which was issued at the instance of the Owosso Carriage & Sleigh Company, plaintiff in error. * * *

One C. K. Sweet was engaged in the implement, vehicle and hardware business in the town of Brownwood. The evidence strongly indicates that on the 10th day of August, 1909, he was insolvent. * * * He was indebted to the plaintiff in error * * * in the sum of $1,700. * * * He owed various other creditors in the aggregate sum of $3,000. On said 10th day of August, 1909, he sold his stock of goods in bulk to McIntosh & Warren, defendants in error, for the consideration of $6,005.97. * * *

On October 19, 1910, plaintiff in error filed suit against the said Sweet * * * and at the same time caused a writ of garnishment to be issued, which was served upon the defendants in error on the 20th day of October, 1910. On the 20th day of December, 1910, plaintiff in error recovered in said suit its judgment against said Sweet in the sum of $1,883.60, with costs of suit and interest at the rate of 8 per cent.

The evidence indicates that there was no intentional fraud upon the part of the defendants in error in purchasing said merchandise, or on the part of said Sweet in making the sale. * * * The bulk sales statute of 1909 was not complied with in any form in making said sale. * * *

We will now consider the important question as to the effect of the service of the writ of garnishment upon the defendants in error

subsequent to the sale of the merchandise by them, which they had purchased from Sweet. It is contended that the garnishment did not fasten upon either the property belonging to Sweet, or upon its proceeds after sale, for the reason, as asserted, that the property belonging to Sweet, which passed into the hands of the defendants in error, had been sold by them, and that the proceeds of the sale could not be reached by the writ of garnishment, and that the writ of garnishment would not be effective unless served before such sale. Upon the other hand, the contention is made that the writ of garnishment took effect and became a lien upon the proceeds of the sale of said merchandise.

In considering this question it should be remembered that the purchase by defendants in error from Sweet, however innocently intended, was in open violation of the bulk sales law, and, under section 1 thereof, "void as against creditors of the seller." There was, then, no real sale, in law, but merely a change of possession. The parties could not accomplish that which was prohibited by law. The possession was transferred from Sweet to the defendants in error, which left them holding it in trust for the benefit of Sweet's creditors, with the title still in Sweet. This necessarily follows as the result of the attempted sale being rendered void by the statute. A contract between citizens, however honestly made, cannot prevail as against a statute which prohibits the making of the contract. * * *

When the defendants in error sold the merchandise, the title to which remained by law in Sweet, they became indebted to Sweet for its value. Having sold and converted property which, in law, belonged to Sweet, it obviously follows that they owed him for its value. It is true, the law would not aid Sweet in recovering its value from the defendants in error; for, having acted in the sale in open violation and defiance of a statute, public policy would deny him a remedy, and leave the parties to the legal wrong where it found them. Especially would this be true since the statute in question, under the circumstances of this sale, holds the property for the benefit of Sweet's creditors, and the courts would not aid Sweet to withdraw it beyond their reach. But the plaintiff in error is not in the same attitude as Sweet. Not having participated in the wrongdoing, the law would aid it to recover the fund set apart by statute for creditors. Now the evidence shows that the defendants in error sold the merchandise for at least as much as they agreed to pay for it. In other words, the evidence shows that the defendants in error sold Sweet's property for at least as much as $6,005.97, and at the time the writ of garnishment was served they still were indebted to Sweet in said sum, and the garnishment fastened upon said fund.

The identical question presented here has not been adjudicated by this court in connection with the bulk sales statute. In other jurisdictions the authorities appear to be somewhat in conflict, but the weight of authority is to the effect that, when one purchases merchandise in violation of the bulk sales law, he holds the property, not for himself, but as trustee for the seller's creditors, who may reach the trust fund by writ of garnishment, even though the purchaser has paid full value for the merchandise and has resold it. * * *

For the reasons indicated, the judgment of the Court of Civil Appeals should be reversed, and the judgment of the trial court should be affirmed. * * *

CHAPTER IV

NEGOTIABLE DOCUMENTS OF TITLE

Section
1. Introduction.
2. Definition of a Negotiable Document of Title.
3. Negotiation of Negotiable Documents of Title.
4. Rights of an Indorsee of a Negotiable Document of Title.
5. Rights of the Indorsee Against Indorsers.
6. Rights of Creditors Against Goods Represented by Negotiable Documents of Title.
7. Rights of Transferees of a Non-Negotiable Document of Title.

SECTION 1.—INTRODUCTION

It is highly advantageous, even necessary, for the business community to be able effectively to deal with goods during the time they are in transit or while stored in warehouses. We have already seen that, in order that a sale of goods shall in all respects be binding as against creditors and subsequent purchasers of the seller, there must be a delivery. Obviously, delivery of goods while in transit or while stored cannot be made in any real sense without incurring a good deal of effort. To meet this difficulty the commercial world has found it necessary to use some more or less formal document as a representative of the goods. This document contains the evidence of a contract executed by the person who has possession of the goods and by the persons who owned them. The document discloses the name of the owner of the goods, the bailor, the name of the party in possession, the bailee, and the terms of the contract of bailment. It is this document which may thereafter be made use of with the same legal effect that would follow a dealing with the actual goods themselves. There are some important differences, of course, and these variations will be duly noted in the ensuing sections. A document which may effectively transfer a title to goods is therefore properly spoken of as a document of title. Bills of lading, issued by carriers, and warehouse receipts, are the well-known illustrations of documents of title.

It is to be noticed, however, that our topic here is "negotiable documents of title." It is possible to create a document of title which is not negotiable. But it is not surprising that the business world, thoroughly familiar with advantages resulting from the use of negotiable instruments, should greatly desire that documents of title should likewise possess the attributes of negotiability. We are already familiar with the formal requisites of negotiable instruments payable in money, and of the rights and liabilities of the parties thereto, and we know that all of these numerous rules develop out of the desire to protect purchasers of them to the greatest extent compatible with justice to all other parties. In

our study of the law of sales thus far, particularly Chapter III, it appears that a purchaser of goods assumes a much greater risk in buying goods than he does in buying a note, check, or bill of exchange. The desire was, therefore, to draw upon the principles of the law governing negotiable instruments payable in money, and, in so far as it was possible, to incorporate these rules into the law of sales of goods represented by a document of title, and so we have to-day negotiable documents of title.

The analogy between negotiable instruments payable in money and negotiable documents of title is not perfect. A note or bill of exchange does not transfer title to any specific piece of money. It merely transfers a right to demand money; whereas a bill of lading or warehouse receipt exists primarily for the purpose of transferring title to specific, ascertained goods. While not perfect, the analogy is surprisingly similar. A comparison of the relation of the parties to bills and notes with those to bills of lading and warehouse receipts may be of value. The bailee is the primary obligor; therefore the bailee occupies a position similar to that of the maker of a note or the acceptor of a bill of exchange. As between these two, the bailee perhaps more nearly occupies the position of the acceptor of a bill of exchange—but not that of a drawee, before acceptance. The bailor occupies a position similar to that of the drawer of a bill of exchange payable to the drawer's own order, with this exception—that the bailor's liability, he being the seller, is a primary, and not a secondary or conditional, liability, such as that of the drawer of a bill of exchange. Indorsers and indorsees of both kinds of instruments occupy the same relative positions, although their rights and liabilities are not quite the same.

In the study of this chapter, therefore, it should be realized at all times that the various rules of law here discussed represent attempts to introduce the law of negotiable instruments payable in money into this branch of the law of sales.

SECTION 2.—DEFINITION OF A NEGOTIABLE DOCUMENT OF TITLE

Sales Act, Section 27. A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

This section would make negotiable bills of lading and warehouse receipts, though the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act contain sections of like import. The distinctive characteristics of negotiable documents of title is, therefore, that it must provide that the goods shall be deliverable to the order of a specified person or to bearer. If these words are omitted from a bill of lading, we have what is then known as a non-negotiable or straight bill of lading which cannot be used as

a symbol of the goods. A warehouse receipt which omitted these words would not be effective to transfer title to the goods. Further comment on this section is not necessary, except to note some similarities and differences between negotiable documents of title and negotiable instruments payable in money. As regards the necessity for using the words "or order," or "bearer," we note that the same rule applies.

The words "or order," "or bearer," or words of similar meaning, must appear on the document. Frequently the color of paper used for negotiable bills of lading will differ from that on which the same carrier prints straight bills of lading; but it is the presence of these words which produces the great variation in legal effect between the two kinds of documents.

One variation is to be noted. If an instrument payable in money contained all of the formal requisites of negotiability, but there appeared on the instrument the words "non-negotiable," courts would generally hold that these words would control, and the instrument would be non-negotiable. But if the words "non-negotiable" appear on a negotiable document of title, the words "non-negotiable" are deemed not to control. Section 30 of the Sales Act provides:

"If a document of title which contains an undertaking by a carrier, warehouseman, or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable" or the like.

We have no rule which expressly provides that the document must direct an unconditional delivery to the consignee, but presumably the courts would follow the analogous rule in the law of negotiable instruments—that the promise or order must be unconditional. Such a case as this is not likely to arise, because the forms of bills of lading and warehouse receipts are well standardized. A negotiable instrument must be payable in money; but here, obviously, the very purpose of the bill of lading or warehouse receipt is to transfer title to specified property then in the possession of the issuer of the document, and not to create a right to demand money. No rule expressly requires that the negotiable document of title shall make the goods deliverable within a fixed or determinable future time, as we find in the law of negotiable instruments, but as a matter of fact negotiable documents of title rarely provide that the goods shall be deliverable at any specified time. No provision as to time of delivery is inserted. A negotiable instrument, in which no time of payment is expressed, is

deemed payable on demand, and hence at a determinable future time. This rule by implication governs negotiable documents of title. The rule in the law of negotiable instruments that renders non-negotiable an instrument which contains a promise to do an act in addition to the payment of money would not be followed in the law of negotiable documents of title. The carrier often expressly assumes obligations other than to deliver the goods, for example, to ice perishable goods traveling in refrigerator cars, and to give additional service to live stock. For the most part it is seen that the formal requirements of a negotiable document of title are the same as for negotiable instruments payable in money.

SECTION 3.—NEGOTIATION OF NEGOTIABLE DOCUMENTS OF TITLE

Sales Act, Section 28. A negotiable document of title may be negotiated by delivery:

(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer; or

(b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Sales Act, Section 29. A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Sales Act, Section 32. A negotiable document of title may be negotiated—

(a) By the owner thereof; or

(b) By any person to whom the possession or custody of the document has been intrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the documents has been intrusted, or if at the time of such intrusting the document is in such form that it may be negotiated by delivery.

There are three questions here: (1) As regards the form of indorsement necessary for negotiation; (2) as regards the legal effect of each kind of indorsement; and (3) as regards the persons who have power to negotiate. The same kinds of indorsements used to transfer title to negotiable instruments payable in money are used to transfer title to negotiable bills of lading and warehouse receipts; i. e., the special indorsement, "Deliver to A.," signed by the then holder of the document, and the blank indorsement, consisting only in the signature of the holder. Either of these indorsements, accompanied by delivery, transfers title to the instrument and to the goods, just as the same indorsements, coupled with delivery, transfer title to the instruments and to the legal right to recover money from the party primarily liable thereon. Apparently there is no occasion for the use of the restrictive indorsement, or the conditional indorsement, for the established custom is to transfer the title to the document to banks which are employed to present and collect the amount called for by a bill of exchange drawn upon the buyer for the purchase price and sent along with the bill of lading. The legal effect of the special and blank indorsements, when accompanied by delivery, is the same as in the law of negotiable instruments; i. e., the title to the instrument passes. There is one possible exception. A negotiable document of title, which, on the face of the document, makes the goods deliverable to bearer, will, by virtue of section 28b, be controlled by a subsequent special indorsement; that is, that in any case where a negotiable document of title is transferable by delivery—i. e., when it is made out to bearer, or originally made out to order and became deliverable to bearer by virtue of an indorsement in blank, in both of these cases the subsequent special indorsements changes the character of the bill from a bearer bill to an order bill. In the law of negotiable instruments it seems that an instrument payable to bearer on its face cannot be controlled by subsequent special indorsement.

As regards the persons who have power to negotiate documents of title, it is to be noted that section 32 differs essentially from the corresponding sections in the Negotiable Instruments Law. It will be recalled that the effect of several sections of this law give to a thief or finder of a negotiable instrument payable to bearer the legal power to pass a good title to holders in due course. These sections codified a well-established rule of the common law. Section 32 of the Sales Act, however, provides that the only persons who may negotiate a document are (1) the owner; or (2) a person to whom the possession or custody of the document has been intrusted by the owner. A thief or finder of a negotiable document in form transferable by delivery certainly is not a person intrusted by the owner with the possession or custody of the instrument. Therefore it would seem quite clear that an innocent purchaser of a negotiable document of title running to bearer, under the Sales Act, would get no title to the instrument nor to the

goods. Section 40 of the Uniform Warehouse Receipts Act contains the same language as that which is used in section 32 of the Sales Act. Therefore a thief or finder of a negotiable warehouse receipt would have no power to transfer a title to an innocent purchaser. The Uniform Bills of Lading Act, however, follows out the analogy of the rule in the Negotiable Instruments Law, for section 31 of the Uniform Bills of Lading Act provides that **"a negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery."** While the theft of negotiable documents of title is not so common as the theft of other negotiable instruments, it is important to bear these distinctions in mind. A purchaser of a negotiable warehouse receipt should realize that he is taking a chance that at some place in the chain of title the instrument, if at any time running to bearer, might have been stolen. Of course, he will always have his remedy back against his indorser; but in some cases this may not be as great a degree of protection as he may desire.

There are no provisions in the Sales Act, Warehouse Receipts Act, or Bills of Lading Act which deal with the effect of forgery of negotiable documents of title, and of the names of holders thereof, as directly as these matters are dealt with in the Negotiable Instruments Law. Instances of forgery, either of the carrier's name or holders of genuine bills, are not common. The analogies in the law of negotiable instruments in most instances would be carried out. The forgery of the name of the person to whose order goods are deliverable, or of a special indorsee's name, clearly would pass no title to the innocent transferee.

SECTION 4.—RIGHTS OF AN INDORSEE OF A NEGOTIABLE DOCUMENT OF TITLE

Sales Act, Section 33. A person to whom a negotiable document of title has been duly negotiated acquires thereby: (a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith and for value; and (b) the direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Sales Act, Section 38. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making

the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

In the present section our problem is to ascertain the rights of an indorsee of a negotiable document of title arising out of his ownership of such document. We have already noted the circumstances under which a party in possession of a document of title will be deemed to be the owner of the same. The instrument must have been negotiated to him in one of the ways allowed by law. Granted, then, that a person is owner of the document; what rights against all other people does he acquire thereby? This general problem involves three subordinate inquiries: (1) Under what circumstances will an indorsee be an innocent purchaser for value? (2) Under what circumstances will claims of ownership and all other kinds of claims with respect to the goods, asserted by other persons, be cut off by the negotiation of the document to an innocent purchaser? (3) What rights does an innocent indorsee acquire against the carrier or warehouseman who issued the document?

The first question, as to the circumstances under which an indorsee will be deemed to be an innocent purchaser, need engage our attention but briefly, because such a person must be substantially in the same position that a person must occupy in order to be a holder in due course of a negotiable instrument payable in money. (a) That is, he must take in good faith and without notice of the claim of the third party. The element of good faith, or conversely, what constitutes bad faith, was sufficiently treated in the law of negotiable instruments. (b) He must be a purchaser, not a donee. But just as we found to be true in negotiable instruments, a person will be a purchaser when he has parted with value, and value is defined in section 76 of the Sales Act as **"any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefore."** A donee, or a transferee with notice from an innocent purchaser, would be an innocent purchaser unless he participated in the fraud.

The second question, as to the circumstances under which the claims of others with respect to the goods will be cut off, opens up a broad field of possibilities. At the start, one matter should be noted by way of comparison with the rights of a holder in due course of negotiable instruments payable in money. We there found that in the hands of a holder in due course two very different kinds of rights possessed by third parties were cut off; i. e., equities of defense and equities of ownership. Equities of defense were, from a practical standpoint, more important than equities

of ownership. That is, we found that usually, when the holder in due course was suing the maker or acceptor, the defendant was attempting to set up a defense which undoubtedly would have been available to him, had he been sued by the party with whom he dealt, but that such defenses, usually lack of consideration, fraud in the inducement, payment or breach of contract, etc., were shut out when he was sued by a holder in due course. Occasionally some person will assert against the holder in due course an equity of ownership, and we found that these equities were likewise shut out in the hands of the holder in due course. The point worthy of observation here is that equities of defense more commonly arise in connection with negotiable instruments payable in money than do claims of ownership. Just the converse is true in connection with negotiable documents of title. Equities of defense are seldom asserted, but claims of ownership continually arise. So in looking at our second question we are concerned largely with claims of ownership in the goods asserted by other parties. When will these claims be cut off?

When the bailor actually obtained a negotiable document, and did not deposit any goods, obviously the innocent indorsee will obtain no goods. This situation arises in this way: A person may intend to deliver the goods to a carrier, and upon making this representation will induce the agent to issue the bill of lading. Later events may make it impossible to deliver, or the bailor may have acted fraudulently. It is clear that the indorsee of the document can acquire no title to the goods. But may he hold the carrier liable? May the defense which the carrier clearly has against the procurer of the document be asserted against the innocent indorsee? Generally not. The carrier will be liable to the holder of the bill. This defense is not available as against the innocent holder—it being a personal defense. At common law there was a conflict of authority on this point. Those courts which held that the carrier could set up the defense of non-receipt of the goods against the innocent holder allowed it upon the theory that the defense was a real defense; the execution and delivery of the document by the carrier's agent being regarded as entirely an unauthorized act, tantamount to a forgery of the carrier's name. The Uniform Bills of Lading Act now throws the loss upon the carrier. This section is as follows:

Section 23. If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to the consignee found in a non-negotiable bill or the holder of a negotiable bill.

Notice that this section is limited to cases where the bill was issued by an agent whose actual or apparent authority included the issuance of bills of lading. If the bill were issued by a switchman, the indorsee would acquire no rights against the carrier. A warehouseman would be under a liability of similar scope. This

section would throw the liability on the carrier in a case where some of the goods were received, but not as many as were called for by this bill of lading. This situation may easily arise. A shipper of grain may declare that there were 500 bushels, when in reality there were but 400. The carriers may, however, avoid this liability by inserting in the bill of lading the words "shipper's load and count." This statement relieves the carrier from liability for damages caused by improper loading or by non-receipt of the goods. Section 23 of the Uniform Bills of Lading Act authorizes this stipulation to be made and prescribes its effect.

Assuming, now, that goods were in fact delivered over to the carrier or warehouseman, and a negotiable document issued for them; are there any circumstances under which the holder of the document will have a claim inferior to that of third parties? Obviously there are such cases. If the bailor had stolen the goods, he could not by the simple device of depositing them and procuring a negotiable receipt obtain the power to cut off the claims of the true owner. The indorsee will lose in this case. The case of theft will not be common, but we know that there are a great many situations where a person may have possession of goods, but will not have the power to transfer a good title to a purchaser. In this connection we should recall the subject-matter of Chapter III. We there found that in some cases a person, although not the owner of goods, did possess the power to transfer title to an innocent purchaser. This power is not nearly so extensive as is the power to transfer title to money and negotiable instruments payable to bearer. In fact, the presumption is all against the existence of such power. Still, if the seller had a voidable title, or was in possession of goods already sold, or where there was some element of estoppel against the true owner, a party, though not the owner, will have power to pass title to an innocent person. It is then to be noticed that the introduction of the negotiable document of title does not change this general situation in the slightest degree. Section 33, above quoted, states that the title acquired by the indorsee will be (1) the title which the person negotiating the document had or (2) had ability to convey. A person will have ability to convey title in cases where he is not owner, only in those situations which were discussed in Chapter III.

Complications of great difficulty arise at this point. The problem of ascertaining the respective rights of the holder of the document and of some other claimant is not always easy of solution. In the first case presented, Commercial Bank v. J. K. Armsby Co., a pledgee bank was protected. In the two cases following Commercial Bank v. J. K. Armsby Co. a type of business transaction is presented which is of considerable importance, particularly in connection with the import and export trade. All manner of difficulty may arise therefrom, depending upon the nature of the "accident" which has plunged the parties into litigation. These two cases by no means exhaust the possibilities, but they are in-

serted here, first, because of the commercial importance of the transaction involved; and, second, because they vividly reveal the inherent difficulty in balancing the rights of the various parties who may become concerned therein.

The situation may be called generally "the trust receipt transaction." An importer desires to import a cargo of goods. His capital is limited. He does have credit. He arranges with a bank either to accept bills of exchange drawn by the foreign exporter, and the bank will issue a letter of credit, or in some way will bind itself to pay the price to the foreign exporter. The cargo is shipped, usually under negotiable documents of title, and finally the bill of lading, accompanied by the bill of exchange, will be presented to the bank which has undertaken to finance the transaction for the importer. The bank pays the exporter, and the banks which represented him drop out. The other bank holds the importer's note and the bill of lading. So far this bank is the only party who has parted with any money in connection with the transaction. The bank does not expect to sell these imported goods, but eventually it expects to transfer the possession to the importer, who is chiefly interested in the shipment. The bank is interested in the deal only to the extent that it desires reimbursement of the funds advanced and a legitimate profit. But the importer has no funds, and cannot pay until he sells the goods which were imported. So the business problem which confronts the bank is how to enable the importer to dispose of the goods, and at the same time retain a sufficient hold upon the goods, and upon the proceeds arising therefrom, to protect the loan to the importer.

There are various possibilities open. The bank may surrender the bill of lading unconditionally, trusting to the importer's general credit. Here, of course, there is no special protection whatever, except that which any general creditor has. Second, the bank could transfer the bill of lading and require a mortgage back. But this solution may be hedged with difficulty. Obviously the mortgage must carry a power of sale to the importer; otherwise he could not sell the goods. The mortgage would be of no value to the bank as soon as the goods were sold, unless the mortgage covered the proceeds arising from the sale. Furthermore, many banks will not have power to take a chattel mortgage, and, even if they did, the mortgage would not create an effective hold upon the money derived from the sale, for money may be disposed of to other creditors of the importer, in which case the bank's protection is gone, except in so far as such payments operate as recoverable preferences in bankruptcy.

Perhaps there are other possibilities, but the policy usually adopted by the bank is to deliver the bill of lading to the importer in exchange for what is known as a "trust receipt" executed by the importer. This trust receipt may be executed for various purposes. In the first place the importer may desire to obtain the bill of lading merely for a temporary purpose, such as getting the

goods through the custom house, leaving for a later transaction the arrangements under which a final sale by the importer may be made. Or the trust receipt may permit a sale only to a particular person. Whatever the reason for the delivery of the bill of lading to the importer may be, if there be restrictions imposed upon the importer's use of the bill of lading, we have a case where the holder of the bill has intrusted the possession of the same to a person who has but a limited legal right thereto; but he has a legal power to dispose of the bill which is considerably broader than his legal right so to do.

COMMERCIAL BANK v. J. K. ARMSBY CO.

(Supreme Court of Georgia, 1904. 120 Ga. 74, 47 S. E. 589, 65 L. R. A. 443.)

Action by the J. K. Armsby Company against the Commercial Bank. Judgment for plaintiff, and defendant brings error.

CANDLER, J. The J. K. Armsby Company, an Illinois corporation, shipped to Walton & Carr, their brokers in Augusta, a quantity of salmon for distribution to different parties to whom the goods had been sold. Walton & Carr were merely agents of the Armsby Company, and had no right or title to the salmon. The goods were shipped from a point in Oregon, by parties from whom they had been ordered by the Armsby Company, on a through bill of lading to Augusta, and were consigned to the order of the consignor, with directions to notify Walton & Carr. The Armsby Company sent Walton & Carr a check for the amount of the freight, which was paid, and it also mailed them the original bill of lading, which was indorsed blank. Carr, a member of the firm of Walton & Carr, took the bill of lading to the Commercial Bank of Augusta, and hypothecated it for a loan of money. Shortly thereafter Walton & Carr failed, and the bank converted the salmon for the payment of its debt, whereupon the Armsby Company brought against it the present suit, which was an action of trover. The case was tried before the judge of the city court of Richmond county, without a jury. * * * It was admitted that neither the bank nor any of its officials knew or had reason to suspect that Carr had no right to convey the salmon, and that, in the event the bank should be held liable, the proper amount to be recovered was $700. The judge found in favor of the plaintiff, and rendered judgment in its favor for the amount mentioned. The defendant excepted. * * *

The sole question for our determination, then, is, does a bill of lading of the character of the one involved in this suit constitute such an external indicium of the right of disposing of the property for which it was issued as to bring the case within the operation of the rule laid down in the Code. As a general rule, the transferee of a bill of lading can obtain no better title to the goods which it covers than that which was in the person by whom it was transferred. Indeed, it is a self-evident proposition that no man can convey that which he does not possess. But the true owner of property may, by placing it in the power of another to defraud innocent purchasers by an apparently valid transfer of the property, cut himself off from claiming it, and thereby divest the title from himself. In 4 Am. & Eng. Enc. L. (2d Ed.) 551, it is said that an important exception to the general rule

which has already been stated "arises in the case of the transfer of a bill of lading to a bona fide purchaser for value by a consignee to whom the goods are by the terms of the instrument made deliverable, or to whom the consignor and original owner of the goods has indorsed and delivered the bill. It seems to be established that in this case the transfer defeats the vendor's right of stoppage in transitu, and passes the title to the goods to the bona fide transferee." * * * While a bill of lading is not in the full sense a negotiable instrument, it is treated by universal commercial usage as a symbol of the goods for which it is issued, and consequently it is in a measure negotiable. * * *

The following language from the opinion of Mr. Justice Miller in the case of McNeal v. Hill, Woolw. 96, Fed. Cas. No. 8,914, is there quoted with approval: "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent, invention of like character, for the transfer, without the cumbersome and often impossible operations of actual delivery, of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are sui generis. From long use and trade they have come to have among commercial men a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale."

In this case there was no dispute as to the general custom of trade in regard to bills of lading of the character of the one negotiated by Carr with the Commercial Bank. It was the daily practice of banks in Augusta and elsewhere to advance money on such security, for possession of the bill of lading was regarded as prima facie evidence of the title of the holder to the goods of which the bill was the symbol. Ordinarily bills of lading of this kind are attached to drafts for the purchase price of the goods, and can only be obtained by payment of the drafts. Carr's possession of the bill of lading was therefore prima facie evidence that he had paid a draft drawn by the consignor, and was entitled to the property. * * *

Judgment reversed. * * *

ROLAND M. BAKER CO. v. BROWN et al.

(Supreme Judicial Court of Massachusetts, 1913. 214 Mass. 196, 100 N. E. 1025.)

Action by the Roland M. Baker Company against Waldron P. Brown and others. There were findings for defendants, and plaintiff brings exceptions.

Tort to recover for the alleged conversion of 120 bales of hides which plaintiff claimed to own by reason of a bill of lading which it had received from the Columbia Leather Co.

SHELDON, J. This case seems to have been dealt with, both at the trial and at the argument in this court, largely as if the plaintiff's rights depended upon the title which it acquired when the bill of lading for the goods in question, with the indorsements thereon, was de-

livered to it. If that were so, it might be found, as was found at the trial, that the plaintiff took the bill of lading with notice of the defendants' claim to the goods represented thereby and of the trust receipt which the defendants had taken from the Massachusetts Hide Company, and so was not a purchaser in good faith and without notice of the breach of duty of the Hide Company in violating the terms of that trust receipt. But that point is not decisive of the case. The plaintiff had, or there was evidence that it had, purchased the hides of the Columbia Leather Company; and if so, the plaintiff, whatever notice or knowledge it may have had of the defendants' rights, yet acquired all the rights of its vendor. * * *

The testimony was that the Columbia Company took these hides from the Massachusetts Hide Company in payment of a debt due to it from the Hide Company. The defendants had held this bill of lading, and the goods mentioned therein were to be delivered to their order, in consequence of their having issued to the Hide Company a letter of credit, upon which the hides had been purchased in Russia, and shipped to Boston. The defendants had paid or caused to be paid the drafts drawn under their letter of credit for the price of the hides, and bills of lading for the hides had been issued in triplicate, all of which were originals and "one of which being accomplished, the others [were] to stand void." The defendants were accordingly the absolute owners of the hides. * * *

The defendants then, before the arrival of the hides, but after they had received the bills of lading, wrote upon the back of the first of the triplicate bills the indorsement signed by them, "Deliver to Massachusetts Hide Corporation," and on August 11th delivered it to a clerk of that company. This they did upon the representation of that company that it wished to arrange for the custom-house entry in advance of the arrival of the ship, with the understanding and intention of both parties that the Hide Company should take the bill merely as the agent of the defendants, and without any design to pass to the Hide Company the title either to the bill of lading or to the goods which it represented, but with authority to sell the same to one Baker whom the Hide Company falsely represented that it had obtained as a purchaser thereof. At the same time with the bill of lading, the defendants handed to the Hide Company a "trust receipt," to be properly filled in and signed and returned to the defendants. This was done, and the trust receipt was returned to the defendants a few days later signed by the Hide Company and by its treasurer. By this receipt, the signers acknowledged that they had received from the defendants the hides "in trust to deliver the same to R. M. Baker, who have [sic] purchased the same and to obtain form the purchaser the proceeds of the sale of the same," and to deliver immediately such proceeds to the defendants. This trust receipt provided also that the defendants might at any time cancel the trust and take possession of the goods or the proceeds thereof.

By this transaction, under the common law as declared by our decisions, the title to the hides remained in the defendants; the Hide Company had no power to dispose of them in any other way than by a sale to Baker; and no one else could by a purchase from the Hide Company or by any dealings with it acquire a title to the hides which would be good against the defendants. The bill of lading merely represented the goods themselves; the Hide Company had no greater right, and could pass to any purchaser other than Baker no greater right,

than if its possession with this limited authority had been of the goods themselves instead of the bill of lading which was their representative. * * *

But before any of these transactions took place our Uniform Bills of Lading Act (St. 1910, c. 214) had been passed. Section 5 of that act provides that "a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill." By section 29, "a negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person." By section 32, any one to whom a negotiable bill has duly been negotiated acquires thereby "such title to the goods as the person negotiating the bill to him had, or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had, or had power to convey to a purchaser in good faith for value." By section 38, "the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress or conversion." And section 39 further adds that "where a person having sold, mortgaged or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation."

The effect of the statute has been to change fundamentally the rights of parties to transactions within its purview. In the present case if the statute applies to it, when the defendants delivered their bill of lading to the Hide Company, with their unconditional and unlimited indorsement thereon, they intrusted their property to the honesty of that company and relinquished their right to set up their title against any one who might in good faith, for value, and without notice of the duty which rested upon the Hide Company, purchase from that company the goods described in the bill and take from that company a delivery of the bill itself duly indorsed by it. The previous decisions of this court, by which the defendants were protected against the consequences of their agent's breach of duty, have been abrogated and nullified by the statute. As is said in Williston on Sales, § 437, the statute "renders unsafe what has doubtless been a common practice of bankers—the intrusting of the documents for a special purpose to the pledgor of them or the proposed buyer of the goods." The Columbia Company seems from the findings of the judge to have made, or at any rate it could be found to have made and there is no finding that it did not make, its purchase from the Hide Company in

good faith and without notice of any limitation upon the authority or any breach of duty of the Hide Company. It gave value for its purchase. The statute provides (section 53) that "an antecedent or pre-existing obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor." If the statute applies to this case, the plaintiff's exceptions must be sustained. The case then, must be governed by the decisions which either were made upon statutes resembling more or less closely the one which we are considering, or independently of statutes have adopted the rule thereof, instead of the one laid down in our former decisions. * * *

It follows from what has been said that the Columbia Company by its purchase from the Hide Company and the indorsement and delivery of the bill of lading acquired as against the defendants a good title to the hides, and that title passed to the plaintiff by its purchase from the Columbia Company. The act of the defendants in obtaining the hides from the carrier by means of the second bill of lading was, as to the plaintiff, wrongful and having been done under a claim of right, constituted a conversion, for which they became liable to the plaintiff; and no demand was necessary before bringing the action. * * *

Nor can the defendants be heard to claim that the first bill of lading had become a spent document, upon the ground that before the plaintiff received that bill the carrier had delivered the hides to the defendants upon the second original bill of lading, which had remained in their possession. It may be that the carrier was justified in making this delivery, and that the plaintiff could not have maintained any action against the carrier therefor. * * * But it was none the less, as to all parties claiming under the first bill, which the defendants had indorsed and allowed to be put into circulation, a delivery wrongfully obtained by the defendants. * * *

Exceptions sustained.

Suppose, in the preceding case, that the person to whom was intrusted the negotiable document of title, instead of negotiating it, had surrendered the bill to the carrier, obtained actual possession of the goods, and had then sold the goods; would the purchaser be protected against the claim of the holder of the trust receipt? Is the possession of the goods themselves to be deemed a representation by the owner—in this case the holder of the trust receipt—that the party in possession of the goods has power to dispose of them. It is possible to say that such person is now in the position of an ordinary bailee, and therefore has no such power. It is possible to reach a contrary result by saying that the trust receipt evidences a conditional sale. In some states the holder of the trust receipt, the conditional vendor, would be protected; in others he would not be, for there is a conflict in the authorities as to whether the conditional vendor or the purchaser from the conditional vendee shall be protected. Many states have statutes requiring the recording of conditional sales contracts to render them effective against creditors and purchasers of the con-

ditional vendee. In such states the holder of the trust receipt would be protected if the instrument were recorded, but he would not be protected if it were not recorded. A slight variation in the facts would also change the result.

Suppose that, after obtaining possession of the goods, the goods are stored in a warehouse, and negotiable warehouse receipts procured, all without authority from the holder of the trust receipt, and then suppose the warehouse receipt is negotiated to an innocent holder; would this purchaser obtain title good against the holder of the trust receipt? This would depend entirely upon whether the depositor of the goods in the warehouse had power to sell the goods. A person who, being intrusted with a negotiable document of title, while he has power to pass a good title to the document to an innocent purchaser will not necessarily have such a corresponding power to sell the goods, if in breach of his duty he attempts to sell them. In this connection would section 20(4) add to the power of the bailee in possession of the goods. A clause therein provides that, where the seller sends the negotiable bill of lading, accompanied by a draft, directly to the buyer, he acquires no added right if he wrongfully dishonors the bill. The section then adds: "If, however, * * * one who purchases in good faith, for value, the bill of lading or goods from the buyer will obtain the property in the goods."

The next case presents a situation involving a re-deposit of the goods and a negotiation of the document to an innocent holder.

COMMERCIAL NAT. BANK OF NEW ORLEANS v. CANAL-LOUISIANA BANK & TRUST CO. et al.

(Supreme Court of the United States, 1916. 239 U. S. 520, 36 Sup. Ct. 194, 60 L. Ed. 417, Ann. Cas. 1917E, 25.)

HUGHES, J. This is a controversy arising in a bankruptcy proceeding. The Commercial National Bank of New Orleans petitioned the district court for the recovery from the trustee in bankruptcy of certain bales of cotton alleged to have been held by the bankrupts, Dreuil & Company, for the account of the petitioner under trust receipts. The Canal-Louisiana Bank & Trust Company defended, presenting its reconventional demand based upon a claim of superior title. The district court entered a decree in favor of the Canal-Louisiana Bank & Trust Company, which was affirmed by the Circuit Court of Appeals.

The controversy arises from the following transactions which were had prior to the bankruptcy. On December 9, 1912, Dreuil & Co., holding inland bills of lading for two lots of cotton (40 bales and 60 bales respectively), pledged the bills of lading with the Canal-Louisiana Bank to secure certain promissory notes for moneys advanced. On December 13, 1912, the bills of lading were withdrawn from the Canal-Louisiana Bank on trust receipts, as follows:

"Received of Canal Bank & Trust Company the bills of lading or other documents or securities as enumerated below, held by the said bank as collateral pledged to secure advances made to the undersigned,

and in consideration thereof, the undersigned hereby agrees to pay over to the said bank or its assigns, and to specifically apply against the very same advances the proceeds of the sale of the property mentioned in the said documents; or to deliver to the said bank or its assignees the shipping documents or warehouse receipts representing the undermentioned goods within one day from the receipt thereof, this delivery being temporarily made the undersigned for convenience only, without novation of the original debt, or giving the undersigned any title thereto, except as trustee for the said bank, and except to receive the avails thereof or the documents therefor for account of the said bank."

Dreuil & Co., surrendering the bills of lading to the railroad company, obtained delivery of the cotton and sent it to a "pickery," where the lot of 40 bales was remade into 60, and the lot of 60 bales into 90. Dreuil & Co. then stored the cotton with a warehouseman, the Planters' Press, receiving two negotiable warehouse receipts which, on December 17, 1912, they pledged to the Commercial Bank as security for their notes. On December 20, 1912, and December 28, 1912, these warehouse receipts, respectively were withdrawn by Dreuil & Co. from the Commercial Bank on trust receipts similar in tenor to those which had been given as above stated, to the Canal-Louisiana Bank. Dreuil & Company then obtained a delivery of the cotton from the Planters' Press; on December 31, 1912, they were adjudicated bankrupts and temporary receivers were appointed. It appears that 60 of the bales had been disposed of, but the remainder of the cotton, which had been sent by Dreuil & Co. to a steamer for shipment, was recovered by the receivers and placed by them in the Planters' Press, warehouse receipts being issued therefor which passed into the possession of the trustee. Despite the changes mentioned, and re-markings (which we need not consider), the District Court found the identity of the cotton to be established, and there is no further controversy upon that point. Nor is it controverted that the Commercial Bank was a purchaser in good faith for value of the warehouse receipts negotiated to it.

We assume that under the jurisprudence of Louisiana the transaction between Dreuil & Co. and the Canal-Louisiana Bank (described by the bank as a pledge) created rights in the bank in the nature of ownership for the purpose of securing its advances * * * (Uniform Bills of Lading Act, § 32), and that when the Canal-Louisiana Bank intrusted the bills of lading to Dreuil & Co. for the purposes described in the trust receipts, given to that bank, it could still assert its title as against Dreuil & Co. and their trustees in bankruptcy. * * * The bills of lading were not negotiated; they served their purpose, being surrendered to the railroad company on the delivery of the goods to Dreuil & Co. The transactions with the "pickery" are not material to the question to be decided. Dreuil & Co. having obtained possession of the cotton, as was contemplated, placed it in store and the question is as to the effect of the negotiation of the warehouse receipts to the Commercial Bank.

It is a familiar rule that one who has no title to chattels cannot transfer title unless he has the owner's authority or the owner is estopped. * * * It follows that, in the absence of circumstances creating an estoppel, one without title cannot transfer it by the simple device of warehousing the goods and indorsing the receipts. But if the owner of the goods has permitted another to be clothed with the apparent

ownership through the possession of warehouse receipts, negotiable in form, there is abundant ground for protecting a bona fide purchaser for value to whom the receipts have been negotiated. * * *

It will be observed that "one who takes by trespass or a finder is not included within the description of those who may negotiate." Report of Commissioners on Uniform State Laws, January 1, 1910, p. 204. Aside from this, the intention is plain to facilitate the use of warehouse receipts as documents of title. Under section 40, the person who may negotiate the receipt is either the "owner thereof," or a "person to whom the possession or custody of the receipt has been intrusted by the owner" if the receipt is in the form described. The warehouse receipt represents the goods, but the intrusting of the receipt, as stated, is more than the mere delivery of the goods; it is a representation that the one to whom the possession of the receipt has been so intrusted has the title to the goods. By section 47, the negotiation of the receipt to a purchaser for value without notice is not impaired by the fact that it is a breach of duty, or that the owner of the receipt was induced "by fraud, mistake, or duress" to intrust the receipt to the person who negotiated it. And, under section 41, one to whom the negotiable receipt has been duly negotiated acquires such title to the goods as the person negotiating the receipt to him, or the depositor or person to whose order the goods were deliverable by the terms of the receipt, either had or "had ability to convey to a purchaser in good faith for value." The clear import of these provisions is that if the owner of the goods permits another to have the possession or custody of negotiable warehouse receipts running to the order of the latter, or to bearer, it is a representation of title upon which bona fide purchasers for value are entitled to rely, despite breaches of trust or violations of agreement on the part of the apparent owner.

It cannot be doubted that if Dreuil & Co. had pledged to the Commercial Bank the bills of lading which they withdrew from the Canal-Louisiana Bank under the trust receipts, the former, paying value in good faith, would have had the superior right. This would have been directly within the terms of the Uniform Bills of Lading Act. * * * It seems to be contended that the case is different with the warehouse receipts. But it cannot be said that it was not within the contemplation of the parties that Dreuil & Company, on obtaining the goods from the railroad company, should put them in warehouse and take the usual receipts. As we have stated, we are not concerned with what happened at the "pickery," as the case is precisely the same, so far as the Commercial Bank is concerned, as if the original bales had been warehoused (without remarking) as soon as received. It was not the placing of the cotton in warehouse in the usual course of business, but the negotiation of the receipts, that constituted the violation of Dreuil & Co.'s agreement with the Canal-Louisiana Bank. By the very terms of that agreement Dreuil & Co. were to take the position of "trustee" for the bank, with authority to receive "the avails" of the goods or "the documents" therefor for account of the bank, and being bound to apply the proceeds of sale to the bank's advances. And in taking documents of title, in ordinary course, pursuant to the agreement, which was intended to facilitate the disposition of the cotton through Dreuil & Co., the latter were manifestly permitted to take such documents to their own order, as they took the bills of lading with which they were intrusted. To repeat, it was the negotiation of the receipts

that constituted the breach of trust. But after the Canal-Louisiana Bank had allowed Dreuil & Co. to be clothed with apparent ownership through possession of the receipts, it cannot be heard to question the title of a bona fide purchaser for value to whom they had been negotiated. * * *

It is said that under the law of Louisiana, as it stood prior to the enactment of the Uniform Warehouse Receipts Act, the Commercial Bank would not have taken title as against the Canal-Louisiana Bank. * * * and it is urged that the new statute is but a step in the development of the law, and that decisions under the former state statutes are safe guides to its construction. We do not find it necessary to review these decisions. It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the Uniform Warehouse Receipts Act expressly provides (section 57): "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the uniform act, and that it should not be regarded merely as an off-shoot of local law. The cardinal principle of the act—which has been adopted in many states—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the states dealing with such documents, but there still remained diversity of legal rights under similar commercial transactions. We think that the principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it; and, in this view, we deem it to be clear that, in the circumstances disclosed, the Commercial Bank took title to the warehouse receipts and to the cotton in question.

Finally, it is insisted that whatever right the Commercial Bank might have had, if it had retained the warehouse receipts, it lost as against the Canal-Louisiana Bank by permitting Dreuil & Co. to withdraw the documents under the trust receipts which they gave to the Commercial Bank; that is, that as the cotton came into the possession of Dreuil & Co., the equities of the two banks are equal, and the earlier equity should prevail. We think that this contention begs the question. The Commercial Bank did not lose its rights by permitting the withdrawal of its warehouse receipts under the agreement to hold for its account, any more than the Canal-Louisiana Bank lost its rights merely by the withdrawal of the bills of lading under its trust receipts. It was because the Canal-Louisiana Bank clothed Dreuil & Co. with the indicia of ownership that a bona fide purchaser for value was enabled to take title; and a similar result would have followed if, after the withdrawal of the warehouse receipts from the Commercial Bank, there had been a like negotiation by Dreuil & Co. But there was no subsequent negotiation, and the Commercial Bank, in the absence of the intervention of a purchaser in good faith for value, did not lose its rights by the agreement under which the cotton which it had duly

acquired was to be held for its account. There is no equality of equities, for it was through the action of the Canal-Louisiana Bank and the apparent ownership it created in Dreuil & Co. that the Commercial Bank was led to advance its money upon the faith of the documents of title.

The decree is reversed and the cause is remanded, with direction to enter a decree in favor of the appellant.

Before leaving the subject of trust receipts, let us examine briefly one further situation. The holder of the trust receipt has delivered the bill of lading, and authorized the holder of the bill, the buyer, to obtain possession of the goods, and has authorized him to sell the goods in the regular course of trade. But the trust receipt provides that the proceeds arising from the sale of the goods shall be held in trust for the holder of the trust receipt. Suppose the buyer becomes bankrupt; may the holder of the trust receipt claim the whole of this fund, or must such holder share with all other creditors? The bankruptcy of the buyer is the very contingency which the bank desired to protect itself against, and to bring about this result attempted to create a trust. It will be recalled that property held in trust by a bankrupt does not constitute a part of his assets. The beneficiary may claim it, and is not forced to share with general creditors. The parties have called this a trust, and it would seem, therefore, that the holder of the trust receipt would be protected, and many courts so hold. But calling a thing a trust will not make it so. The term "trust" is descriptive of certain legal relations existing between a person called a trustee and a person called a beneficiary or cestui que trust. A horse may be called a race horse, but calling him such gives him no capacity to run fast. So it is possible that the trust receipt does not evidence a real trust. Some courts take this view. Which view was stated by the Supreme Court of the United States in its opinion in the Canal Bank case to be correct?

Enough has been said to show the general nature of these problems, although there are many situations which have not been adverted to. Where a person is financing transactions involving considerable risk, the plan of handling them should not be adopted without obtaining the judgment of able counsel, who have had the opportunity of making a searching investigation into the matter. from the standpoint of the local law.

This closes the discussion as to question 2, heretofore raised, as to the circumstances under which the negotiation of a negotiable document of title cuts off claims of third parties, and we have seen that the indorsee does take some risk. In some cases he will acquire no title, although the rules go quite far in protecting him.

The third question concerns the rights of the indorsee against the carrier. We have already noted the circumstances under which a carrier will be liable to the indorsee where the carrier received

no goods. Will the carrier or warehouseman be liable to the indorsee in the event that goods were received, but not owned by the bailor? Obviously, it would seem, the bailee should not be liable; and this is the law. This defense of the carrier may be regarded as a real defense. So, also, as regards the kind or quality of the goods shipped. The carrier will not be liable to the indorsee for the seller's breach of contract, except where the bill of lading misdescribed the goods under circumstances where the carrier should have known that the statement was not true. If the goods are lost or damaged in transit, generally the carrier will be liable, but not always. The liability of a carrier for loss or damage to goods opens up a broad subject, which we adverted to briefly in Chapter XI of Contracts. If the carrier delivers the goods to the buyer without requiring the surrender of the bill of lading, and if at the time the negotiable bill is held by another party, may the holder of the bill recover from the carrier for its wrongful delivery?

Before taking up the next case, it may be mentioned that, where goods are sent under negotiable bills of lading, the usual practice is to take out a bill running to the order of the seller. It is very desirable that the buyer be assured of prompt notice of the arrival of the goods, so that he may go to the bank, pay the bill of exchange, and procure the bill of lading. The only way to insure the giving of such notice is for the buyer's name to appear on the bill of lading to the carrier and to notify such party. The practice, therefore, is to insert in the bill of lading the words "Notify A."—A. being the buyer. Is a carrier justified in delivering the goods to the "notify party" without obtaining the bill of lading?

CANANDAIGUA NAT. BANK v. CLEVELAND, C., C. & ST. L. RY. CO.

(Supreme Court of New York, Appellate Division, 1913. 155 App. Div. 53, 139 N. Y. Supp. 561.)

Action by the Canandaigua National Bank against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals.

LAMBERT, J. This action involves the value of a car load of apples, shipped from Farmington, N. Y., to Terre Haute, Ind. The shipment originated upon the Lehigh Railroad, and the defendant was the delivering carrier. The apples were loaded by the Manchester Produce Company, which concern owned the fruit, having collected and purchased same in the vicinity of Farmington.

Through a pre-existing arrangement, this fruit was to be shipped to John W. Neumann & Co., a copartnership, which was to market the apples, first remitting to the Produce Company the cost price thereof, and ultimately the Produce Company and Neumann & Co. were to share equally in any profits of the venture. Similar practices had been engaged in by these two business concerns prior to this particular shipment. At the request of Neumann & Co. and in pursuance of prior arrangements, and for the purpose of facilitating the market-

ing of these apples, this car was billed out as though Neumann & Co. were the shippers. They were named in the bill of lading as consignors. As between these two concerns, at least, this manner of shipment was not intended to evidence any change of title to the property, but was merely adopted for convenience. The actual title to the apples still remained in the Produce Company.

In the bill of lading, the consignees were named as follows: "Order John W. Neumann & Co. Notify Dan Case." * * *

After initiating this shipment and receiving this bill of lading, the Manchester Produce Company attached to the bill of lading a draft, drawn upon Neumann & Co. for the cost price of these apples, and then sold the draft and bill of lading to the plaintiff. The draft and bill of lading were in the due course of business presented for payment to Neumann & Co., and such payment was refused, upon the claim made that the Produce Company was then largely indebted to Neumann & Co.

Upon the arrival of this car at destination, the defendant, upon the written order of Neumann & Co., delivered same to "Dan Case," who was named therein to be notified of its arrival without requiring the production, indorsement, or surrender of the bill of lading. Upon this state of fact plaintiff brings this action for conversion. It must be conceded that the defendant breached the contract of carriage by not complying with its provisions, and, further, that conversion is the proper remedy, if any exists in plaintiff. The sole question presented, of consequence, is whether plaintiff is in a position to assert the contract obligation of the bill of lading as against the defendant.

This manner of shipping property has the sanction of usage, and, based upon the carrier's agreement to require the surrender of the original bill of lading, a commercial practice has become established, whereby the shipper is enabled, through banking institutions, to secure the value of the property consigned, in advance of its delivery at destination by the sale or pledge of the bill of lading. Such sale or pledge, in effect, secures the value advanced by pledging the property represented thereby. Such a course of commercial dealing has long had the sanction of our courts. It has been uniformly held that the transfer of the bill of lading transfers the title to the property represented thereby, and that such transfer of the bill of lading may be by mere delivery thereof when such is the intention. * * * It is also well settled that the bill of lading is valid and enforceable in the hands of a bona fide transferee in all its terms and provisions. * * *

The only question remaining is whether the sale by the Manchester Produce Company to plaintiff transferred any title. We can discover no reason why it did not. The Produce Company was concededly the owner of the apples. It had bought and paid for them. It had not transferred the title to any other person, and its right to effect a sale thereof was unlimited except that such sale was required to be subject to its contract for the transfer of such title to Neumann & Company, upon payment of the draft. The title of the Produce Company being complete, there was no restriction upon its right to sell the same, and that object was accomplished by the transfer of the bill of lading. The bank was then in a position to insist upon all the carrier's obligations, as expressed in the bill of lading.

Nor does the fact that the Produce Company named Neumann & Co. as consignors have any effect upon the status of the parties. Such

fact did not work to the detriment of the carrier in any manner, and hence no estoppel could arise. The bill of lading makes no restriction upon the shipment in the name of the consignee instead of the consignor. Under its plain provisions, even if Neumann & Co. had actually initiated the shipment, its obligation to require the surrender of the bill of lading remained unchanged. Under such circumstances, the rights of third parties were just as likely to intervene shipment and delivery. In fact, it is not an infrequent practice for the consignor of goods to ship them to his own order, with an accompanying direction to notify third parties, and then to dispose of the bill of lading to banking institutions, as was done in this case, thus securing his money for the shipment in advance of its delivery. * * * It will thus be seen that the naming of Neumann & Co. as consignors did not affect the contract obligation of the carrier. The only safe course for the carrier was to observe its contract. By so doing it could sustain no loss, while by its violation it would necessarily defeat the intervening property rights of third persons, who might deal with the bill of lading, upon the faith of the agreement of the carrier to require its production before making delivery. This is equally true, whether the railroad supposed Neumann & Co. to be the consignors or not. It cannot be said that the delivery in this instance was induced, in any way, by the manner in which this shipment was made. The carrier chose to violate the plain obligation it had assumed and with entire disregard to the rights of the plaintiff. Because of such delivery the defendant was unable to surrender the property to the plaintiff and a conversion thereby arose, for which the defendant should be held liable.

The judgment appealed from should be affirmed.

In the above case, such delivery was wrongful. The holder of the bill of lading could have recovered possession of the goods from the person to whom the carrier made delivery. If the goods are delivered to a person, who at the time was lawfully in possession of the bill of lading and entitled to delivery, but without requiring surrender of the bill of lading, such person would thereby obtain power to transfer title to the goods; that is, if the goods were sold to one person and the bill of lading subsequently negotiated to another person, in this case, the indorsee of the bill would get no title to the goods, but such holder could hold the carrier liable for making delivery without requiring surrender of the bill of lading. This rule is recognized in section 14 of the Uniform Bills of Lading Act.

One additional class of rights against a carrier should here be mentioned. The contractual obligations of the carrier, as provided for in the bill of lading, are due to the holder of the bill of lading. The indorsement of the document also operates as an assignment of all the contract rights which the bailor had against the bailee. Generally, perhaps, the holder of the bill, being the owner, possesses all the remedies necessary, solely because he is owner of the goods; but sometimes it will be to his advantage to sue, not as

owner of the goods, but as assignee of the rights which the bailor had against the bailee. The converse is not true. The carrier cannot sue the holder of the bill of lading for freight charge. The contractual obligations of the bailor do not pass by the assignment of the bill. The carrier, however, cannot be compelled to surrender the goods until the freight is paid; hence the carrier is in just about as safe a position as though it were allowed to sue the holder for the freight. The carrier would not have this right against the owner of goods wrongfully shipped.

SECTION 5.—RIGHTS OF THE INDORSEE AGAINST INDORSERS

Sales Act, Section 36. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title, unless a contrary intention appears warrants:

(a) That the document is genuine.

(b) That he has a legal right to negotiate or transfer it.

(c) That he has knowledge of no fact which would impair the validity or worth of the document, and

(d) That he has a right to transfer title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Sales Act, Section 37. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Sales Act, Section 35. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

The liability of an indorser of a document of title is very different from the liability of the unqualified indorser of a negotiable instrument payable in money, but is very much like the liability of the indorser without recourse. The unqualified indorser of a negotiable instrument enters into two kinds of obligations: (1) A series of warranties; and (2) a special engagement to pay the amount called for by the instrument, if it be not paid at maturity, conditioned upon there having been a due presentment for payment upon the person primarily liable and due notices of dishonor, and, in case of a foreign bill, due notice of protest sent out to the indorser. It is clear from sections 36 and 37 that the indorser or transferor of a negotiable document of title does not enter into

any such "special engagement." Therefore, with respect to negotiable documents of title, there is no corresponding practice or necessity for making any due presentment upon the bailee and for the giving of notices of dishonor to indorsers. The indorsers of the negotiable document of title does enter into the same warranties which attach to the indorser "without recourse." It is true that the act does not mention that such indorser warrants that prior parties had capacity to contract, but the probabilities are that such an obligation would be construed to be involved in the general warranty that he has a legal right to negotiate it. The special warranty expressed in 36 (d) has no analogy in the law of bills and notes. From a practical standpoint the warranties pertaining to the kind and quality of the goods are the most important. It is to be noticed that, if certain warranties would have been implied, had the parties been dealing with the goods directly, instead of by means of a document of title, such warranties are still regarded as attaching to the sale. All sellers of goods impliedly warrant certain things. A seller of a negotiable document of title is a seller of goods; therefore he incurs the liability which arises out of the several implied warranties. There are six implied warranties: (1) Of title; (2) in sale by description, that the goods shall correspond to the description; (3) of merchantability, in certain cases; (4) in sales by sample, that the goods shall correspond to the sample; (5) of reasonable fitness for a particular purpose, in certain cases; and (6) any additional warranty arising out of established usage. The Sales Act mentions but three of these warranties, though it is not likely that section 36 (d) would be construed as confining the liability of indorsers of negotiable documents of title to these three types of implied warranties.

Do these warranties run to all successive holders, or do they run only to the immediate indorsee? The Sales Act makes no provision, and the point seems not to have been decided. In negotiable instruments we found that the indorser without recourse warranted to all successive holders, but that the transferor by delivery warranted only to his immediate indorsee. In sales of personal property, not involving negotiable documents of title, the warranty extends only to the immediate buyer, except, perhaps, in sales of food. Logically, we should say, therefore, that the warranties specified in 36 (a), (b), and (c) would run to successive holders, but not where the negotiation was by delivery, thus following out the analogy in negotiable instruments. But as regards the warranties in 36 (d) the analogy in sales of personal property generally should be followed, and these warranties, therefore, would not as a rule extend beyond the immediate indorsee.

What is the position of a bank which has taken for purpose of collection a bill of exchange drawn by the seller upon the buyer for the amount of the purchase price, which bill was attached to a negotiable document of title? The negotiable document of title will nearly always be indorsed, either specially to the bank or in

blank, so that the bank has apparent ownership. If the bank has already discounted the bill of exchange, then the bank has an actual interest in the bill of lading and in the goods, but the bank's interest is essentially a pledgee's or mortgagee's interest. When the bank indorses or delivers the bill to a sub-agent bank, does the bank incur liability on the bill of lading? Generally not, because this transaction is not a sale. The bill of exchange will usually be indorsed restrictively to the sub-agent bank, and such an indorsement carries no liabilities upon the indorser, for it is merely a transfer of title to the bill for the purpose of making a collection. There has been no sale of the bill. The same would be true as regards the transfer by the bank of the negotiable document of title. The transaction is not a sale; therefore no liability would attach to the bank. If the bills should get out of banking circles and be sold to innocent parties, there is reason to think that the bank would be liable.

Does the transfer of the bill of lading to the buyer, at the time of the buyer's payment or acceptance of the bill of exchange, impose upon the bank making such delivery any liability to the buyer because of the seller's breach of contract? This question is raised in the following case. The liability of the transferor by delivery merely of a negotiable document of title, which is in such form as to require indorsement to pass title, by section 35 is made the same as that imposed upon the transferor of unindorsed negotiable instruments payable in money, and the rights of such a transferee are likewise the same.

TOLERTON & STETSON CO. v. ANGLO-CALIFORNIA BANK, Limited.

(Supreme Court of Iowa, 1901. 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777.)

The petition originally filed in this case asked, briefly, for damages on account of a breach of warranty in the sale of merchandise. Plaintiff is a corporation engaged in the wholesale grocery business at Sioux City, Iowa. Defendant is a banking corporation. During the summer of 1897 plaintiff purchased a car of canned goods from the California Canneries Company, of San Francisco, under a warranty that the goods should be equal in quality to certain samples shown. The Canneries Company delivered said goods to a railway company at San Francisco, taking a bill of lading therefor, in which defendant bank was named as consignee at Sioux City. This bill of lading was by defendant bank attached to a draft in its favor drawn by the Canneries Company on plaintiff for the price of said goods. The car of goods came in the course of transit into possession of the Sioux City & Pacific Railroad Company, and was by it delivered to plaintiff, who paid to said railroad company the price of said merchandise, which sum was paid over by the latter to defendant bank. Plaintiff relied on the warranty in receiving the goods, and thereafter found such goods inferior in quality to the samples. Plaintiff notified the Canneries Company of the breach of warranty, but nothing was done by the latter to rectify matters. It is further alleged that defendant is the assignee of the order for the purchase of said goods, and as such is bound by

the warranty of the Canneries Company, and asks judgment against it for the damages caused by such breach.

WATERMAN, J. * * * There was a sale of these goods with a warranty, which was broken. Defendant was the payee of the draft drawn by the Canneries Company on plaintiff for the price, with the bill of lading attached, and as such received payment of the full purchase price. The question to be determined is whether defendant is now liable in damages for the breach of the Canneries Company's warranty. It must be confessed that this theory of its liability is fully supported by the case of Landa v. Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48, and that the doctrine of that case has been adopted and followed by the supreme court of North Carolina in Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, decided since the trial below. If we were prepared to yield our assent to the line of reasoning pursued in these cases, we should have to affirm this judgment. These decisions proceed upon the theory that the assignee stands in all respects in the shoes of his assignor, and to this broad doctrine we cannot agree. While the rights of such an assignee are to be measured by those of his assignor, his liability is not necessarily the same.

Defendant bank could not have compelled payment by plaintiff of any greater sum than could have been collected by the Canneries Company, but on what theory can we say it is liable on a contract of warranty which it never made? The rule of the Landa Case is founded on the thought that the transfer of the draft and bill of lading to the bank amounted to a sale of the goods, and that the bank as a purchaser undertook to deliver the goods and carry out the Canneries Company's contract with plaintiff, and because of these facts it necessarily assumed the contract of warranty, although it may have been in fact ignorant that any warranty was made. We do not think, even as the proposition is thus stated, the premises justify the conclusion. But the premises are not correct. The transaction between the Canneries Company and defendant was not and could not be a sale of the goods, for they had already been sold to plaintiff, and it was the intention of all parties that such sale to plaintiff should be consummated by delivery. What was in fact done by the assignment of the draft and bill of lading was to transfer to the bank the Canneries Company's right to the price, and to give it the possession of the goods as security. Manifestly, while the bank could collect no more than its assignor would have been entitled to, the character of its engagement was not such as to impose upon it any liability to the buyer which it did not expressly assume. One who purchases an account against another takes it subject to defenses, but not to affirmative claims of the debtor on some collateral agreement with the original creditor. The two cases cited stand alone in holding the purchaser of a draft with the bill of lading attached liable on a warranty made by the assignor, and the line of reasoning pursued to reach this conclusion is so at variance with well-established elementary principles of law that we decline to accept the rule they announce. * * *

Plaintiff's remedy is against the Canneries Company. It has now no enforceable claim against the bank. Reversed.

SECTION 6.—RIGHTS OF CREDITORS AGAINST GOODS REPRESENTED BY NEGOTIABLE DOCUMENTS OF TITLE

Sales Act, Section 39. If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee in no case can be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Sales Act, Section 40. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

These sections carry out the underlying theory of negotiable documents of title by giving to indorsees of such documents rights superior to those of other persons. A creditor who seeks to levy on the goods of his debtor, who then holds a document of title for them, must act with considerable promptness, because the negotiation of the document will cut off the right to levy on the goods. A creditor is virtually barred from levying on the goods, and his rights are confined to proceeding against the document. This result is brought about indirectly by the requirement that the creditor must first obtain the document, or obtain a decree from a court enjoining its negotiation.

SECTION 7.—RIGHTS OF TRANSFEREES OF A NON-NEGOTIABLE DOCUMENT OF TITLE

Sales Act, Section 31. A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or a donee. A non-negotiable document cannot be negotiated and the indorsement of such document gives the transferee no additional right.

Sales Act, Section 34. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If this document is non-negotiable such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee

to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

The purpose of this section is to make it clear that a straight bill of lading cannot safely be used as a document of title. The transferee never acquires a better right than his transferor had, and even after receiving the document his right to the goods may be defeated by a subsequent sale by his transferor, or by an execution against the goods levied by a creditor of the transferor.

Occasionally, even yet, persons overlook the important distinction between straight bills of lading and negotiable bills of lading as the next case shows.

C. E. WHITE & CO. v. CENTURY SAVINGS BANK OF DES MOINES, IOWA.

(United States Circuit Court of Appeals, Seventh Circuit, 1916. 229 Fed. 975, 144 C. C. A. 257.)

Action by the Century Savings Bank of Des Moines, Iowa, against C. E. White & Co., a corporation. Judgment for plaintiff, and defendant brings error.

BAKER, Circuit Judge. This is an action in trover, instituted by defendant in error, a bank at Des Moines, Iowa, against White & Co., a commission house at East St. Louis, Ill. Judgment for the bank was entered upon a directed verdict.

To sustain the charge of a tortious appropriation of the bank's chattels, the following proofs were made: On June 22, 1908, Hough was a stock buyer at Des Moines and was the owner and in possession of 319 hogs. He took them that day to the Wabash Railroad, which loaded them into cars and issued to him a bill of lading for their transportation from "Shipper L. R. Hough," at Des Moines to "Consignee C. E. White & Co.," at East St. Louis. Hough on the same day took the bill of lading to the bank, indorsed it in blank, and signed a demand draft on White & Co. in favor of the bank for $3,900. On delivery of this draft and bill of lading the bank paid Hough the face value less lawful discount. * * * In the evening of the same day the bank deposited the draft with the bill of lading attached in the mail. * * * The draft and bill of lading did not reach East St. Louis and were not presented to White & Co. until June 25th. In the meantime, on the morning of June 23d, the hogs arrived in East St. Louis and were delivered by the railroad to White & Co. Prior to this time White & Co. had continuing authority and instructions from Hough to receive his hogs and sell them promptly on commission. During the day of June 23d White & Co. sold the hogs. Hough never directly revoked his instructions. If his transfer of the bill of lading to the bank was

an indirect revocation, White & Co. had no knowledge thereof until two days after they had parted with possession of the hogs.

Do these facts sustain the judgment in tort? * * * In our judgment the difficulties in the present case arising from an apparent conflict between principles concerning factors and principles concerning the rights of indorsees or holders of bills of lading are solvable by reference to the different aspects in which a transference of a bill of lading may be considered.

These are three: 1. As evidence of an intended sale, pledge, or mortgage of the chattels described in the bill of lading, the same as a separate document would be evidence. 2. As an assignment of the shipper's rights against the carrier. 3. As a symbolic delivery of the chattels, equivalent in law to manual delivery. It would seem that there could be no doubt that all these elements characterize the transference of an "order" bill of lading.

But is the third element present as against the factor consignee of a "straight" bill of lading? In our judgment, No. We believe that a "straight" bill of lading is not a true document of title, possession of which is symbolic of actual possession, and that the carrier's possession, though not for all purposes the actual possession of the consignee, nevertheless is on his behalf. * * * If the consignor be in truth the owner and the consignee merely his factor, the consignor may transfer his interest as owner to a third person. But for that purpose his assignment on and delivery of the bill of lading are of no greater force than would be a separate bill of sale while the chattels were in the actual possession of the carrier for the factor consignee. For, "strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods." * * * In other words, though the owner consignor may deal with his interest as owner by separate documents (and they are separate even if written upon the bill of lading), he is powerless to disturb the effect of the "straight" bill of lading as against the carrier or the factor consignee without notice. And this we believe is just, because the owner is the one who creates the bill and selects its form. Necessarily the transferee of such a bill is bound to take notice of its form and acquires no greater rights than the transferrer had. And so the bank, succeeding only to Hough's interest as owner of the consigned hogs, and failing to prove notice to White & Co. of its interest before sale by White & Co., has not sustained its declaration in trover. * * *

The judgment is reversed, with the direction to grant a new trial.

CHAPTER V

REMEDIES OF THE SELLER

Section
1. Introduction.
2. Action for the Purchase Price.
3. Seller's Rights Against the Goods in General.
4. Unpaid Seller's Lien.
5. Right of Resale.
6. Right of Rescission.
7. Right to Damages for Breach of Contract to Sell.

SECTION 1.—INTRODUCTION

In this chapter we are to look at the contract after it has been broken by the buyer, and the question is: What remedies does the seller now have against the buyer? May he recover money damages? If so, how much? Does the seller have any right to keep or take back the goods sold or contracted to be sold? We shall have to deal both with contracts of sale and contracts to sell. We shall find that the seller in some cases may recover the amount of the purchase price; in others, the seller will not be allowed to recover as much as the purchase price, but is allowed only the difference between the contract price and the market price. We shall also find that the seller has a right against the goods themselves in some cases; that is, he may keep them without being guilty of any breach of contract, and in some cases he may even get them back, although he has parted with their possession, and may keep them as his own or resell them.

SECTION 2.—ACTION FOR THE PURCHASE PRICE

There are three situations where the seller is allowed by the law to recover from the buyer, who has broken the contract, the actual amount of the purchase price agreed upon:

(a) Where the title has passed to the buyer; (b) where, although title has not passed, the buyer has agreed to pay the purchase price on a day certain; (c) where, although title has not passed to the buyer, and although the buyer has not agreed to pay the price on a day certain, the property contracted to be sold was of such a nature that it could not readily be resold for a reasonable price.

The provisions of the Sales Act dealing with these three situations will be taken up in this order.

(a) ACTION FOR PURCHASE PRICE, WHERE TITLE HAS ALREADY PASSED TO BUYER

Sales Act, Section 63. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer

wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

This section recognizes the rule, which we have all along assumed to be true, that the seller could recover the price, if title, or, as the Sales Act here calls it, "the property," had passed to the buyer. The main question in all such cases is to determine whether or not title had actually passed. We do not need to retrace this ground which was covered in Chapters I, II, and IV. If the buyer broke his contract one minute before title would have passed to him, if something had not happened to prevent, this section is not applicable. When invoking this section, the seller must prove that title is in the buyer. One should have in mind here particularly sections 17, 18, 19, and 20 of the Sales Act, and also the sections dealing with negotiable documents of title, and the cases which we have taken up construing and applying these sections. With that statement it is believed that it is not necessary to go further into the section quoted above.

(b) ACTION FOR PURCHASE PRICE, WHERE TITLE HAS NOT PASSED TO THE BUYER, BUT THE BUYER HAS AGREED TO PAY THE PRICE ON A DAY CERTAIN

Sales Act, Section 63, Subsection 2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

This section states a general principle of contract law. If A. agrees to sell his horse to B., and to transfer title and possession to B. on February 1st next, and B. agrees to pay for the horse on January 1st preceding the date fixed for transfer of title to him, it is clear that B., having made a promise to perform on January 1st, will at the close of that day be guilty of a breach of contract, and A. may on January 2d sue B. for the price. By the express terms of the contract the obligation of A. to deliver possession and to transfer title to the horse were not conditions precedent to B.'s obligation to perform. This situation is common in connection with contracts of conditional sale, as is illustrated in the next case.

R. C. BARTLEY CO. v. LEE.

(Supreme Court of New Jersey, 1915. 87 N. J. Law, 19, 93 Atl. 78.)

Action by the R. C. Bartley Company against Edwin Lee. There was judgment for plaintiff, and defendant brings certiorari.

SWAYZE, J. The Bartley Company contracted with Lee to put a heating apparatus in his house, reserving title until he had paid for the same. He paid a portion of the purchase price but refused to pay the balance and when suit was brought claimed to recoup damages. The trial judge decided the facts in favor of the plaintiff, and awarded judgment for the balance of the purchase price. The only question presented by the appeal is whether it is proper to allow the Bartley Company to recover the balance of the purchase price or whether they should have been restricted to a recovery of the damages for breach of an executory contract of sale. The theory of the defendant is that as the title did not pass, although the heating apparatus was in his house, the only remedy of the plaintiff was for breach of an executory contract. Whether this is to be regarded as a working contract or a contract of sale strictly so called is of no importance. Assuming, in the defendant's favor, that it was a contract of sale, the law is settled adversely to his contention.

It is dealt with by Williston at section 579 of his treatise on Sales, and is within the rule of section 63 of Sales Act, C. S. 4662. It is also the logical result of our decision in American Soda Fountain Co. v. Vaughn, 69 N. J. Law, 582, 55 Atl. 54. As Prof. Williston says: "No satisfactory solution of the rights of the parties in such a transaction can be found without observing that the essential character of the transaction is the same as that of an absolute sale with a mortgage back."

The judgment of the Morris common pleas must therefore be affirmed, with costs.

(c) ACTION FOR THE PRICE, WHERE TITLE HAS NOT PASSED, AND THE GOODS CANNOT READILY BE RESOLD FOR A REASONABLE PRICE

Before the adoption of the Sales Act, there were many states—a majority of them, in fact—held that, in any case where the buyer wrongfully refused to take the title when it was tendered to him, the seller could recover the purchase price, even though title had not passed. This rule has been criticized, because it gives to the seller a remedy which is higher than the corresponding remedy of the buyer, if the buyer were suing for the seller's breach of contract. In the latter action, the buyer, as plaintiff, would be limited in his recovery to the amount which he had actually suffered—i. e., the difference between the contract price and the market or current price of the goods at the time when the goods should have been delivered; or, to put the matter in another way, the rule really gave the seller the remedy of specific performance, when the buyer would not be entitled to this remedy. The Sales Act did not adopt the whole of this rule, but did adopt it to a certain extent:

Sales Acts, Section 63 (3). Although the property in the goods

has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's, and may maintain an action for the price.

The principal question which presents itself is, therefore: Under what circumstances will one be justified in assuming that the goods contracted to be sold cannot readily be resold at a reasonable price? This is a question of fact, not a question of law. To answer it one must inquire into the facts largely from the business point of view. Certainly the rule would not apply to contracts to sell goods which the seller always kept in stock and was actually selling to the trade. A majority of contracts to sell would not, therefore, come within this rule. Accordingly in such case the seller would be limited to his action to recover the actual damage suffered. In the end, the seller, theoretically, would recover the purchase price, even under the latter rule, for, after having searched the country over for a buyer, doubtless he would find some one who would take them, though probably at one-half, or even a less percentage, of the purchase price. The seller could then sue the buyer for the actual damages suffered, and recover the difference between the relatively small amount which he obtained from the buyer at the greatly sacrificed price and the price agreed upon. If the seller could not sell them at any price, it would be for the court or jury to determine the amount which they should bring. While theoretically the seller is thus in the same position, actually, it makes a great deal of difference to him. If it were not for the exception stated in this subsection the buyer must go to all the trouble and expense of finding some one who will take his goods even at greatly reduced prices. In the second place, the court might find that the seller was not justified in the particular case in selling at such a heavy discount from the agreed price. To allow the seller to recover the actual price, as this subsection permits, without the necessity of taking all these risks, is of considerable value to him.

The usual case where the exception is applicable will be where goods were manufactured specially by the seller for the buyer. The following cases illustrate the application of the rule.

ILLUSTRATED POSTAL CARD & NOVELTY CO. v. HOLT.

(Supreme Court of Errors of Connecticut, 1912. 85 Conn. 140, 81 Atl. 1061.)

Action by the Illustrated Postal Card & Novelty Company against Clarence D. Holt. Judgment for plaintiff, and defendant appeals.

WHEELER, J. The plaintiff is a manufacturer of post cards in New York City. The defendant is a wholesale dealer in post cards in New Haven. A salesman of plaintiff procured from defendant in

New Haven a verbal order for Christmas post cards, subject to change. Subsequently, the defendant called at plaintiff's place of business in New York, and, after examining plaintiff's catalogue, gave it a written order for 100,000 Christmas post cards No. 438, for the price of $275, and for other Christmas cards, the price for the whole order amounting to $321, the same to be shipped, by what method did not appear, on August 1st, and paid for December 1, 1910. The plaintiff in its business manufactured post cards of this character on special order and did not keep them in stock. On July 16, 1910, defendant wrote plaintiff that he was obliged to cancel the order for the 100,000 post cards. After securing this order, the plaintiff began the manufacture of the cards, and all of the cards so ordered were finished and packed for shipment at the date of receipt of this letter. The plaintiff replied that it could not accept the attempted cancellation as the cards would be left on its hands. Wholesale dealers in Christmas post cards place their orders by April 1st, the retail trade continues usually until the fall, and after July 1st there was no available market for these cards with jobbers and wholesale dealers. The defendant twice again requested plaintiff to cancel the order for card No. 438, which plaintiff declined to do, replying to defendant's last letter of July 29th, on July 30th, and on August 4th shipped defendant's entire order by common carrier, not separating cards 438 from the rest of the order. Upon arrival of the goods in New Haven, defendant refused to receive them and notified plaintiff he would receive balance of order exclusive of No. 438. Thereupon plaintiff notified him the goods were in the hands of the New England Navigation Company subject to his order, where they have since remained. * * *

This action was begun to recover for the price of goods sold and delivered. Prior to the passage of the Sales Act (P. A. 1907, c. 212), our law permitted an action for damages by the seller against the buyer for breach of his contract to buy goods to be manufactured for him, and it sought in such action to put the injured party in the place the contract would have placed him in had it been performed. The actual damage suffered was the recovery upheld. That was, as a rule, measured by the difference between the price of the contract of sale and the value of the goods made. When there was no market, or they were worthless, the actual damages might even be the entire value of the goods. * * * So far as we are aware, no case has ever reached this court where upon breach of contract for the sale of goods an action for the price of the goods was begun.

The English law denied such a remedy, and many of our state courts have followed the English law, while a number under the lead of the New York court have given the seller, upon breach of a contract of sale, a remedy permitting him to store or retain the goods for the buyer and sue the buyer for the entire purchase price. The theory of this law is that when the seller deposits the goods with a third person for the buyer, or segregates the goods and notifies the buyer that he holds them for him, the title passes, or the rights of the parties will subsequently be adjusted as if it had passed at that time. Williston on Sales, p. 945, § 56. Our law was in this condition when the Sales Act was passed.

The remedies provided by the Sales Act for the recovery of damages for nonacceptance of goods (section 64), and for the recovery of

the price (section 63, 1, 2), when the property in the goods has passed, do not substantially differ from the remedies provided by our law at the time of its enactment.

The remedy (section 63, 3) is an addition to the remedies up to that time known to our law. * * * Prof. Williston who wrote the Sales Act, says in a note (42 Am. Law Rev. 900): "The rights of the seller are also enlarged as compared with his rights under the English act both by the greater freedom in rescission allowed an unpaid seller with a lien (section 61), and by the allowance of an action for the full price, even though the property in the goods has not passed, if they cannot readily be resold for a reasonable price (section 63, 3)."

The elements of an action under this section are: (1) A breach of the contract to sell goods; (2) that the property in the goods at the time of the breach has not passed; (3) that they cannot be sold for a reasonable price; (4) that the seller has offered to deliver them to the buyer; (5) that he has refused to receive them; (6) that the seller has notified the buyer that he thereafter holds the goods as bailee for the buyer.

The notification of cancellation by this defendant and his persistence in this course constituted a breach of the contract of sale. At this time the goods had not been segregated, nor marked for the buyer, nor delivered to a carrier for the buyer, and, in the absence of provision in the contract to the contrary, the property had not passed to the buyer. * * *

The finding that there was no available market for the goods after the breach, and that jobbers and wholesalers place no orders after April for such goods, and that these goods are not goods kept in stock, but are manufactured on special order, fully shows that the goods could not be sold for a reasonable price. There was no obligation upon the manufacturer to sell these cards at retail or to the retail trade—that would have involved the undertaking on its part of a new business. * * *

The plaintiff was under no obligation to separate the order, nor to attempt to sell goods for which it knew it could not obtain a reasonable price. * * *

There is no error.

SECTION 3.—SELLER'S RIGHTS AGAINST THE GOODS IN GENERAL

INTRODUCTION

Let us suppose that title to the goods has passed to the buyer, under some one of the numerous rules which heretofore have been studied, and that the seller has not been paid. What are the rights of the unpaid seller against the goods? It is very easy to think that an unpaid seller of goods, who is still in possession of them, really owns them, but under our assumption here this is not true. We are assuming a case where title has passed. It has already been shown that this is the usual case. If the bargain relates to ascertained goods in a deliverable condition, title is presumed to pass at the time the contract was made; and, if they are to be put into a deliverable condition by the seller, title will pass at the in-

stant that they are put in a deliverable state. Also, where the contract relates to unascertained goods, title presumptively will pass at the moment when, in addition to the act of putting them into a deliverable state, there has been some act of unconditional appropriation assented to by buyer and seller. In any of the very numerous cases which fall within these rules under which title has passed to the buyer, our general inquiry is: What rights does the law give to an unpaid seller against the buyer's goods, which are the subject of the sale?

This general inquiry divides itself into three subordinate inquiries:

(1) **Who are unpaid sellers?** That is, what legal relations must be found to exist between buyer and seller, before the seller may be deemed unpaid, within the meaning of the law?

(2) **How must the unpaid seller be situated with respect to the goods,** before he may exercise any rights against them which are accorded to him by the law?

(3) **What rights does an unpaid seller have?** That is, of what nature are such rights? Of what value are they to the unpaid seller? How may the unpaid seller exercise these rights so as to prevent financial loss to him?

(a) WHO ARE UNPAID SELLERS?

Sales Act, Section 52. (1) The seller of goods is deemed to be an unpaid seller within the meaning of this act—(a) When the whole of the price has not been paid or tendered. (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2) In this part of this act, the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section 54. (1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: (a) Where the goods have been sold without any stipulation as to credit. (b) Where the goods have been sold on credit, but the term of credit has expired. (c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

To observe merely the important features of these two sections, we find that we must consider two features of the contract: (1) We must look at the nature of the contract. (2) We must note whether or not the buyer has performed his obligations thereunder.

(1) As to the nature of the contract, section 54 declares that a seller is unpaid (a) Where the goods have been sold without any stipulation as to credit. Let us see what kinds of contracts are here contemplated: (1) We know that, in a contract to sell ascertained goods in a deliverable state, title presumptively passes to the buyer at the date of the contract. There being no express agreement as to credit, possession remaining in the seller, this would be one case where the seller would have his special remedies against the goods. (2) We may also include the case where there has been a contract to sell unascertained goods, followed by an act of unconditional appropriation, assented to by buyer and seller. This act passes title to the buyer; but, if possession is retained by the seller, the seller, in such case, has his special remedies against the goods. (3) We may also include the case where the goods have been shipped under a negotiable bill of lading running to the order of the consignee, the bill being retained by the seller or his agent. Most, if not all, of the possible cases will fall under the classes of contracts just enumerated. These are the kinds of contracts to which section 54 refers when it mentions cases "where the goods have been sold without any stipulation as to credit."

By way of contrast, it should be noticed that contracts under which title has not passed do not come within this section. These cases are: (1) Cash sales; (2) conditional sales; (3) sales on approval; (4) sales of goods shipped to the buyer under a negotiable bill of lading running to the order of the seller, the bill being retained by him; (5) sales of goods shipped under a straight bill of lading to the seller or to the seller's agent; (6) all executory contracts to sell. In all these cases title has been reserved by the seller; at least, a security title. Having title, he is not an unpaid seller within the meaning of these sections. This does not mean that such a seller—one from whom the title has not passed —will have no remedies against the goods. Having title, he may protect himself more easily than the seller from whom title has passed. By virtue of his having title he is entitled to all the benefits to which the unpaid seller is entitled under the sections now being considered, and even more. These sections are necessary only for the seller who has theretofore transferred his title, and this general object is to assist such an unpaid seller in getting back that title, with which he has already parted. Section 54 (1) (a) is perfectly clear in its meaning when it declares that the rights of the unpaid seller exist when there has been a sale other than a sale on credit, title having passed, possession remaining with the seller.

But there are two cases where the rights of the unpaid seller arise, even where there has been a sale on credit and the possession still remains with the seller. These cases are: (1) Where the buyer becomes insolvent before the period of credit expires. This is eminently just. If A. sells B. goods on credit, and for any

reason B. sees fit not to exercise his legal right of then taking possession of the goods, and before the date arrives at which he agreed to pay for them he becomes insolvent it is altogether proper to provide that the act of becoming insolvent constitutes a material breach of his contract, which has the effect of creating in the seller a lien for the purchase price. Of course, no lien will arise if the seller has already given up possession to the buyer; but, if he has the goods, then the law allows him to take advantage of his position. The second case where there is a lien growing out of a sale, on credit arises where the seller is in possession, after the period of credit has expired. Insolvency of the buyer is not necessary. The buyer had the right to take the goods at any time up until the arrival of the date on which he had promised to pay for the goods. This date having passed without payment from the buyer, it is just for the law at that time to create in the seller a lien on the goods; and this is so, whether the buyer is insolvent or not. Any other result would in effect be an extension of the period of credit without the consent of the seller, which clearly would be unjust.

(2) Assuming, then, that we have before us the kind of contract of sale in which there is an unpaid seller within the meaning of the sections just discussed, the next question which arises is: What kinds of acts done by the buyer will have the effect of putting an end to the unpaid seller's rights? The answer made by section 52 (1) is that payment by the buyer will destroy the seller's rights. This, obviously, would be true. But what constitutes a payment? Is the acceptance of the buyer's negotiable note, or a note or bill of exchange of a third party indorsed by the buyer, a payment? It is possible to accept a negotiable instrument in absolute payment, but the presumption is that the instrument is accepted only in conditional payment. During the time from the date of the acceptance of the negotiable instrument until its maturity, the seller is not an unpaid seller; but at the moment the instrument is dishonored, or if before dishonor the buyer becomes insolvent, the seller then becomes an unpaid seller. The situation then is the same as though no instrument had ever been accepted by the buyer.

The second act which takes from the seller the rights which he has against the goods as an unpaid seller is a tender. Very seldom will a seller find it to his advantage to refuse money when it is offered to him, but occasionally a seller will find it to his interest to refuse money offered him by the buyer. It may be that the reason for refusing the money tender is that he thinks the proper amount has not been offered. Of course, an offer of an incorrect sum is not a tender; but, if it should turn out that the buyer was mistaken, and that the seller tendered the correct amount of money, then there has been a valid tender, the effect of which is to deprive the seller of his rights against the goods.

It is thus seen that an unpaid seller is (1) a seller of goods who

does not have title, and (2) who has not been paid or tendered the whole of the purchase price.

(b) HOW MUST THE UNPAID SELLER BE SITUATED WITH RESPECT TO THE GOODS BEFORE HE MAY EXERCISE HIS RIGHTS AGAINST THEM?

In addition to the preceding requirements, to be an unpaid seller, the seller must either be **in possession** of the goods, or, he must be in such a position that although no longer in possession, he may exercise the right of **stoppage in transitu**. Section 53 provides: **Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—(a) a lien on the goods or right to retain them for the price while he is in possession of them. (b) In case of the insolvency of the buyer, a right of stoppage in transitu after he has parted with possession of them**; Section 60 (1) in part provides that **an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods.** Section 61 provides that **an unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods.**

From these three extracts from sections 53, 60, and 61 we obtain our first intimation of the nature of the seller's rights against the goods—i. e., the (1) **lien** on the goods; (2) the right to **resell**; and (3) the right to **rescind** the contract. But, at this point of the subject, attention is not directed to the study of the nature of the **lien**, the right of **resale**, and the right of **rescission**, but rather to the **physical condition of things** upon which the existence of the lien, the right of resale, and the right of rescission turn.

It is to be noticed that all of these rights, the lien, the right of resale, and the right of rescission, all turn on the question whether the unpaid seller was **in possession** of the goods, or had the right to stop in transitu. Section 53 states that the unpaid seller has a lien **while he is in possession**, or upon exercising **the right of stoppage in transitu after he has parted with possession of them.**

Section 60, while it does not directly say that the right of resale depends upon the seller's having possession of the goods, or upon his having stopped the goods in transitu, reaches precisely the same result, because the section discloses that the right of resale is dependent upon the "unpaid seller having a right of lien or having stopped the goods in transitu," and we know from section 53 that the right of lien exists only when the seller has possession, or has the right to stop the goods in transitu. Likewise section 61 does not directly make the right of rescission depend upon the unpaid seller's having possession, or having stopped the goods in transitu, but does declare that the right of rescission arises only when the unpaid seller has a lien, or has the right to stop the goods in transitu, and section 53 makes the lien turn upon possession, or upon the right to regain possession, by exercising

the right of stoppage in transitu. The unpaid seller's remedies against the goods—i. e., that of a lien, or resale, and of rescission —may be exercised when, and only when the seller **has possession of the goods**, or, if he does not have possession, then these remedies exist only when the seller has the right to recover possession by exercising the right of stoppage in transitu. (1) Under what circumstances may it be said that an unpaid seller has **possession**? (2) Under what circumstances may the unpaid seller regain possession by exercising **the right of stoppage in transitu**?

(1) The question as to what constitutes possession is not strictly a part of the law of sales. At least, the Sales Act does not attempt to define possession. Volumes have been written on the subject of possession. There is a real difficulty in the subject, which we may point out here, but shall not undertake to develop. The difficulty is this: The word "possession" has a double meaning. In the first place, the word "possession" may be used to describe the physical relation existing between an individual and some physical object, as, for example, if A. has a book in his hand, A. may be said to have possession of it. A. has physical control over the book. In the second place, the term "possession" is used in a legal sense, as descriptive of an individual's legal relation with all other people in the world with respect to an object. Thus A., being in the state of Maine, might in this sense have "possession" of a book which for the time being was physically in the hands of B., who was in the state of California. The word "possession," as it is used in the Sales Act, must be given the meaning which it has in the law, as a word descriptive of the legal relations existing between the person said to have possession and all other persons. It is apparent, therefore, that one may have actual physical control over an object, and not have possession in law; conversely, that one may have possession in law, and not have actual physical control over the object. In the majority of cases, no doubt, possession in fact is possession in law, and possession in law is possession in fact; but there are a great many exceptions to this rule. If a merchant is negotiating a cash sale with a customer, and hands him the object which the customer is considering, the merchant still has possession; the customer has something less than possession. If goods are placed in storage, the warehouseman has possession. Possession in law is in the employer, when in fact the property may be in the hands of his employee. For our purposes the more or less popular notion of possession, as meaning substantially physical control, in fact is sufficiently accurate; but we should be aware of the existence of difficult problems which can arise involving the interpretation of the meaning of this word.

There is one special case, which should be mentioned in this connection. When the seller ships goods to the buyer by carrier, under a negotiable bill of lading which runs to the **order of the buyer**, section 20 of the Sales Act provides that, while the seller

is in possession of the bill of lading, the seller reserves the right to possession. Is such a seller an unpaid seller? Probably not, technically, because the right to possession is not quite the same as possession. But, the seller having the right to possession until payment, the buyer cannot get the goods until he obtains the bill of lading. The seller needs but to direct his agent to obtain possession, by means of the bill of lading, and certainly from that moment on the seller, assuming that he fulfills all the other requirements, does have the necessary possession to give him the rights of an unpaid seller.

Two sections of the act have been inserted for the purpose of making clear the circumstances under which the unpaid seller's rights against the goods once possessed will be lost. Necessarily these conditions must relate to the giving up of possession, expressly or by implication. They are as follows:

Section 56. (1) The unpaid seller of goods loses his lien thereon: (a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof.

Another way of stating the meaning of this subsection is to say that, when the seller delivers the goods to a carrier for shipment to the buyer under a straight bill of lading, running to the buyer as consignee, the rights against the goods are lost, but that a delivery to a carrier under negotiable bills of lading running either to the order of the shipper or to the order of the buyer, the bill of lading retained by the seller or by his agents, does not destroy any rights which the seller, at the time of delivery to the carrier, had in or against the goods.

Section 56. 1 (b) The unpaid seller loses his lien thereon when the buyer or his agent lawfully obtains possession of the goods.

The usual case here would be that of a voluntary surrender by the seller to the buyer. From the business standpoint this is quite important. The seller cannot expect to have any of his rights against the goods, and at the same time permit them to get into the hands of the buyer. If the business situation confronting him is such that he deems it necessary to deliver possession to the buyer, and the seller desires to retain a hold on the goods themselves, the safest way to do so is to enter into a contract of conditional sale, or to require the buyer to execute a chattel mortgage, and then to record the instrument.

Section 56 (1) (c) provides that **the unpaid seller of goods loses his lien thereon, by a waiver thereof.** A waiver may be express or implied. If the seller desires to retain his rights against the goods, he should exercise considerable care, in his dealings with the buyer, not to assume any position inconsistent with that which he must assume as the holder of rights against the goods. The seller might, for example, convert the transaction into a sale on credit. Clearly, in such a case, the rights against the goods will be lost.

Section 56. (2) The unpaid seller of goods having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

If the seller has made a good bargain, no doubt, he would prefer to have the amount of the purchase price than to have his goods, and so he may even sue the buyer for the price. This section provides that the obtaining of a judgment against the buyer does not cause a loss of the lien. Nothing but actual satisfaction—i. e., payment of the judgment—would destroy the seller's rights.

Section 55. Where an unpaid seller has made a part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

(2) **Stoppage in Transitu.** There is one exception to the rule that an unpaid seller's lien is lost by a surrender of possession. Where goods have been shipped to the buyer under such circumstances that title has passed, the seller may regain possession upon the insolvency of the buyer. The Sales Act provides:

Section 57. Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

This section declares the existence of the right. Note the circumstances under which it may be exercised: (1) Title must be in the buyer and the possession must have passed from the seller to the carrier. (2) The goods will be traveling under a straight bill of lading, or under a negotiable bill of lading, which bill has been delivered to the buyer and is still in the buyer's possession—i. e., not negotiated to an innocent purchaser. (3) The buyer must be insolvent. (4) The goods must be in transitu. (5) The seller must be unpaid.

Points (1) and (2) here enumerated have been sufficiently commented upon. The third requisite, the insolvency of the buyer, requires a brief explanatory statement. When is one insolvent? Various definitions might be found. There are two well-established general rules as to what constitutes insolvency which differ very materially. One of them is adopted in the law of sales; the other, in bankruptcy proceedings. The Sales Act, in section 76, clause 23, defines insolvency as follows: **A person is deemed insolvent within the meaning of this act who has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is solvent within the meaning of the federal bankruptcy law or not.** Note the very marked difference between the above definition and the definition of insolvency found

in section 1, clause (15), of the Federal Bankruptcy Law (U. S. Comp. St. § 9585), which we have heretofore considered: **A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have [fraudulently] conveyed, transferred, concealed or removed, with intent to defraud, hinder or delay his credition, shall not, at a fair valuation, be sufficient in amount to pay his debts.**

It is quite apparent that one may be "insolvent," to the extent that his creditor will be justified in stopping goods in transit, when such person would not be insolvent within the meaning of the Bankruptcy Act. The rule permitting a creditor to stop goods in transit when his debtor is insolvent virtually means that when the debtor has ceased to meet his obligations as they mature he is to be deemed insolvent, even though the fair valuation of his assets exceeds liabilities. The rule is very easily applied, because the right to make it rests upon external circumstances readily discovered. The determination of the fact of insolvency under the Bankruptcy Act calls for a careful valuation of assets, and a comparison of this item with liabilities. A great many difficulties present themselves in determining whether liabilities exceed assets. The law, in adopting different notions of insolvency in sales and in bankruptcy, merely goes to show that it is deemed good policy to allow creditors to regain possession of goods by stopping them while in transit, under circumstances when it would not be good policy to permit a creditor to have his debtor declared a bankrupt.

The fourth requisite to the right to stop goods is that they must be **in transit.** When are goods in transit? Of course, one can tell, under ordinary circumstances, when goods are in transit; but now and again that troublesome case in the law arises which is near the line. This type of problem calls for considerable ingenuity and sound judgment in the field of legal definition and in the application thereof to varied facts. In fact, a great deal of the study of the law consists of an effort to discover, and to draw boundary lines of, legal doctrines which in their general aspect are reasonably clear to any one who has no technical knowledge of the law.

When does a transit begin? When does it end? We have previously decided that a transit begins at the moment that goods are placed under the physical control of the carrier's agents, and such agents have manifested their willingness to assume responsibility for the safe keeping of the goods, and so the Sales Act, Section 58 (1) (a), provides: **Goods are in transit within the meaning of section 57 from the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer.** No further comment on this section is here necessary, for the question as to what constitutes a delivery has been sufficiently adverted to in earlier chapters.

When does transit end? Upon delivery, certainly; but what con-

stitutes a delivery? If the buyer, consignee, sends his trucks for the goods, pays freight charges, and the freight agent allows the goods to be taken away, there is a delivery; but is it necessary that the goods actually be taken from the possession of the carrier? Or, suppose the consignee took the goods from the railroad company's platform without paying the freight, and without consent from the carrier, would this be an ending of the transit? The following sections of the act attempt to make clear what constitutes an ending of a transit. In the main these sections undertake to declare what constitutes a delivery.

Sales Act, Section 58, Subsection 1. (a) Goods are in transit within the meaning of section 57 * * * until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee. (b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

Section 58. (2) Goods are no longer in transit within the meaning of section 57: (a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination. (b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer. (c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf.

(3) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent for the buyer.

(4) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole goods.

It will not be possible to go into a detailed discussion of the problems that involve the application of this section, but special mention should be made of two situations which are of considerable importance. Notice that subsection 2 (a) provides that a delivery may be made to the buyer or to his agent before the goods reach their destination. A buyer may purchase a carload of merchandise and order it shipped to a designated place. At the time the shipment is started, the buyer intends to sell the car during transit and upon effecting the resale will direct the carrier to reconsign the shipment to the purchaser. Again, the buyer may direct the carrier to deliver the shipment to the buyer's agent at some intermediate point. In either event, as soon as the order from the consignee is received by the carrier, the original transit is

at an end. This situation illustrates the necessity for prompt action by a seller, if he expects to make effectual his right of stoppage in transitu.

The other point that may be specially mentioned is that there may be a delivery in law, although the goods are still in the car or freight sheds of the carrier at the point of destination. As section 58 (2) (b) provides, this result occurs when the carrier has acknowledged to the buyer or his agent that he holds the goods on his behalf.

Another difficult situation arises when the goods are consigned to some forwarding agent acting for the buyer, and such agent, upon delivery of the shipment to him, reships them to a third party. The rule which governs here, as laid down in Cabeen v. Campbell,[1] is: "When an intermediate delivery occurs before the goods reach their ultimate destination, if the party to whom they are delivered has authority to receive them and gives to them a new destination, not originally intended, the transitu is at an end. They have reached the ultimate destination intended by both buyer and seller. But if the middleman be a mere agent to transmit the goods in accordance with original directions, the vendor's right continues. The rule may be stated as follows: If in the hands of the middleman they require new orders to put them again in motion, and give them another substantive destination—if without such new orders they must continue stationary—then the delivery is complete and the lien of the vendor has expired."

Sales Act, Section 59. (1) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If however, a negotiable document of title representing the goods has been issued by the carrier or other bailee he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

[1] 30 Pa. 254 (1858) quoted in Williston on Sales, § 530.

PRATT v. S. FREEMAN & SONS MFG. CO.

(Supreme Court of Wisconsin, 1902. 115 Wis. 648, 92 N. W. 368.)

MARSHALL, J. * * * If a person contracts to sell and deliver property to another on credit, not retaining any lien thereon, specifically, to secure the purchase money, the presumption is that he acts upon the belief that the latter is solvent, and on condition that he will so remain. If there is a breach in that regard before control of the property passes to the buyer, the seller may withdraw from the contract the element of credit and insist that it shall stand only as an agreement to sell for cash upon delivery of the property, and that the contract as so modified shall be executed; and upon the buyer's neglect or refusal to perform, the seller may have a choice of several remedies for the wrong:

"The seller may store the property for the buyer and sue for the purchase price; or may sell the property as agent for the vendee and recover any deficiency resulting; or may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery." Van Brocklen v. Smeallie, 140 N. Y. 70, 75, 35 N. E. 415.

In case he elects to take the second remedy mentioned, the sale of the property is but a mere means of determining the precise amount of the damages caused by the breach, while the incidental effect is to satisfy the loss suffered by the vendor so far as the proceeds of the sale will accomplish that result. * * * Immediately upon the vendee's refusing or neglecting, when required to do so, to comply with the sale contract by paying for the property and accepting delivery thereof, the cause of action of the vendor becomes complete and his right to enforce the same by such appropriate remedies as he may elect to pursue perfect. If he chooses to liquidate his damages by a sale of the property and incidentally to recover his loss so far as the proceeds of the sale will effect that result, * * * failure to do that which is reasonably necessary to secure the best price obtainable therefor, does not give the vendee any right to rescind his contract, but renders the result of the sale not binding on him as to the amount of the vendor's loss by the former's breach, and he will remain liable to the latter for the full market value of the property less his actual damages, independently of the sale. The sale in such circumstances is but a method, as before indicated, of enforcing a right to damages for breach of contract, and of making evidence of the precise amount of such damages. The sale, when properly conducted, the executory vendee having been so notified of the intention to make it as to give him reasonable opportunity to prevent it by paying his debt, constitutes a basis, binding on him, for computing the damages for which he is liable. The rule governing the subject was laid down in T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513, in these words:

"If a resale is made and the evidence shows that all reasonable efforts were made to secure the best price obtainable, or that the price obtained was a fair one, it settles the question of the market value, so that the damages become liquidated."

The idea is that when the executory vendee of property breaks his agreement to take and pay for the property, the measure of damages

is the difference between the market value thereof and the contract price; but the vendor must necessarily establish that as a basis for his claim. If he sues for his damages without selling the property, or without selling the same with proper regard to the rights of the executory vendee, he takes upon himself the burden of establishing the fair market value of the goods at the time of the breach. * * *

DIEM v. KOBLITZ et al.

(Supreme Court of Ohio, 1892. 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.)

WILLIAMS, C. J. * * * The right of stoppage in transitu is the right of the vendor to resume possession of the goods sold, while they are in transit to the vendee, who is insolvent or in embarrassed circumstances. Actual insolvency of the vendee is not essential. It is sufficient if, before the stoppage in transitu, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary, apparent evidences of insolvency. Nor is the vendor's right abridged or in any way affected by the fact that he has received the vendee's bills of exchange or other negotiable securities for the whole price, even though they have been negotiated, and are still outstanding. It seems to be well settled that when the right of stoppage in transitu is properly exercised the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. He has the same rights with respect to the property, and they may be enforced in the same way. His right to intercept the goods before they reach the hands of the vendee, and his right to withhold those still in his possession, rest upon the same just principle, that the insolvent vendee cannot require the vendor to deliver the goods or perform the contract when he himself is unable to pay for them or perform the contract on his part. To require the goods to be delivered to such vendee would simply be applying the property of one man to the payment of another man's debts.

The right of the unpaid vendor with respect to the goods is sometimes called a "lien"; and it is a lien, in the sense that the vendee, upon payment or tender of the price, but not otherwise, may recover them. But it is something more than a mere common-law lien, which is only a naked right of possession. With the goods in his possession, the vendor has a special property in them, which is parcel of his original ownership. Whether the effect of the stoppage in transitu, or the retention of the goods by the vendor, on the discovery of the vendee's insolvency, is to rescind the contract, or not, has been the subject of much discussion; and some authors say the question is not yet definitely settled. But the prevailing opinion now is, we believe, that the contract is not necessarily rescinded, unless the parties by their conduct so treat it, which conclusion is most favorable to the vendor, for whose protection the doctrine of stoppage in transitu was first established. * * *

The observations of Gholson, J., in Benedict v. Schaettle, 12 Ohio St. 520, 521, are in point, and * * * he says: "If the true principle of the right of stoppage in transitu be found in that certainly just rule of mutual contract by which either party may withold performance on the other becoming unable to perform on his part; if the

foundation of the rule be a just lien on the goods for the price until delivered—an equitable lien adopted for the purposes of substantial justice—then it is the ability to perform the contract, to pay the price, which is the material consideration. If there be a want of ability, it can make no difference, in justice or good sense, whether it was produced by causes or shown by acts at a period before or after the contract of sale. Substantially to the vendor who is about to complete delivery, and abandon or lose his proprietary lien, the question is, can the vendee perform the contract on his part? has he, from insolvency, become unable to pay the price?" And in another part of the opinion he further says: "The rights of a fair vendee will be sufficiently protected by giving him an indemnity when the right of stoppage in transitu is exercised upon rumor or suspicion without any foundation in fact, and by depriving the vendor, in all cases, of any chance of speculating upon the goods, by requiring them to be delivered or accounted for to the vendee or his assignee on the payment or tender of the agreed price." * * *

GASS v. SOUTHERN PAC. CO.

(Supreme Court, of New York, Appellate Division, 1912. 152 App. Div. 412, 137 N. Y. Supp. 261.)

Action by John H. Gass against the Southern Pacific Company. From a judgment of the Supreme Court, in favor of the plaintiff, for the sum of $752.62, defendant appeals.

HIRSCHBERG, J. The defendant, a common carrier, appeals from a judgment awarding the plaintiff damages for the alleged conversion of certain lumber. The material facts were not disputed. It appeared that about February 1, 1905, the International Mahogany Company agreed to sell and to deliver to the plaintiff, free on board defendant's dock in the city of New York, certain lumber for the sum of $27 per 1,000 feet, including freight charges to that city, which were to be paid by plaintiff in cash. March 2, 1905, the International Mahogany Company, in order to comply with its contract, made a contract with the Gibson Cypress Lumber Company, a foreign corporation, whereby the latter company agreed to ship the lumber to the former company, free on board defendant's dock in the city of New York, for $385.83; the former company agreeing to pay the freight charges in cash at the time of delivery. On March 4, 1905, the Gibson Cypress Lumber Company delivered the lumber to the defendant at Gibson, in the state of Louisiana, for transportation to defendant's dock in New York City, and received a bill of lading therefor, marked "Not Negotiable," and containing the name of the International Mahogany Company as consignee. On March 20, 1905, the International Mahogany Company assigned its bill against the plaintiff for the purchase price of said lumber to the Astoria Veneer Mills. About the same day the plaintiff was notified of the assignment and asked to pay the purchase price of the lumber to said Astoria Veneer Mills. The bill of lading, properly indorsed, was delivered to the plaintiff on April 1, 1905. On March 30, 1905, the lumber arrived at the defendant's dock in New York City and was completely discharged thereon at 3 o'clock of the afternoon of the following day. On the 30th of March, 1905, the defendant sent a written notice to the consignee, the International Mahogany Company,

informing it of the arrival of the lumber, and stating that the freight charges were $214.50. The International Mahogany Company indorsed this notice with a direction to deliver the lumber to the plaintiff, and delivered the notice so indorsed to the Astoria Veneer Mills. The latter company on April 3, 1905, loaned the plaintiff, at his request, the amount of the freight charges, and gave him the indorsed notice of the arrival of the lumber, with a receipted bill for the purchase price thereof, and the plaintiff gave that company his secured promissory notes therefor. On April 4, 1905, the plaintiff demanded the delivery of the lumber from defendant and tendered it the bill of lading, the notice of arrival, and the Astoria Veneer Mills' check for the freight charges. The defendant refused to deliver the lumber unless the freight charges were paid in cash. The parties stipulated on the trial that the defendant had the right to demand the payment of those charges in cash. On the same day and before the payment of the freight charges in cash, and while the lumber was in defendant's possession, the consignor, Gibson Cypress Lumber Company, notified the defendant not to deliver the lumber. On that day the consignee, the International Mahogany Company, was duly adjudged a bankrupt. On April 5, 1905, the plaintiff again demanded delivery of the lumber, and again presented the Astoria Veneer Mills' check in payment of the freight charges, and the defendant again refused to deliver the lumber. On the following day the plaintiff tendered cash to the defendant in payment of the freight charges, and the defendant then refused to deliver the lumber, on the ground that its delivery had been prevented by the order of the consignor.

The unpaid consignor's right of stoppage in transitu may be exercised against an insolvent consignee at any time prior to actual or constructive delivery of the goods or the assignment of the bill of lading to a bona fide purchaser for value. The consignor may exercise this right while the goods are in the possession of the carrier at the place of destination and are held for unpaid freight charges, unless the bill of lading has been so assigned. * * * In the case at bar there was no delivery of the goods prior to the defendant's receipt of the stoppage order from the consignor, and the indorsement and transfer of the bill of lading was ineffectual under the circumstances of the case to defeat the consignor's right of stoppage in transitu. * * * By neglecting promptly to pay the freight charges he unreasonably delayed obtaining possession of the lumber until the consignee had failed and the consignor had exercised its right of stoppage in transitu. Under these circumstances, * * * I think the defendant was warranted in obeying the stoppage order transmitted to it by the consignor. Its letters to the consignee do not contain any waiver of its right to hold the lumber, those communications expressly making the proper payment of the freight charges a condition precedent to delivery.

The judgment should be reversed.

NORTHERN GRAIN CO. v. WIFFLER et al.

(Court of Appeals of New York, 1918. 223 N. Y. 169, 119 N. E. 393, 7 A. L. R. 1370.)

Action by the Northern Grain Company against Joseph J. Wiffler and others. From a judgment for defendants, plaintiff appeals.

HISCOCK, C. J. This appeal involves a consideration of the right of stoppage in transitu of goods sold on credit and shipped by a common carrier. The question of the existence of the right is to be determined upon an agreed statement of facts.

Plaintiff sold to one Wiffler on credit a carload of oats which were shipped to the latter over the line of the defendant railroad company. A bill of lading covering the shipment was forwarded with a draft for the purchase price of the oats, and upon acceptance by the vendee of the draft the bill of lading was delivered to him. He presented the same at the office of the defendant railroad company, where it was received and marked, "Canceled by delivery." "Thereupon" the vendee examined and was dissatisfied with the condition of the oats and "thereupon" withdrew the bill of lading from the railroad company, caused the words "Canceled by delivery," to be stricken from the face of the bill and "thereupon" returned it to the plaintiff with the statement that he refused to accept the oats or take delivery thereof by reason of their condition and that he rejected the same.

Nothing more was done by which there is claimed to have been accomplished a delivery to or acceptance by the vendee of the oats. These, after remaining in a car in the possession of the railroad company for six months, were sold at public auction to satisfy its lien for transportation charges and the surplus of the proceeds over such charges was held by the railroad company and is the subject of the present controversy.

The draft which had been accepted by the vendee was not paid at maturity, and an action was commenced against him thereon by the vendor and a judgment recovered which has never been satisfied. In such action the vendee alleged that: "The draft was given by defendant in payment of a certain carload of oats which plaintiff sold to the defendant and that the same were good, marketable, and useable (thus written in the agreed statement), and that when defendant received said carload the same were old and musty, and could not be sold and used, and were of no value whatsoever, and for that reason the note was given without consideration."

Intermediate the commencement of this action and entry of judgment the vendee made an assignment for the benefit of creditors to the defendant Dana, and thereafter plaintiff surrendered to the defendant railroad company for cancellation the bill of lading before mentioned and served upon it notice asserting the exercise of its right of stoppage in transitu of said oats, claiming that the latter had never been delivered to the vendee. * * *

The only debatable question under the tests thus prescribed is the one whether the goods had been delivered by the carrier to the vendee. It seems to us that they had not been. The facts determinative of that question have already been stated and need not be repeated. Referring back to them, it may be conceded that if the vendee after taking his bill of lading to the carrier and permitting it to be marked, "Canceled by delivery" had stopped, there would have been a constructive de-

livery. Also, if he had allowed the mater to rest in that situation for a substantial time before doing anything to recall this act, it might be necessary to submit to the jury the question whether a delivery had not been so consummated that it could not thereafter be avoided. But he pursued neither of these courses. After the stamping of the bill of lading, he "thereupon,"—that is, immediately—examined the oats and made what, if then permissible, was a clear and decisive refusal of acceptance of them from the buyer and of delivery from the carrier. It is only by separating these steps and regarding them as divisible and distinct transactions that a delivery can be made out. We do not think they ought to be thus separated, but that they were so closely connected in point of time and otherwise that they should be given the effect of one connected transaction. This being done, it is clear that there was no delivery. * * *

In accordance with these views, the judgment should be reversed and judgment directed in favor of plaintiff against the defendant New York Central & Hudson River Railroad Company, for the sum of $287.85, with any interest. * * *

NORFOLK HARDWOOD CO. v. NEW YORK CENT. & H. R. R. CO.

(Supreme Judicial Court of Massachusetts, 1909. 202 Mass. 160, 88 N. E. 564.)

Action by the Norfolk Hardwood Company against the New York Central & Hudson River Railroad Company. Judgment for defendant, and plaintiff appeals.

Plaintiff shipped certain lumber ordered by the Cambridge Lumber Company, consigned to plaintiff's order at East Cambridge, where it arrived August 3, 1904, over defendant's road. On July 21st plaintiff wrote the lumber company inclosing an invoice. On July 27th a waybill of defendant road was sent to plaintiff, showing freight, etc., and on October 4th defendant's agent wrote plaintiff requiring that the car be promptly unloaded, to which plaintiff replied that the car was intended for the Cambridge Lumber Company, and that the bill of lading called for Boston & Maine delivery, after which plaintiff directed the agent to deliver the lumber to the lumber company. The lumber company immediately directed that the lumber be stored, after which plaintiff received the lumber company's 90-day note therefor, and the lumber company, without paying the freight, had defendant reship the lumber for it to another town.

SHELDON, J. This action has been argued for the plaintiff as if it presented merely a question of the right of stoppage in transitu, but we are of opinion that this is not the case. The plaintiff, although it accepted the order of the Cambridge Lumber Company for the lumber in question, and undertook to forward the lumber accordingly, yet when it came to ship the goods consigned them to itself and took a bill of lading running to itself. It thus, as between itself and the purchaser, retained the possession and control of the lumber, and retained also its vendor's lien for the agreed price. * * * If the plaintiff has not lost this lien by parting with the possession of the goods, it can hold them in spite of the credit agreed to be given, upon the insolvency of the purchaser. * * * But if a delivery has been made to the purchaser by the authority of the plaintiff, then its lien, depending solely upon the possession of the property, is gone, and the plaintiff cannot hold the goods. * * *

When the car containing this lumber arrived at East Cambridge on August 4, 1904, the defendant's agent notified the plaintiff thereof, and the plaintiff on August 6th informed the agent by letter that the car was intended for the Cambridge Lumber Company, which is hereinafter called the purchaser; and on August 12th, the plaintiff, at the request of the defendant's agent, expressly authorized delivery to be made to the purchaser. In the meantime, on August 8th, the defendant, at the request of the purchaser, forwarded the car containing the lumber from East Cambridge to the defendant's Huntington avenue storehouse in Boston, and issued to the purchaser a local waybill naming the purchaser as the consignee. On August 10th the purchaser requested the defendant to store these and some other goods; and the defendant did accordingly store them in the name of the purchaser in its storehouse aforesaid, where they remained until taken by the plaintiff on this writ of replevin.

There can be no doubt upon these facts that the property, subject to the defendant's lien for its proper charges, was delivered by the defendant to the purchaser with the consent and authority of the plaintiff; and the plaintiff's lien for the price of the lumber was thus destroyed. * * * The plaintiff voluntarily gave up its lien upon the property; it does not rest its claim upon the allegation that this was procured by means of any fraud practiced upon it; and it cannot now reinstate itself in its original position.

If, however, it were necessary to pass upon that question, we should be obliged to hold that the plaintiff had failed to show any right to stop these goods in transitu. The goods were to be transported to East Cambridge, and, according to the final directions of the plaintiff, to be there delivered to the purchaser. The right of stoppage in transitu would continue until the goods were delivered to the purchaser, or until, by some new arrangement between the carrier and the purchaser, the former had recognized the title of the latter, and attorned to it, and agreed to hold the goods, not merely as carrier or as a warehouseman pending a complete delivery to the purchaser, but as agent for the purchaser under a new contract made and assented to by both the carrier and the purchaser. * * * The fact that the carrier's prior charges have not been paid, although strong evidence that no such new contract has been made, is not decisive. * * *

But here, although the defendant's charges remained unpaid, it yet did make a new agreement with the purchaser for the further transportation of these goods to a neighboring city; and it carried out that agreement. There was more than a mere storage of the goods for the convenience of the purchaser, which would not have terminated the transit. There was a recognition of the purchaser as owner, and a new transit, made under a new agreement with the purchaser, to a new destination, for the expenses of which the plaintiff personally could not have been held. If this new agreement had been made by the purchaser with another railroad company, which had paid the defendant's charges and made the new transportation, there could be no question that the original transit had ended, even though this new carrier held the goods not only for the freight due to itself, but also for the past charges of the former carriers which it would have satisfied. The original transit is at an end when the goods have reached their original destination; and when after this they are actually sent by the purchaser to a new destination, the right of stoppage in transitu

is as effectually destroyed as if he had taken manual possession of them and placed them in his own warehouse. This has been clearly stated by Lord Esher, in Bethell v. Clark, 20 Q. B. D. 615, 617, in which it was held that the original transit was not terminated: "There has been a difficulty in some cases where the question was whether the original transit was at an end and a fresh transit had begun. The way in which that question has been dealt with is this: Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage in transitu exists; but if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are in transitu afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone." * * * It can make no difference in principle that the new directions were given by the purchaser to the original carrier, and that the new transit was made over the lines of the original carrier. * * *

Accordingly the plaintiff had no right of stoppage in transitu when it replevied these goods, and no right to their possession, and cannot maintain this action. * * *

The judgment for the defendant must be affirmed.

Would a sale by the consignee, prior to notice from the seller to the carrier to stop the goods, and while the goods were still in transit, cut off the right of the seller to regain possession? It would follow, from the general rule that goods may be stopped at any time during the transit, that such resale, even to an innocent purchaser, would not affect the seller's rights. The Sales Act, however, expressly covers this point:

Section 62. Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Where there is a negotiable bill of lading outstanding, the situation is quite different. As long as the seller retains possession of the bill of lading, there is no need for him to resort to this right of stoppage in transitu; but, if he should deliver the bill of lading to the buyer, then his only remedy would be to exercise the right of stoppage in transitu. But the right under these circumstances is a very delicate one. It is available only so long as the bill of lading is in the hands of the buyer, and it is not effective, even then, if, subsequent to the stoppage, the buyer negotiates the bill of lading to an innocent purchaser. With respect to these matters the Sales Act provides:

Section 62. If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or

other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

RUMMELL et al. v. BLANCHARD et al.

(Supreme Court of New York, Appellate Division, 1915. 167 App. Div. 654, 153 N. Y. Supp. 159.)

Action by Jacob Rummell and another against Archibald Blanchard and another, trustees in bankruptcy of Alden & Co., a bankrupt, and another. From a judgment for defendant, plaintiffs appeal.

Action of replevin. In fulfillment of a contract dated January 27, 1913, for the sale or exchange of certain cases of shellac which Alden & Co. were to return at a later date, plaintiffs indorsed and delivered to Alden & Co. a negotiable warehouse receipt for the cases in question. On February 14th Alden & Co. tendered the receipt to the warehouseman and demanded new receipts running in their name. This demand was refused on the ground that the warehouse charges were unpaid, which payment Alden & Co. failed or declined to make. On their appointment, the indorsed receipt came into the possession of the defendants, trustees in bankruptcy of Alden & Co., from whom plaintiffs sought in this action to recover the goods.

HOTCHKISS, J. The sole question is whether plaintiffs lost their sellers' lien by indorsing and delivering the negotiable receipt to Alden & Co. Nearly 70 years ago, in the course of his opinion in McEwan v. Smith, 2 H. L. Cas. 309, Lord Campbell said (page 328): "There can be no doubt that, after sale of the goods, the vendor has a lien on them for the price, so long as they remain in his possession, and this is a doctrine as old as any doctrine connected with the purchase and sale of goods."

It is scarcely necessary to cite authorities to show that this ancient lien existed practically unchanged at the time of the codification in this state of the law of personal property, including bills of lading and warehouse receipts, and that it depended upon possession. * * * If the buyer once gets both title and possession from the seller, at common law the lien of the latter is gone. * * *

Prior to the legislation to which I have referred, it was uniformly held that bills of lading were in and of themselves muniments of title sufficient to vest title as well as possession and absolute control of the goods in him to whose order they were drawn. * * * These instruments, when indorsed and delivered for value, also vested in the indorsee to whom they were delivered, with intent to pass title, the same ownership and control of the goods as that held by him to whose order they originally ran. In this respect warehouse receipts were the same as bills of lading. * * *

The presumption is that Alden & Co. accepted the bill of lading in full satisfaction of their contract to sell and deliver. * * * These principles have been incorporated into the Personal Property Law and the Warehouse Receipts Act. * * * Section 137, art. 5, of the Personal Property Law, entitled "Sales of Goods," provides that the unpaid seller of goods loses his lien thereon "when the buyer or his agent lawfully obtains possession of the goods." Section 125 of the General Business Law provides that "a person to whom a negotiable receipt has been duly negotiated acquires thereby," not only the title

the one negotiating the receipt or the depositor of the goods, to whose order they were by the terms of the receipt to be delivered, had or could convey, but also "the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him." * * *

If such an instrument has been issued, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such document has been negotiated, etc. As Williston explains in his treatise on sales (page 921), these provisions were intended to protect a purchaser for value without notice after the seller had stopped the goods either by virtue of his right of stoppage in transitu or his seller's lien. It must be clear that they could not have been intended to work such a radical change in the law as would be the result if we accepted the appellants' argument that they applied to sustain a lien of a seller in the situation of these plaintiffs.

The order should be affirmed. * * *

SECTION 4.—UNPAID SELLER'S LIEN

All of the preceding portion of this chapter was devoted to the explanation of the circumstances under which an unpaid seller would have the rights of lien, of resale, and of rescission of the contract. We may now turn our attention to the discussion of the nature of these rights and as to the manner in which they may be exercised.

The prominent feature of a lien is that the seller in possession of the goods, or one who has regained possession by exercising his right of stoppage in transitu, has a right to continue to hold the goods, and by so doing is not guilty of any breach of contract with the buyer. The following cases illustrate the effect of the right of lien, and also one way in which the lien may be lost.

CAPUANO v. ITALIAN IMPORTING CO. OF NEW YORK.

(Supreme Court of New York, Appellate Term, 1915. 89 Misc. Rep. 449, 151 N. Y. Supp. 994.)

Replevin by Guiseppe Capuano against the Italian Importing Company of New York. From judgment for defendant, and from an order denying new trial, plaintiff appeals.

PENDLETON, J. The action is in replevin. The answer is a general denial, and sets up as a separate affirmative defense an alleged vendor's lien on the goods and the right to possession thereunder. It was apparently conceded at the trial, and nothing to the contrary is now claimed, that defendant bought the goods, with others, from one Andreis, and paid for them under an agreement that any not sold by the end of the season Andreis would take back and pay defendant therefor the invoice price, plus any duty paid. At the end of the season the goods in question remained unsold, and defendant demanded of Andreis under the agreement payment therefor of the invoice price, plus the duty paid. Andreis refused, and defendant thereupon

brought suit against Andreis for the agreed price, and recovered judgment for the full amount. Plaintiff claims title to the goods under an alleged purchase from Andreis subsequent to the entry of the above judgment.

That title to these goods passed to defendant at the time of their delivery to it under the original agreement with Andreis seems clear. On the latter's refusal to take back the goods and pay the agreed invoice price and duty paid, defendant could rescind and sue for the difference between the agreed price and their value as damages (section 142, Sales Act; * * *), or treat the goods as belonging to Andreis and sue to recover the contract price. If it elected to pursue the former course, title remaining in it, plaintiff took nothing by the assignment from Andreis and cannot recover. As matter of fact, it chose the latter, as an examination of the judgment roll introduced in evidence shows. In thus suing it treated Andreis as a vendee, and was entitled to a vendor's lien until the purchase price was paid, * * * unless it had lost the right to assert the lien, either (1) by an agreement to release it, which must have been a valid agreement for a consideration; or (2) by representations which had estopped it from asserting a lien; or (3) by acts so inconsistent with the lien as to show an election on its part to waive the lien and rely on another and inconsistent right or remedy.

As to any agreement, the only possible evidence was the alleged statements that the goods were at Mr. Andreis' disposal. These were without consideration, and could not constitute a valid agreement. They could not work an estoppel, as for that purpose it is essential to show that the representations were made to the person asserting the estoppel, that they were intended to be relied on, and were in fact relied on, and a change of position. There is nothing to show here that they were made to plaintiff, or intended for him, or that he ever heard of or relied thereon.

The suit brought against Andreis was not a waiver of the lien. * * * It is no more inconsistent with, or a waiver of, a lien than a suit on a note secured by collateral, or on a bond secured by a mortgage. There was, therefore, no evidence of waiver, and plaintiff's request to go to the jury on that question was properly denied, and the direction of a verdict for defendant was proper.

Judgment affirmed. * * *

WRIGHT v. FRANK A. ANDREWS CO., Inc.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 186, 98 N. E. 798.)

Action by William B. Wright against the Frank A. Andrews Company, Incorporated. There was a judgment for plaintiff, and defendant brings exceptions.

SHELDON, J. The jury could find that the plaintiff purchased a particular diamond of the defendant, the title to which at once passed to the plaintiff, but that he left it with the defendant to be set in a ring, for the whole price of $500, of which he paid down the sum of $100. They also could find that the stone was set in the ring to his satisfaction and acceptance, and that the defendant then retained it until he should make full payment therefor. The plaintiff, as it could be found, could not then pay the residue of the price, and after a con-

siderable delay made an offer to the defendant to rescind the purchase and take back what he had paid; but the defendant did not accept this offer. After still further delay he tendered the balance due to the defendant and demanded the ring, and the defendant merely answered that it did not then have the ring but could get it. By the tender, any lien which the defendant had upon the ring was ended, and the plaintiff was entitled to immediate possession thereof, as could be found, but the defendant refused to give it to him. If so, he was entitled to maintain an action for its conversion. * * *

Nor were the jury bound to find that the defendant had rescinded its contract with the plaintiff for his delay in making full payment, even if it could have done so. It never had returned or offered to return the payment which the plaintiff had made; nor as could have been found, had it availed itself of any one of the remedies which his default left open to it. * * * It may be assumed that it had a vendor's lien for the unpaid purchase money. * * * But this was perfectly consistent with, and indeed presupposed, a general right of property in the plaintiff, and would be ended by the plaintiff's tender. Nor was the tender invalid because it did not include interest which was not shown to have been due.

Accordingly a verdict for the defendant could not have been ordered. * * *

Exceptions overruled.

SECTION 5.—RIGHT OF RESALE

Obviously the bare right to hold the goods does not protect the seller sufficiently, for, if the buyer is intending never to pay for the goods, the seller will either desire to sell them to other persons or to use them himself. If all the seller has is a right to hold the goods, a sale by him to a third party or the use of them would amount to a conversion of the buyer's goods. We must not lose sight of the fact that title is really in the buyer in all of these cases. Clearly the law would not stop with giving the unpaid seller a mere right to continue in possession. In fact, wherever we find a lien, whether in the law of sales or other branches of the law, we will discover that the law prescribes a certain procedure whereby the lienholder may convert his lien into money or into an absolute ownership in himself. In the law of mortgages of land, every one is more or less familiar with the foreclosure suit. The term "foreclosure suit" merely describes the procedure by which the mortgagee, who has, by virtue of his mortgage, a lien on the land, has the right to have the land sold, and the proceeds arising from the sale paid over by the officer of the court who made the sale, to the mortgagee. So, also, where a pledgee of personal property may, by following out certain other, but similar, rules, obtain a sale of the goods and the right to apply the proceeds on the debt due him. Railroad companies have liens on freight to secure freight charges, and the company has a right, upon certain conditions and by following the prescribed procedure, to sell the goods and to apply the money on the debt.

Liens arise in a great many ways, but the point here sought to be made is that the law does prescribe some method by which the holder of the lien will be able to convert that right into money. The steps necessary to bring about this result vary according to the circumstances under which the lien arose. Accordingly in the law of sales we find special rules which the seller must follow, if he desires to sell the property or to resume his ownership in it. The most distinctive feature is that the buyer need not begin any action in court, as is necessary in enforcing a mortgage lien on land. The lien, given to the unpaid seller, is thus seen to be the real basis for the other two rights—of resale and of rescission. The latter two are derivative.

Sales Act, Section 60. (1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of an intention to resell be given by the seller to the original buyer. But where the right of resale is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer has been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

The first point that should be noticed in connection with this section is that the unpaid seller, in reselling the goods, **is not selling his own goods.** He is selling the goods of the buyer. The above section does not say that the unpaid seller, in making a resale, is doing so as owner of the goods. These sections merely give to the unpaid seller the legal power and legal privilege to sell the buyer's own goods and to pass a title to the buyer at the resale, which sale will be effective as against the claims of the original buyer. The distinction between selling as owner and selling, in a sense, as agent for the buyer, may sometimes affect the amount of the damages which the seller will be allowed to recover from

the buyer after the resale. We should recall that the circumstances are such, title being in the buyer, that the seller has the right to sue the seller for the amount of the purchase price. Let us suppose, in a particular case, that this amount is $1,000. The unpaid seller, instead of suing for the price, resells them strictly in accordance with this section, and obtains $900 for the goods on the resale. Suppose, also, that the market price was $950. When the seller sued the buyer, after the resale, he would recover the difference between the contract price, $1,000, and the amount obtained at the resale, $900—i. e., he would recover $100. If he had resold as owner, then the seller, in his subsequent suit against the buyer, would recover the difference between the contract price of $1,000 and the market price of $950, or $50. The resale fixes the amount of damage which may be recovered from the buyer.

There is this further difference between selling as owner and selling the purchaser's goods. The seller may add to his damages the expense to which he was put in selling the goods, and may also recover the cost to which he was put in keeping the goods from the time when the buyer was first under a duty of paying for the goods and the date of the resale.

From the business point of view, the important things to keep in mind are: First, that the right to resell does not arise until the buyer has been in default an unreasonable time. If a seller undertakes to resell on the first day after the buyer was under an obligation of paying the price, he is very likely to find that the law, instead of sanctioning the resale, will say that the act was a tortious conversion of the buyer's goods, and accordingly the seller will be liable to the buyer for all damages sustained thereby by the latter. There is one exception, noted in the section, where the seller is not obliged to wait until the buyer is in default an unreasonable time; i. e., when the subject of the sale was of a perishable nature. The reason for such exception is apparent. On the general question, how long must the seller wait? no satisfactory answer can be laid down in general terms. The circumstances of the case will in general indicate what constitutes an unreasonable time. In this connection the seller should not put very much reliance upon the rule stated in the section, which relieves him from the necessity of giving the buyer notice of the time and place of sale. That clause is by no means a dead letter, but at the same time it is decidedly to the interest of the seller to give such notice to the buyer of the time and place of sale. This gives an opportunity, and a fair one, to the buyer to protect himself. If notice is not given under circumstances where it could have been given, this carries with it suggestions that the seller may be attempting to take an unfair advantage of the buyer. For these reasons notice should be given. Before the adoption of the Sales Act, and in some of the states where it has not been enacted, the law requires notice to be sent to the buyer.

In the second place, the seller should take note of the direction

that he exercise reasonable care and judgment in making a resale. In connection with the circumstances of a particular transaction, this requirement may mean a good deal. The law will not permit an unpaid seller deliberately to resell the goods at a great sacrifice when a better price could have been obtained. If it proves to be an unfair sale, the seller will not be allowed to recover from the buyer any more than the difference between the contract price and the market price. If the sale is a fair one, he will recover the difference between the contract price and the amount which the goods brought at the resale.

SECTION 6.—RIGHT OF RESCISSION

The third and last right which the unpaid seller has against the goods is the right of rescission. This word is often used to express the idea that a party to a contract is excused from performing his obligation thereunder, if the other party has materially broken his promise. The term should not be used in this sense. When used in connection with a contract, rescission means some act which has the legal effect of totally destroying the legal relations between the parties to a contract or to some part thereof. What is the relation of the parties after destruction of these relations? As was shown in Chapter X of Contracts, the parties are in the same position that they were in before they entered into the contract. Any suit between the parties subsequent to a rescission of the entire contract is for the sole purpose of putting the parties in the same financial or proprietary position which they occupied just before they entered into contract relations. Such a lawsuit has a different object from an action brought on the contract to recover damages for its breach. An action to recover damages for the breach of a contract seeks to put the plaintiff, party not in default, in the same position he would have been in if the contract had been performed. An action following a rescission of a contract because of default, or for any other reason, seeks to put the plaintiff, not where he would have been if the contract had been performed, but to put him in the same position which he held before he entered into the contract which is now rescinded. One cannot sue upon a contract which has been totally rescinded. If but a part of it has been rescinded, the remaining portion is sufficiently alive to support an action upon it.

The Sales Act gives the unpaid seller two powers of rescission: (1) Power to rescind the transfer of title; and (2) power to rescind the entire contract. These sections are as follows:

Section 61. (1) An unpaid seller having a right of lien or having stopped the goods in transitu may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where

the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer has been in default an unreasonable time before the right of rescission was asserted.

The important point to notice in the first instance is, that this section authorizes an unpaid seller, upon the buyer's default, to **rescind the transfer of title**; that is, the buyer's failure to pay gives to the seller the legal power to treat the title as never having passed to the buyer. The seller may exercise this right only in the manner prescribed in the act; i. e., by manifesting by notice to the buyer or by some overt act an intention to rescind. While the next sentence provides that this notice need not be communicated to the buyer, it is always wiser to do so. After the seller manifests his intention to rescind, what are the legal relations between buyer and seller? Simply this: There is still a contract between buyer and seller, but the title to the goods has now returned to the seller. The situation is the same as would exist in any contract to sell goods, title not having passed to the buyer, which contract had been broken by the buyer. Consequently the seller may sue the buyer after rescission upon the contract for damages to recover for the breach. Since title is now back in the seller, the provisions of section 64 are applicable to all actions brought by the seller against the buyer for the latter's breach of an executory contract to sell. Here we find that the rule of damages is: "Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted." It is to be noticed that, if the seller, after rescission of the transfer of title, sells the goods, he does so as any owner of goods may do, and his right is in no sense based upon the section heretofore discussed, giving an unpaid seller the right of resale.

As noted above, the law gives the unpaid seller the power, not only to rescind the transfer of title, but also to rescind the whole contract.

Section 65. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder or has committed a material breach thereof, the seller may totally

rescind the contract or the sale by giving notice of his election so to do to the buyer.

Very seldom will it be to the advantage of the seller totally to rescind the contract, because, if he does so, he will have no right of action on the contract against the buyer for the breach. The unpaid seller may sue the buyer, not on the contract, but upon an implied or quasi contract to recover the reasonable value, not the contract price, of what he parted with. The plaintiff in such a case is seeking restitution. He is not suing for damages to compensate him for the loss of the contract. It would seem that an actual notice must needs be given to the buyer in this case, whereas, in rescinding the transfer of title, he need but manifest his intentions to rescind by some overt act. The remedy of rescission was taken up in Chapter X of Contracts, so that it is not necessary to go further into this matter here.

SECTION 7.—RIGHT TO DAMAGES FOR BREACH OF CONTRACT TO SELL

Where title has not passed to the buyer, and the buyer has broken his contract, it is perfectly obvious that the seller may sue the buyer on the contract and recover damages for the breach. Assuming that the seller was not in default, and that the buyer had materially broken his contract, the only remaining question concerns the measure of damages.

Sales Act, Section 64. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question, the measure of damages, is in the absence of special circumstances, showing proximate damages of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. (4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Sales Act, Section 51. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

TORKOMIAN v. RUSSELL et al.

(Supreme Court of Errors of Connecticut, 1916. 90 Conn. 481, 97 Atl. 760.)

Action by Baron J. Torkomian against William E. Russell and another. From a judgment for plaintiff, defendants appeal.

WHEELER, J. The finding recites that: On November 1, 1913, the defendants were dealers in automobiles in Waterbury and agents for the sale of the Lozier make of automobile. On said day the plaintiff and the defendants entered into a written contract by the terms of which the defendants agreed to sell the plaintiff a Lozier Six automobile, to deliver the same between April 15 and May 1, 1914, and to accept in part payment a used Studebaker car at the agreed price of $700, and to give the plaintiff their note for $700 payable to plaintiff or order on demand in consideration of the Studebaker car. The plaintiff in consideration of the promises of the defendants agreed to pay $3,250 for the Lozier car and not to demand payment of the $700 note unless the defendants failed to deliver the Lozier car. From about the beginning of 1914, down to the delivery period, the plaintiff repeatedly expressed his unwillingness to take the Lozier Six, and desired defendants to substitute another car, which they refused to do. The defendants were ready and willing to deliver the Lozier Six at the delivery period; but, by reason of plaintiff's expressed unwillingness to accept a car if delivered, the defendants did not make actual physical delivery.

The agreement expressly provides that the note is not to be demanded unless the defendants failed to deliver the car at the period named. The defendants pleaded, and it is found, that the plaintiff had notified the defendants for upwards of five months and down to the period of delivery named that he would not accept the Lozier Six. The defendants were entitled to act upon the assumption that the plaintiff meant what he said, and they were not required to go through the idle ceremony of making a physical tender. They did all that they were obliged to do when, having the means of getting the car, they "were ready and willing to deliver the Lozier Six automobile at the time specified for delivery in said contract." * * * There has been no failure on the part of the defendants to deliver this car, and the judgment, so far as the action upon the note was concerned, should have been for the defendants.

The remaining reasons of appeal that require consideration are based upon the measure of damages for the defendants adopted by the trial court. In count 1 of the complaint the plaintiff seeks to recover for

the defendants' breach of their contract, and in count 2 upon the $700 note. The defendants alleged under their special defense to both counts and as a basis of recovery on their counterclaim, that the plaintiff had notified them that he would not accept the car contracted for, if tendered, and, further, that they had lost in consequence of this breach of contract by the plaintiff seven hundred dollars. The defendants, if entitled to recover under their counterclaim, were entitled to recover under our common law such sum as would put them, so far as it can be done by money, in the same position they would have been in if the contract had been performed.

In the absence of special circumstances requiring a different rule, the damages recoverable by a vendor for refusal to take goods contracted for is the difference at the time and place of delivery, between the contract price and the market price. * * * But we recognize that this rule is not an unbending one, that the circumstances may require its modification in order to effectuate the cardinal purpose, "just compensation for the loss incurred." And the loss must be such as "may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract." * * * Section 64 of the Sales Act reaffirms our rule for measuring damages in case of breach of a contract of sale by the contractee or vendee.

The market price to these defendants of a Lozier Six was undoubtedly less than its selling price, since they were selling agents who purchased and took title to the cars they disposed of. Section 64 provides as a measure of damages the difference between the contract price and the market price "in the absence of special circumstances showing proximate damage of a greater amount." The circumstance that these defendants were selling agents and purchased cars at a rate lower than the market price of the cars to the public made the ordinary measure of damages inadequate. The defendants lost by the plaintiff's breach the difference between the contract price and what the car ready for physical delivery to the plaintiff would have cost them, which would have been the purchase price of the car plus the expense, if any, of delivery and of making it ready for delivery. This is the application to the facts of this case of section 64. It requires the person who has failed to keep his contract of sale to pay the loss caused to the contractor who has kept his contract. * * * The defendants, as vendors or contractors, were entitled to show what a Lozier Six car would have cost them in the same way a manufacturer might show the cost of an article manufactured by him. The defendants would thus recover the profits they would have made had the plaintiff carried out his contract. In such a case profits are not speculative, but certain and ascertainable, and the legitimate fruits of the contract. * * * The profit of the defendants might also have been ascertained by finding the commission made by them in the sale less the expenses incurred by them. * * *

Since the defendants retained the Studebaker car and the agreed price of this car was $700, the plaintiff should be allowed this sum, and the defendants should be allowed their profit had the plaintiff fulfilled his contract. The judgment should have been for the difference between these sums and for the plaintiff if the $700 exceeded the profit, and for the defendants if the profit exceeded the $700.

There is error, the judgment is reversed, and a new trial ordered.
* * *

CHAPTER VI

WARRANTIES

Section
1. Introduction.
2. Express Warranties.
3. Implied Warranties Considered Generally.
4. Implied Warranty of Title.
5. Implied Warranty That the Goods Shall Correspond to the Description.
6. Implied Warranty That the Goods Shall Correspond to the Sample.
7. Implied Warranty of Merchantability.
8. Implied Warranty of Fitness for a Particular Purpose.
9. Implied Warranties May Arise from the Usage of Trade.
10. Implied Warranties May be Negatived by Agreement.
11. Rights of Sub-Vendees Against Former Warrantors.

SECTION 1.—INTRODUCTION

From the business standpoint, the subject of warranties in sales and contracts to sell is of great importance. The legal problem in outline is simply this: To ascertain the circumstances under which the law regards a seller as having broken his promise as to the kind or quality of goods sold. We are already aware of the fact that the law recognizes express promises and implied promises. Similarly we find two classes of warranties: Express warranties and implied warranties. The representation or promise which is called a warranty is often called a guaranty. It is sometimes said that a seller guarantees his product. In the law the word "guaranty" is not used in this sense. In the law the word "guaranty" is used to describe a contract in which one person promises to be responsible for the performance of another person's obligation.

Controversy and litigation between buyer and seller over warranties is sometimes unnecessary. A grocer, who sells his customer a can of beef, which gives his customer ptomaine poisoning, could not very easily have avoided the liability; but the seller of a machine, who makes extravagant statements of fact concerning the article, might have avoided the liability.

Let us look for a moment at the subject of express warranties through the eyes of the seller, who, although anxious to make a sale, does not intend to make untrue statements about his goods. What matters of legal policy should he be aware of as he enters the negotiations leading up to the sale? Why does one make untrue statements about the goods which he sells? Now and then, of course, we find one who will deliberately and intentionally misrepresent his goods. This is fraud, because there is a guilty mind accompanying the act. In such a case, wholly outside the law of contracts, the law of torts gives to the defrauded buyer a right to sue the fraudulent seller in an action of deceit. We may eliminate that kind of a case from our discussion, for we are here concerned

with the honest seller. He very often makes untrue statements about his goods, but the law does not exempt him from responsibility because he made a mistake and acted honestly. Intention is not an element of a warranty.[1]

There are perhaps three principal reasons for the innocent or unintentional making of untrue statements of fact with respect to goods offered for sale:

(1) A clerk in a dry goods store, if asked whether a certain fabric will fade, may answer, "No," whether he has affirmative knowledge of that fact or not. A seller of a second-hand automobile may be led to state that the car offered for sale has not been run over a specified number of miles. Sometimes he knows the truth of the fact asserted, but often he does not know. The seller of complicated machinery may undertake to make all manner of assertions of fact concerning the article, without possessing the requisite knowledge. But enough has been said to call to mind the fact that there is considerable pressure upon a seller to launch into a vivid description of the thing offered for sale without possessing accurate information in regard to the facts asserted. The remedy for this is an obvious one, however difficult it may be to apply.

(2) Assuming that the seller possesses accurate information concerning the various features of the goods, it is still possible for him to fail to convey the truth to the prospective purchaser, because the language which he employs for that purpose is carelessly selected. Language is sometimes a very poor vehicle for the conveyance of thought from one mind to another. It is altogether possible for a seller to know the truth, and simply fail to transfer to the mind of the buyer the exact idea which the speaker had. The seller may use language which has a broader meaning than that intended, or he may select expressions which have too narrow a meaning. Oftentimes, in a particular line of business, custom may have attached fairly accurate notions to certain words descriptive of quality, which in common usage have a slightly different meaning. A seller may carelessly employ the word in the ordinary sense, under circumstances where the law would give it the technical interpretation.

The third cause for the unintentional making of untrue statements about the goods arises from the natural tendency of the seller to give an answer pleasing to the buyer in response to leading questions from him. The buyer, interested, will naturally make numerous inquiries concerning the goods, and will phrase his questions in leading form; that is, so that the hoped-for response is suggested in the question. It is the tendency for one so interrogated to give the suggested answer, without thinking whether it represents his real judgment. It is for this reason that the law of evidence forbids the asking of leading questions of witnesses; the answers thereto, as a general rule, not being trustworthy. The dramatic situation which may develop in the negotiations may easily lead the seller into the making of warranties which, in his sober judgment, he would not have made.

The law makes some concession to this trait of human nature, and provides, accordingly, that a statement of opinion shall not be deemed a warranty. But still the question is always raised: How may a statement of fact be distinguished from a statement of opinion? With this comment we may now take note of the purely legal aspects of express warranties.

SECTION 2.—EXPRESS WARRANTIES

Sales Act, Section 12. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty.

(1) A warranty may take the form either of an affirmation or of a promise. An affirmation relating to the goods differs from a promise relating to the goods, in that an affirmation is in form a statement of a fact then existing, while a promise is in form a statement that the individual so promising undertakes to do whatever may be necessary to bring the fact into existence. The affirmation will be a statement descriptive of the quality or of other attributes of the goods. Where the affirmation consists in a description of the goods given for the purpose of enabling the parties to identify them, this affirmation also is a warranty, but it is regarded as an implied warranty rather than an express warranty. If A. is selling B. a horse, and the horse is present, words describing the horse will constitute express warranties. But if A. is selling B. a horse, which at the time is in a field with many other horses, affirmations which describe the horse in such a way that he may, by means of the description, be identified, will be regarded as implied warranties. There is no difference in legal effect between the two except this: Where the contract relates to goods not identified, the affirmations descriptive of the identity of the goods makes the contract one of sale, as distinguished from a contract to sell, and therefore would affect the time when title would pass. If the description did identify the subject-matter of the contract, title would then pass. If the descriptive statement did not sufficiently identify the goods, title would not pass until there was an act of unconditional appropriation, assented to by both parties. An affirmation of fact relating to the attributes of the subject of the sale, whether it be with respect to ascertained goods or unascertained goods, are express warranties.

(2) The definition, set forth in the section above quoted, shows that it must be a particular kind of affirmation; i. e., one of fact, as distinguished from one relating to value, or which expresses some other opinion of the seller.

(3) It is to be noticed that not all affirmations of fact may be treated as express warranties. Only those affirmations of fact which have "the natural tendency to induce the buyer to purchase goods" may be so treated.

(4) Finally, the affirmation of fact which has a natural tendency to induce the buyer to purchase the goods, while it thus satisfies all of the formal requirements of warranty, will not be so regarded, unless, in the particular case, the buyer did in fact purchase the goods relying upon such affirmation of fact.

All of these four elements must be present before a seller will be held liable for breach of an express warranty. The following cases illustrate the application of these rules.

HOBART v. YOUNG.

(Supreme Court of Vermont, 1891. 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693.)

The evidence of the plaintiff tended to show that in early June, 1888, he purchased a pair of horses, of which the horse in question was one; that he first saw these horses in May; that about the 1st of June he rode after them with the defendant; and that the defendant then warranted them to be sound. The bill of sale which the plaintiff signed was as follows: "Alburgh, June 5, 1888. J. W. Hobart bo't of Sumner Young, Esq., one pair of black (Pilot) geldings, sound and kind, $487.50 to be delivered on the cars at the depot with good halters, duties paid, and certificates of the same attached hereto. Rec'd. payment. S. Young."

ROWELL, J. * * * An important question is whether the words "sound and kind," contained in the bill of sale, constitute an express warranty as matter of law. The law of warranty has undergone much change since Chandelor v. Lopus, Cro. Jac. 4, decided in the Exchequer Chamber in 1803. It was there held that an affirmation that the thing sold was a bezoar stone was no warranty; for, it was said, every one, in selling his wares, will affirm that they are good, or that the horse he sells is sound; yet, if he does not warrant them to be so, it is no cause of action. But latterly courts have manifested a strong disposition to construe liberally in favor of the purchaser what the seller affirms about the kind and quality of his goods, and have been disposed to treat such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. * * * And now any affirmation as to the kind or quality of the thing sold, not uttered as matter of communication, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase if so received and relied upon by the purchaser, is deemed to be an express warranty. And in cases of oral contracts it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not. * * *

But when the contract is in writing it is for the court to construe it, and to decide whether it contains a warranty or not; * * * and by the great weight of recent authority positive statements in instruments evidencing contracts of sale, descriptive of the kind, or as-

sertive of the quality and condition of the thing sold, are treated as a part of the contract and regarded as warranties if the language is reasonably susceptible of that construction, and it is fairly inferable that the purchaser understood and relied upon it as such. Thus, in Hastings v. Lovering, 2 Pick (Mass.) 214, 13 Am. Dec. 420, the sale note described the article as "prime quality winter sperm oil." The plaintiff declared in assumpsit on a warranty, and had judgment. In Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367, the bill of particulars affirmed the article to be indigo. The court said that that imported an express warranty if it was so intended, and that it must be taken to have been so intended, as there was no evidence to the contrary. In Brown v. Bigelow, 10 Allen (Mass.) 242, a case exactly in point, these very words, "sound and kind," were held to constitute a general warranty of soundness. In Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455, a bought and sold note described the article as "Ceara scrap rubber as per sample, of second quality." The court said that it did not admit of doubt that the note was intended to express the terms of the sale, and that the contract of the parties was to be found in what was thus written, read in the light of the attendant circumstances. Held a warranty that the rubber was of second quality, and that the fact that the plaintiff made such examination of it as he pleased did not necessarily do away with the warranty.

Osgood v. Lewis, 2 Har. & G. (Md.) 495, 18 Am. Dec. 317, is a leading case on this subject. There the bill of particulars contained a statement that the article was "winter-pressed sperm oil," and the question was whether those words were per se a warranty; and it was held that they were, for it was said they could not be regarded as mere matter of opinon or belief, but as the assertion of a material fact that the defendant assumed to know and to warrant the existence of. In Kearly v. Duncan, 1 Head (Tenn.) 397, 73 Am. Dec. 179, the words, "said negroes, sound in body and mind," contained in a receipt for the price paid for them, were held clearly to constitute a warranty of soundness. The words, "being of sound mind and limb, and free from all disease," in a bill of sale of slaves, were held a warranty in Cramer v. Bradshaw, 10 Johns. (N. Y.) 484. This case is criticised by Bennett, J., in Foster v. Caldwell's Estate, 18 Vt. 181, who would treat the words as a mere representation, descriptive of the property sold. But that case seems to have stood the test in New York, while Seixas v. Woods, 2 Caines, 48, 2 Am. Dec. 215, and Swett v. Colgate, 20 Johns. 203, 11 Am. Dec. 266, to which he refers, and which held that no warranty arises from a description of the kind of property sold, have been expressly overruled by Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595, as not properly applying the doctrine that they correctly announce, wherein a contrary application is made, and wherein it is held that there is no distinction in principle between a representation as to quality and condition and a representation as to kind and character. And in 1 Smith, Lead. Cas. (7th Amer. Ed.) 341, it is said that such a distinction is too refined to be practicable.

In Yates v. Pym, 6 Taunt. 446, a description of bacon in a sale note as "prime singed" was held to be a warranty that it was prime singed. So in Bridge v. Wain, 1 Starkie, 504, the goods sold were described in the invoice as "scarlet cuttings." Held a warranty that they answered the known mercantile description of scarlet cuttings. The advertise-

ment of the sale of a ship described her as a "copper-fastened vessel," whereas she was only partially copper-fastened, and not what was called in the trade a "copper-fastened vessel." Held a warranty that she was copper-fastened. Shepherd v. Kain, 5 Barn. & Ald. 240. A sold note described turnip seed as "Skirving's Swedes." Coleridge, J., said that there was no doubt that the statement was made by the defendant a part of the contract, and it was held to be a warranty that the seed was Skirving's. Allan v. Lake, 18 Q. B. 560. In Wetherill v. Neilson, 20 Pa. 448, 54 Am. Dec. 741, the bill of sale described the soda ash as being of a certain strength, whereas it was of a less strength, and unmerchantable. Held no warranty. It is said in 1 Smith, Lead. Cas. (7th Amer. Ed.) 343, that this case stands almost if not quite, alone, and cannot be reconciled with the general course of decisions in this country and in England. In Barrett v. Hall, 1 Aik. 269, the note was payable in "good cooking-stoves." The court said that no definite quality could be intended from the term "good," and that it imported nothing but opinion, and was no warranty, and referred to Chandelor v. Lopus, Cro. Jac. 4, for authority, which is no longer authority. But we do not say that the court was wrong in that case, for "good" is a very common term of praise in trade, and, as used in the note, ascribed no particular quality to the stoves, and might well be regarded, in that case, as mere matter of opinion or commendation, and as so understood by the parties. In Wason v. Rowe, 16 Vt. 525, the bill of sale said the horse was "considered sound." Held no warranty; and with good reason, for "considered" was no assertion of a fact, but a mere expression of opinion.

The more recent cases in this state recognize the general rule that positive statements of fact by the seller in respect of the kind or the quality of the thing sold that constitute a part of the contract or form its basis, and that are fairly susceptible of such a construction, are to be regarded as warranties. Thus in Beals v. Olmstead, 24 Vt. 114, 58 Am. Dec. 150, one of the reasons given why the defendant's statements ought to be regarded as warranties is that they were made positively, and concerning matters as to which he was supposed and professed to have knowledge. Therefore, it is said, he ought to expect to be bound by them. See, also, Drew v. Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122; Enger v. Dawley, 62 Vt. 164, 19 Atl. 478. It is sufficiently certain, as matter of construction, that the words, "sound and kind," found in the bill of sale before us, were intended by the parties to be a part of the contract of sale, and as such it would be unreasonable to construe them as an expression of mere opinion when they positively ascribe to the horses a condition and a quality that the defendant assumed to know they possessed, and that he had peculiar means of knowing, whether they possessed or not, while the plaintiff had no such means.

We think the words, reading the instrument in the light of the attendant circumstances, clearly constitute an express warranty of soundness and that the chief judge was right in so holding. Judgment affirmed.

DEMING v. DARLING.

(Supreme Judicial Court of Massachusetts, 1889. 148 Mass. 504, 20 N. E. 107. 2 L. R. A. 743.)

Action by Vesta A. Deming against David H. Darling, for fraudulent representations, whereby plaintiff's agent, Dr. Charles Jordan, was induced to purchase a certain railroad bond. Verdict for plaintiff, and defendant excepts.

HOLMES, J. This is an action for fraudulent representations, alleged to have been made to the plaintiff's agent for the purpose of inducing the plaintiff to purchase a railroad bond from the defendant. * * *

Among the representations relied on, one was that the railroad mortgaged was good security for the bonds, and another was that the bond was of the very best and safest, and was an "A No. 1" bond. With regard to these and the like, the defendant asked the court to instruct the jury "that no representations which the defendant might have made or did make to Dr. Jordan, in relation to the value of the bond in question, or of the railroad, its terminals, or other property which were mortgaged to secure it, with other bonds, even though false, were representations upon which Dr. Jordan ought to have relied, and are not sufficient to furnish any grounds for this action;" and also "that each of the expressions, 'and that the same [meaning said rail, and all the property covered by the mortgage] was good security for said bonds,' 'that said bond was of the very best and safest, and was an "A No. 1 bond," ' are expressions of opinion of value, and even though false are not such representations as Dr. Jordan had a right to rely upon, and are not enough to furnish any grounds for this action."

The court declined to give these instructions, and instead instructed the jury that "an expression of opinion, judgment, or estimate, or a statement of a promissory nature, relating to what would be in the future, so far as they were expressions of opinion, if made in good faith, however strong as expressions of belief, would not support an action of deceit."

It will be seen that the fundamental difference between the instructions given and those asked is that the former require good faith. The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as "seller's statements," apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. Pike v. Fay, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion—which do not imply untrue assertions concerning matters of direct observation (Teague v. Irwin, 127 Mass. 217), and as to which "it always has been understood, the world over, that such statements are to be distrusted." * * * Moreover, in this case, market prices, at least, were easily accessible to the plaintiff.

The defendant was known by the plaintiff's agent to stand in the position of a seller. If he went no further than to say that the bond was an "A No. 1" bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable, under the circumstances of this case, even if he made the statement in bad faith.

* * * The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed. * * *

Exceptions sustained.

McCORMICK et al. v. KELLY.

(Supreme Court of Minnesota, 1881. 28 Minn. 135, 9 N. W. 675.)

DICKINSON, J. This action was brought to recover the amount of a promissory note made by the defendant to the plaintiffs for part of the purchase price of a harvester purchased by the former from the latter. The making of the note is not in issue; the only defense asserted being in the nature of a counter claim for damages from an alleged breach of warranty, on the part of plaintiffs, in respect to the harvester.

By his answer the defendant avers that he first took the machine on trial, and upon the trial it proved to be unsatisfactory and would not do good work, and that he notified the plaintiffs to take the machine away; whereupon the plaintiffs promised and agreed with the defendant to put the machine in good order; to furnish certain parts of the machine new, and warranted the machine to be well made, of good material, durable, and not liable to break or get out of order; that it would cut and elevate grain as well as any other machine, and was in all respects a first-class machine, and capable of doing first-class and satisfactory work as a harvesting machine; relying upon which promises, agreements, and warranties, defendant purchased the machine, giving the note in question. * * *

The court further instructed the jury in the following language: "A vendor may warrant against a defect that is patent and obvious. * * * You sell me a horse, and you warrant that horse to have four legs, and he has only three. I will take your word for it. [The court then read in the hearing of the jury the following from Addison on Contracts: 'When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain, and were known to the purchaser, cannot be relied on as a ground of action. If one sells purple to another, and saith to him, "This is scarlet," the warranty is to no purpose, for that the other may perceive this; and this gives no cause of action to him. To warrant a thing that may be perceived at sight is not good.'] Gentlemen, that is not the law of this state."

The court erred in these instructions to the jury. It has always been held that a general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty, and both the weight of authority and reason authorize this proposition, viz.: that for representations in the terms or form of a warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain. * * *

In the nature of things one cannot rely upon the truth of that which he knows to be untrue; and to a purchaser fully knowing the facts in respect to the property, misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract.

It has often been said that a general warranty may cover patent defects, and it has led to some misapprehension of the law. The proposition is strictly true, but, as was said by the court in Marshall v. Drawhorn, 27 Ga. 275, it is "confined to those cases of doubt and difficulty where the purchaser relies on his warranty and not on his own judgment." It has no application to the case of a purchaser who knows the defects in the property and the untruthfulness of the vendor's representations. We do not, however, mean to say there may not be a warranty against the future consequences or results from even known defects. The fact that a portion of the charge given at the request of the plaintiffs stated correctly the legal principle under consideration, cannot affect the result. In fact, that the instructions to the jury were thus inconsistent, and calculated to mislead or confuse rather than inform and guide the jury, is, in itself, a sufficient reason why the verdict should not stand. * * *

The order refusing a new trial is reversed and a new trial is awarded.

MEICKLEY v. PARSONS et al.

(Supreme Court of Iowa, 1885. 66 Iowa, 63, 23 N. W. 265, 55 Am. Rep. 261.)

ADAMS, J. There was evidence tending to show that the plaintiff expressly warranted the brick "to be good brick and all right"; that they in fact were not all good; that there were in the kiln between 45,000 and 50,000 brick, and that about 10,000 were worthless; that the purchaser saw the exterior of the kiln, and that the brick upon the outside appeared to be good, but upon the removal of a portion of them there was revealed what the witnesses call a "cold spot," where the brick had been imperfectly burned; that the "cold spot," or defective part of the kiln, could have been discovered by the purchaser, but not without going upon the top of the kiln, and the kiln was covered with three thicknesses of boards, and some brick and other things, and the purchaser did not go upon the top of the kiln. The court instructed the jury that "if, by the exercise of ordinary care at the time of the purchase, he (the purchaser) might have discovered and known the character, quality, and number of brick in the kiln, and failed to do so, he cannot recover because of a breach of warranty." The giving of this instruction is assigned as error. In our opinion the instruction cannot be sustained.

In Benj. Sales, § 616, the author says: "A general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer." Some of the authorities speak of the defects which are not covered by a warranty as those which are patent or obvious. The doctrine seems to be that the warranty as to such defects is waived. The court may presume, ordinarily, that that was the understanding. But we cannot think that the purchaser who has bought with a warranty is to be careful in order to avoid a waiver of it. The purpose of exacting a warranty may be to exempt the purchaser from the necessity of diligence. The court below was perhaps misled by a rule which applies in a different kind of a case. Where the question is as to whether a representation was understood to be a warranty or mere expression of opinion, it may be important to inquire whether the purchaser could, in the exercise of ordinary diligence, have formed his own opinion.

Where a purchaser forms his own opinion, or might be expected to do so, it is the right of the seller to insist that his representation was a mere expression of opinion. But the case before us is not one of representation, where the words used might or might not be a warranty, according to circumstances. The instruction concedes the fact of warranty. Now, the brick being warranted, the purchaser, we think, might feel excused from exercising the care to discover the defect in the kiln which he, or a prudent purchaser, would probably have exercised if buying without a warranty. * * *

Reversed.

POWERS v. BRIGGS.

(Supreme Court of Michigan, 1905. 139 Mich. 664, 103 N. W. 194.)

Action by Seroll E. Powers against Albert Briggs. There was a judgment for defendant, and plaintiff brings error.

MONTGOMERY, J. This action was brought to recover the price of a hay loader sold and delivered to the defendant. The defense was that the loader was bought under an express warranty that it would do good work and would load hay from windrows, and that, if it failed to do so, defendant might return it; that it did not answer the terms of the warranty; and that defendant returned it. There was a sharp contest on the trial. * * * The evidence shows that, after the conversation referred to in the request, the subject was again taken up, and the loader ordered. In the view most favorable to plaintiff, it was a question for the jury as to whether the subsequent order had reference to, and was understood to have reference to the preceding conversation, and whether both parties understood that the loader was ordered under the warranty which was a part of the offer of the machine in the first instance. The case of Childs v. O'Donnell, 84 Mich. 533, 47 N. W. 1108, is easily distinguished. It was there held that a warranty on a sale of one bill of goods did not attach to a sale of another bill at a later time. In the present case the negotiations all related to the identical machine delivered to the defendant, and the question is whether all that was said during the negotiations was understood to have reference to these machines, and whether, in the understanding of the parties, the proposed warranty attached when the sale was finally consummated. * * *

No error appears. Judgment affirmed.

Sales Act, Section 11. (1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the nonperformance of the condition as a breach of warranty.

Sales Act, Section 7. (1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—(a) as avoided, or (b) as transferring the property in all the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8. (1) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—(a) as avoided, or (b) as binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

ABE STEIN CO. v. ROBERTSON.

(Court of Appeals of New York, 1901. 167 N. Y. 101, 60 N. E. 329.)

Action by the Abe Stein Company against Julius Robertson. From a judgment for plaintiff, defendant appeals.

MARTIN, J. The action was to recover damages for the breach of a contract between the parties for the purchase and sale of a quantity of goatskins. The agreement was made through brokers, and evidenced by a bought and sold note dated May 24, 1895, modified by a letter dated the 31st of the same month. The note was as follows: "New York, May 24, 1895. Sold, for account of Messrs. L. F. Robertson & Son, to the Abe Stein Company, about 85,000 Teinsin goatskins, firsts, 1⅝ to 2 lbs. avg., expected to arrive from China, at 22 cts. per lb. Goods to be shipped immediately by steamer or steamers to New York. About ⅔ of lot to be medium, black-haired skins, and the remainder ⅓ white or gray-haired skins, of which 40 per cent. medium hair, 60 per cent. medium to long hair. Skins to be of the usual good quality of this province. Any question of quality to be decided by selling brokers, and their decision to be final and binding on both parties. Terms, net cash, and to be taken from the wharf. John Andresen & Son, Brokers." The modification by letter was the addition of the usual condition of "no arrival, no sale." Subsequently the defendant notified the brokers of the arrival of a portion of the goods, which were inspected by them in the presence of both parties, whereupon they determined that the goods tendered were not of the

kind or quality described in the contract. As subsequent shipments were received, they were also examined in the same way, and the same conclusion was reached in regard to them. Upon such determinations the plaintiff refused to receive the goods shipped, and brought this action for damages sustained by the failure of the defendant to deliver the goods contracted for. * * *

The appellant insists that the contract was conditional, not only as to its performance, but as to its effect, and that the provisions, "expected to arrive from China," and "no arrival, no sale," were, in effect, an agreement that if the goods referred to in the contract, when they arrived, were not of the quality prescribed, the contract was at an end, and the plaintiff could recover nothing for its breach. Doubtless the effect of those provisions was to relieve the defendant from any breach of the contract occasioned by the nonarrival of the goods, provided it was not caused by fault of the seller. There are also other cases relied upon by the appellant where the existence of a right of recovery is conditional upon the arrival of goods of the quality specified in the agreement. But no such condition existed in this case, as there was an express agreement upon the part of the seller to make shipment of the goods particularly specified in the contract. This contract was clearly executory, and the title was not intended to pass until the goods arrived and were delivered. * * * But the principle that, if the goods specified and described in the contract do not arrive, a condition which terminates the contract exists, and the seller is not liable, has no application where the contract contains either a warranty that the shipment has been made, or an express agreement upon the part of the seller to make shipment of goods described. In the latter case the contract is an existing and continuing one, and its provisions as to the quality of the goods are not only conditions precedent to any obligation upon the part of the buyer to accept them, but, where the seller fails to ship goods of the quality required, the buyer is also entitled to such damages as he sustains by reason of such failure. * * *

In this case, as the contract required the defendant to ship the goods described therein immediately by steamer or steamers to New York, he was bound not only to ship goods at the time and in the manner directed, but was likewise bound to ship goods of the quality required, and upon his failure to do so he was liable for a breach of the contract. The parties expressly agreed that the question of quality was to be conclusively determined by the brokers. That was the only question about which there was any controversy in this case. The undisputed evidence is that the brokers decided that the goods were not of the quality required by the contract, and, as there was no fraud or collusion upon their part, their decision concluded the parties upon that question.

The conclusion we have reached in this case is: (1) That the terms, "expected to arrive," and "no arrival, no sale," apply only to the risks or perils of navigation or transportation. (2) That the goods which the defendant intended to deliver, and which he tendered to the plaintiff in performance of his contract, having been determined, in the manner provided therein, not to be of the quality which he contracted to sell, the plaintiff was not bound to accept them. (3) It having been proved by undisputed evidence that the goods which the defendant shipped in pursuance of his contract arrived, and it having been conclusively established in the manner pointed out in the con-

tract that they were not of the quality required, the plaintiff was entitled to recover such damages as he sustained by the defendant's failure to deliver goods of the quality described in the agreement. (4) Under these circumstances, with the additional one that there was no dispute as to the amount of damages sustained, the court properly directed a verdict, and the judgment should be affirmed, with costs. * * *

J. A. KIRSCH & CO., Inc., v. BENYUNES.

(Supreme Court, Special Term, New York County, 1919. 105 Misc. Rep. 648, 174 N. Y. Supp. 794.)

Action by J. A. Kirsch & Co., Incorporated, against Joseph De A. Benyunes. Plaintiff's motion for judgment sustaining its demurrers to the defenses denied.

LEHMAN, J. The complaint herein alleges that the plaintiff and the defendant on the 27th day of November, 1916, entered into a written contract, a copy of which is annexed to the complaint. The material parts of the said contract are as follows:

"Sold to Messrs. J. A. Kirsch & Co., Inc., New York, for account of Mr. J. D. A. Benyunes, New York. Quantity (about) twenty-eight hundred (2,800) baskets of about 110 net each, crop 1916, good quality Spanish chestnuts at seven cents (7c) per pound net, ex dock New York. Shipment reported by cable to be afloat per S. S. Elef K. Venezelos, scheduled to be due here to-day."

The complaint further alleges that the said 2,800 baskets of chestnuts duly arrived on the Elef K. Venezelos in the city of New York on the 28th day of November, 1916, but the defendant repeatedly neglected and refused to deliver the said 2,800 baskets of Spanish chestnuts purchased by the plaintiff from him, and still fails and refuses to deliver the same. The defendant claims that the steamer Venezelos sailed from the port of Lisbon, Portugal, on or about November 12, 1916, and did not arrive at the port of New York until December 2, 1916; that the chestnuts covered by the agreement of November 27th between the parties arrived in a moldy condition, and that the department of agriculture directed that the entire shipment should be destroyed, except approximately 228 baskets of the said chestnuts, which had not deteriorated, and which were found to have passed the standards of the United States government. The defendant has pleaded this claim, in various forms, in five separate affirmative defenses, and the plaintiff has demurred to the sufficiency thereof. Upon this motion the court must first consider whether the facts claimed by the defendant could constitute a defense to an action for nondelivery of the chestnuts. * * *

The first affirmative defense alleges in effect that the contract of sale was for a specific shipment or consignment of 2,800 baskets of Spanish chestnuts, at that time aboard the steamer Venezelos, on its way to the port of New York; that subsequent to the making of the aforementioned contract of sale of the said consignment of chestnuts, and before their arrival at a dock in the port of New York, without any fault on the part of the defendant, part of the consignment of chestnuts perished, or the whole or a material part of said consignment of chestnuts so deteriorated in quality as to be substantially changed in character. * * *

It is quite evident that the defendant in pleading these defenses intended to allege facts which would bring this case within the rule announced in sections 7 and 8 of the Sales Act. The plaintiff, however, urges that these sections have no application, because (1) under the agreement between the parties the defendant did not sell specific goods on the steamship Venezelos, but merely agreed to deliver 2,800 baskets of chestnuts, complying with a certain description or warranty, and was absolutely bound to ship and deliver such goods; and that (2) if the contract was for the sale of specific goods it contained an express warranty that the goods were of good quality, and that the rule announced in the statute has no application to a sale where there is an express warranty of quality. It seems to me quite clear under the terms of the written contract that the defendant agreed to sell and deliver certain goods described in the contract and that the contract was conditional upon the arrival of the steamship with the goods described in the contract upon it.

In the case of Shields v. Pettie, 4 N. Y. 122, a broker negotiated a contract in these words: "Sold for Messrs. Geo. W. Shields & Co., to Messrs. Pettie & Mann, 150 tons Gartshemi pig iron, No. 1, at $29 per ton, one-half at 6 mos., one-half cash, less 4 pr. ct., on board Siddons." It was understood by both parties that the ship Siddons was at sea when the contract was made, and she arrived at the port of New York about 10 days afterwards with the quantity of iron contracted for, but which turned out not to be the quality denominated No. 1. The court there held: "There was no warranty, express or implied, either that any iron should arrive, or that arriving, it should be of a particular quality. One hundred and fifty tons of Gartsherni pig iron of the quality denominated No. 1 was expected to arrive by the Siddons, and the contract was to the effect that, if that quantity and quality of iron did so arrive, one party should sell and the other should receive it at a certain price per ton. The iron called for by the contract did not arrive, but iron of a different quality, and I think the contract was at an end."

It seems to me that the same rule of law applies to the facts in the present case as pleaded by the defendant. The defendant agreed under that contract to sell to the plaintiff certain specific goods described therein, which both parties evidently believed to be upon the steamship Venezelos. The defendant did not agree to deliver and the plaintiff did not agree to accept any goods of similar kind which might arrive upon another steamship. No goods of that description arrived on the steamship Venezelos, and the contract to sell was therefore at an end. The authority of the case of Shields v. Pettie, supra, has apparently never been questioned in this state, although there are decisions which distinguish and perhaps limit the application of that decision. In the case of Abe Stein Co. v. Robertson, 167 N. Y. 101, 60 N. E. 329, the defendant agreed to sell certain goatskins "expected to arrive from China, at 22 cents per pound. Goods to be shipped immediately by steamer or steamers to New York." Thereafter the defendant did ship goatskins from China, but when they arrived they were not of the quality prescribed. In that case the court held that the right of recovery in the buyer was not conditional upon the arrival of the goods of the quality specified in the agreement, stating: "The principle that, if the goods specified and described in the contract do not arrive, a condition which terminates the contract exists and the seller is not liable,

has no application where the contract contains either a warranty that the shipment has been made, or an express agreement upon the part of the seller to make shipment of goods described."

In the present case it seems to me quite evident that the written contract contained no warranty that the shipment had been made and no express agreement upon the part of the seller to make a shipment of goods described, but that, on the contrary, the contract was made in reliance upon a report that such goods had been shipped on the steamer Venezelos, and was conditioned upon the arrival of that steamer with such goods. It may, however, be urged that the words "good quality" are not words of description, but constitute a warranty by the defendant, and that, since 2,800 baskets of Spanish chestnuts as described in the contract arrived on the steamship Venezelos, the condition upon which the vendor's liability depends was fulfilled, and the vendor was obliged to deliver the goods described in the contract of sale, and in addition to comply with his collateral warranty that the goods were of good quality. * * *

In my opinion, however, these words do not constitute a collateral warranty, but constitute merely a description of the goods covered by the contract of sale. It is true that in the case of Egbert v. Hanford Produce Co., 92 App. Div. 252, 86 N. Y. Supp. 1118, the court stated: "The rule seems to be well settled that upon a sale of personal property, where inspection of it is not possible at the time, and the seller knows the quality and the buyer does not, the representations made by the seller as to quality are to be regarded as a warranty." In the present case, however, there is nothing to show that the seller knew the quality. On the contrary, the goods had at that time been upon the ocean more than 15 days, and the answer specifically alleges that they had deteriorated in quality without the knowledge of the defendant.

Moreover, the first and second affirmative defenses allege deterioration after the making of the contract, and the defendant could certainly not have had any knowledge at that time that they would not deteriorate thereafter. I have not overlooked * * * section 11 of the Sales Act. Under this provision the distinction between an implied warranty of condition that the goods sold shall comply with the description and an express warranty that the goods shall be of the quality named is for most purposes destroyed.

Before, however, a party may treat the nonperformance of the condition as a breach of warranty, it must appear that the other party has actually promised that the condition should happen or be performed; whereas, in the present case, the contract is certainly susceptible of the interpretation that the defendant did not agree that the goods to be delivered under the contract should comply with the description, but merely agreed that if such goods arrived it would deliver them for the agreed price to the plaintiff. If these views are correct, then the fact that 2,800 baskets of good quality chestnuts did not arrive on the steamship as contemplated by the parties would in itself and without regard to sections 7 and 8 of the Sales Act put an end to the contract and release the defendant from any obligation thereunder, for the defendant's promise to sell and deliver such goods was based upon a condition which was never fulfilled. On the other hand, if the contract be regarded as a contract to sell specific goods which actually arrived in New York upon that steamer, and the description was inserted merely for the purpose of identifying the goods, then sec-

tions 7 and 8 of the Sales Act apply, and if the goods had perished at the time when the agreement was made, or the goods without the knowledge of the seller had deteriorated in quality, so as to be substantially changed, or if after the contract was made the goods perished or so deteriorated in quality, the defendant could not be held liable for the loss which occurred without his fault. In other words, the defendant is clearly not bound under this contract to deliver the 2,800 baskets of Spanish chestnuts of good quality and in good condition, unless he has expressly and unconditionally agreed to sell and deliver such chestnuts, and I think that, if the allegations of the answer are true, the defendant has not made such a promise. * * *

For these reasons the plaintiff's motion for judgment sustaining the demurrers is denied. * * *

SECTION 3.—IMPLIED WARRANTIES CONSIDERED GENERALLY

In the law of sales of personal property there are six kinds of implied warranties: (1) The warranty of title; (2) the implied warranty that the goods sold shall correspond to the description; (3) the implied warranty that the goods sold shall correspond to the sample; (4) the implied warranty of merchantability; (5) the implied warranty of reasonable fitness for a particular purpose; and (6) any implied warranty in addition to those enumerated, which is annexed by custom or usage of trade.

An implied warranty differs from an express warranty chiefly in the character of the evidence necessary to prove its existence. Express warranties arise out of the express language employed by the seller. Implied warranties are not to be found expressed in words in the contract. The general character of the transaction gives rise to the inference that the parties intended such an obligation to attach. At least, some implied warranties rest upon the assumed intention of the parties; others are not founded so much upon the assumed intention of the parties as they are upon a rule of law which imposes the obligation irrespective of intention. However, no implied warranty is so essentially a part of a contract of sale that the parties cannot provide that none of them shall be deemed a part of their contract. If such is their intention, the parties must employ language which clearly shows that it was their intention to eliminate all implied warranties; otherwise, the law will assume that they are still present.

SECTION 4.—IMPLIED WARRANTY OF TITLE

We have already noticed that a seller of a negotiable instrument warrants that he has title thereto, and this is so even where he indorses "without recourse" or transfers bearer paper by delivery, though in the latter case his warranty runs only to his purchaser,

and not to any other subsequent holder, while in the former case the warranty extends to all subsequent holders.

In sales of tangible personal property there is likewise an implied warranty that the seller has title, or that he has the power to transfer a title, and that there are no incumbrances upon the property. A seller of personal property will therefore be liable to the buyer, even though the contract of sale does not expressly so provide, if the buyer is forced to surrender the property bought to some person who really owned the property or held a mortgage on it at the time of the sale. The provisions of the Sales Act are as follows:

Section 13. In a contract to sell or a sale, unless a contrary intention appears, there is—(1) An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass. (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale. (3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made. (4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

There was a time, fairly recent, when the doctrine of caveat emptor—let the buyer beware—cast upon the buyer the risk that the seller had title, but that rule, even before the Sales Act, was changed. In Chapter IV we discussed the various situations when a seller did not have the power to transfer title to an innocent buyer. In all those cases, therefore, where the seller did not possess either the legal right or the legal power to transfer a title to the innocent purchaser, the property will eventually be taken from him by the true owner. In this event the buyer will have his remedy back against his vendor for the breach of the latter's implied warranty of title. Of course, it is possible for one to sell merely his interest in property, or it is even possible for the buyer to assume the sole risk of the seller's having any interest in the property, but before a court will so construe the contract there must be clear evidence that the parties intended to negative the implied warranty of title.

KIRKPATRICK v. KEPLER et al.

(Supreme Court of Wisconsin, 1917. 164 Wis. 558, 160 N. W. 1047.)

Action by John Kirkpatrick against A. L. Kepler, Frank E. Walker, and others. From a judgment for defendants dismissing the complaint, plaintiff appeals.

The plaintiff is a dealer in cheese in Richland Center, and on September 1, 1913, paid the defendants A. L. Kepler, A. H. Ray, C. H. Babb, L. C. Brown, James Draper, Fred McMillan, E. E. Kepler, S. Roudebush, William Wanless, and Joseph E. Davis, $690.27 for 83 boxes of cheese at the then market price. These named defendants had been patrons of a cheese factory in Richland Center owned by one Walker, for whose estate the defendant Christie Walker was administratrix. These 83 boxes of cheese had been delivered on June 20, 1913, to one H. J. Bamford at his cold storage warehouse in Richland Center under an arrangement for selling the same. On June 23d and 27th Bamford gave two warehouse receipts for this cheese to the First National Bank of Richland Center for his then indebtedness to said bank. Shortly thereafter Bamford was adjudicated a bankrupt, and appears to have made a composition with his creditors, in which composition none of the defendants appear to have participated.

After the bankruptcy of Bamford the said bank which owned the storage warehouse occupied by Bamford leased the same to plaintiff who, on August 8th, gave a warehouse receipt to the bank for all the cheese he found in said warehouse on taking possession, which included the 83 boxes in question here. This warehouse receipt was not given on account of any obligation owing to the bank by plaintiff.

Shortly before the plaintiff paid the defendants for this cheese he talked with their attorney and then with some of the defendants about the purchase, and as a result of such conversations an instrument [a bond] was drawn by defendants' attorney and submitted by the plaintiff to his attorney, and which was signed by all the defendants other than Walker, and delivered to plaintiff.

ESCHWEILER, J. The plaintiff seeks to recover the amount he paid to the defendants for the 83 boxes of cheese on the theory that there was a failure of consideration and a breach of warranty of title. * * *

By section 1684t13, subsec. 1, it is provided that in a contract of sale, unless a contrary intention appears, there is an implied warranty on the part of the seller that he has a right to sell the goods. By the third subdivision of the same section there is an implied warranty that the goods shall be free at the time of the sale from any charge or incumbrance in favor of any third person not declared or known to the buyer before or at the time when the sale is made.

The general rule is well established that there is an implied warranty of title in a sale of chattels in possession of the seller for a fair price, where a contrary intention is not shown from the surrounding circumstances. * * *

The question in this case really is whether plaintiff, when he paid the defendants full market price, purchased cheese or a lawsuit. If he bought the cheese, there was by law an implied warranty of right to sell in the vendors; if it was intended by the parties that he was to purchase all the possibilities of a lawsuit, then the bond was inconsistent with such purpose. If the purpose of the bond was to limit the form of the lawsuit which defendants undertook to assume the care and expense of, then such limitation in no wise contradicts the implied warranty of title under the statute, and questions concerning the same could only come up if suit were brought upon the bond.

The uncontradicted evidence shows that the warehouse receipt given

by plaintiff to the bank at the time of the taking possession of the warehouse was without consideration, and in no wise altered the respective positions of the parties to this action, except as it might affect the right to bring a suit on the bond; but, that not being before us, the giving of the receipt is entirely immaterial. * * *

Judgment reversed, and cause remanded, with directions to dismiss the complaint as to the defendant Christie Walker, and to enter judgment in favor of plaintiff against the other defendants for the amount claimed.

WINSLOW, C. J. (dissenting). I confess that I cannot understand the reasoning upon which the decision is based. To me the evidence tells a very plain and simple story. The parties on both sides knew that there was a dispute as to the title of this cheese, and that the bank claimed to own it. The plaintiff had in fact gone so far as to acknowledge the bank's title by giving a warehouse receipt therefor to the bank when he took possession of the storehouse. So when the parties met to negotiate for the sale, there was no misapprehension about the situation, the plaintiff knew that the defendants claimed title as the original manufacturers of the cheese, and that the bank claimed title through Bamford, in whose hands the defendants had placed it.

The subject as to what remedy the plaintiff should have in case the defendants' claim of title proved invalid was discussed, and it was finally agreed that the defendants should give the bond or undertaking set forth in the statement of facts. Had this bond been signed by sureties, there would be logical ground for the conclusion that it was given to increase the plaintiff's security, but it was not. It was signed only by the parties who claimed to own the cheese. These parties would all be liable for the value of the cheese on their implied warranty, had nothing been said about security, and this liability would not depend on the successful results of an action of replevin or trover. The liability on the bond, therefore, is a limited liability, considerably more restricted, though included in the liability resulting from implied warranty of title.

It is a familiar legal principle that the giving of express limited warranties excludes and negatives the idea that more comprehensive warranties were intended, "and repels any implication of law to that effect." * * * Hence there was no implied warranty here because the "contrary intention appears," and in such cases the statute in express terms declares that there is no implied warranty. * * *

SECTION 5.—IMPLIED WARRANTY THAT THE GOODS SHALL CORRESPOND TO THE DESCRIPTION

Sales Act, Section 14. Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

The word "description," as here used, means some statement concerning the goods made for the sole purpose of enabling the

parties to identify or pick out the goods, The term as here used does not include statements concerning the quality of the goods. To illustrate: If A. called his grocer over the telephone and said, "Send me one pound of creamery butter," and the grocer agreed to do so, the expression "creamery butter" is a statement descriptive of the goods, as the term "description" is used in this section. The grocer, therefore, impliedly warrants that the butter which he sends is "creamery butter." He would break his warranty if he sent "home-made butter" or "oleomargarine." If the grocer sent creamery butter which was unpalatable, there would be no breach of the warranty in section 14; that is, section 14 does not attach any warranty of quality. We shall discuss the implied warranty of quality in section 7.

Notice that this section applies only when there is either a contract to sell or a sale of goods to be identified by the description. If the goods are identified by looking at them, or by touching them, such a contract to sell, or sale, is not by description. Hence, in our supposed case, if A., instead of calling her grocer over the telephone, had gone to the store, and upon seeing some creamery butter in the refrigerator had said, "I want a pound of that creamery butter," this would not be a sale by description. Obviously there is no necessity for applying section 14 in such a case. When section 14 applies at all, it will make no difference whether the seller is a dealer or not. The section includes all sellers—casual sellers, as well as dealers, manufacturers, etc.

INTERSTATE GROCER CO. v. GEORGE WM. BENTLEY CO.

(Supreme Judicial Court of Massachusetts, 1913. 214 Mass. 227, 101 N. E. 147.)

Action by the Interstate Grocer Company against the George Wm. Bentley Company. Judgment for plaintiff, and defendant brings exceptions.

RUGG, C. J. This is an action of contract to recover damages for an alleged breach of an implied condition or warranty that certain canned sardines purchased by the plaintiff were merchantable. The plaintiff was a wholesale grocer in Missouri. In the summer of 1907 it placed an order with brokers in Missouri for five hundred cases of "¼ oil sardines and 200 cases of ¾ mustard sardines." The broker sent the order to the Maddocks Packing Company, a corporation engaged in the business of packing sardines in Maine. That company had an arrangement with the defendant whereby it placed sardines as fast as packed in storage in a Portland warehouse, taking warehouse receipts in the defendant's name. The defendant upon delivery to it of the warehouse receipts advanced to the packing company a percentage of the value of the stored goods upon which advancements the company paid interest. Orders received by the packing company for sardines were referred to the defendant for approval, and the proceeds of goods which were shipped from those on storage were paid to the defendant. On receipt of the plaintiff's order the packing com-

pany wrote to the defendant, with a request for shipping orders, so that the goods might be sent the following week. * * * The goods were shipped and an invoice was sent in the name of the defendant to the plaintiff, and payment was made by the plaintiff to the defendant, which credited it on its account against the packing company. There was testimony from which it might have been found that the goods were not merchantable when delivered to the plaintiff. * * *

Upon the sale of goods, by name or description, in the absence of some other controlling stipulation in the contract, a condition is implied that the goods shall be merchantable under that name. They must be goods known in the market and among those familiar with that kind of trade by that description, and of such quality as to have value. This is not a warranty of quality. It does not require any particular grade. It is a requirement of identity between the thing which is described as the subject of the trade and the thing proffered in performance of it. The buyer is entitled to receive goods fairly answerable to the description contained in his contract of sale. It does not matter whether the deleterious characteristic is latent or obvious, provided it goes to the extent of changing the nature of the goods, so that they have no value in the market under the designation contained in the contract of sale. This is a general rule applicable alike to all, whether they be manufacturers or dealers or merely sellers. It was declared early in this commonwealth, and has been adhered to consistently. * * *

This being the governing principle, it is of no consequence whether the seller is a manufacturer or not, or whether the defect is hidden or discoverable by inspection. Upon a sale even by a casual owner of sardines, he is bound to deliver something which answers that description in the trade. If he does not, he does not perform his contract. * * * This rule is quite apart from instances where the sale is of specifically defined goods, whether open to the inspection of the parties or not, where the rule of caveat emptor governs. * * * It is distinct also from a sale expressly or avowedly to the knowledge of both parties for a particular purpose, as to which another rule prevails. * * * All these rules are different statements of the principle that a buyer has a right to get that which he had bought. They deal not with a warranty of quality but with a condition of the contract. They touch the identity of the subject with that tendered in performance of it. This principle also is quite separate from that frequently applied in purchases from manufacturers and sometimes from dealers, where the buyer relies upon the skill or knowledge of the seller, and there arises some sort of implied warranty of quality. If the goods in the case at bar were not salable for some price as sardines when they were delivered to the plaintiff, there was a breach of contract by the seller. * * *

Exceptions overruled.

DIEBOLD SAFE & LOCK CO. v. HUSTON et al.

(Supreme Court of Kansas, 1895. 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53.)

Action by Huston & Breeding against the Diebold Safe & Lock Company. Plaintiffs had judgment, and defendant brings error.

ALLEN, J. The plaintiff testified to an oral warranty that the safe was fireproof, by the agent of the defendant. * * * It is clear that

the safe was delivered to the plaintiffs in compliance with the terms of the written order. Does this order contain what in law amounts to a warranty? There are no words in it of express warranty. Does an order, however, for a fireproof safe, imply a warranty? * * *

There is nothing in this case indicating that the safe purchased by the plaintiffs was manufactured specially for them, but the fair inference is that it was one of a kind of safes which the defendants manufactured for sale to whomsoever would buy. It is designated in the order as a "No. 4 fireproof safe," and the order provides that it shall be one of the defendant's latest styles and improvements; thus clearly indicating that it is one of a kind of safes manufactured by the safe and lock company. "There is in America an implied warranty of identity; namely, that the article shall be of the kind or species it purports to be or is described to be,—that is, that the article delivered shall be the same thing contracted for." Benj. Sales (6th Ed.) 636. This proposition is illustrated in the following cases:

In Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367, a sale and bill of parcels of two cases of indigo was made. It was shown that the article paid for and delivered was not indigo at all, but composed of Prussian blue, chromate of iron, and potash, and worthless for any purpose. It was held that the description of the article inserted in the bill of parcels amounted to a warranty that the article was such as represented. In Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595, it was held that the sale of an article as blue vitriol amounted to a warranty that it was such. In Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438, it was held that a sale of seed which the seller said was early strap-leaf, red-top turnip seed was equivalent to a warranty that it was such, and that the purchaser might recover the difference between the market value of the crop raised and the same crop from such seed as was ordered. In White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13, it was held that, on a sale of "large Bristol cabbage seed" to a market gardener, there was an implied warranty that the seed was not only raised from such stock, but free from any latent defect arising from the mode of cultivation, and would produce that kind of cabbage. In Jones v. George, 61 Tex. 345, 48 Am. Rep. 280, it was held that a sale by a druggist to a planter of an article as Paris green implied a warranty that it was that substance.

There is no doubt, under the authorities, that the article sold must answer in kind to the description under which it is sold, and that there is an implied warranty that the article delivered is such an article as the name under which it is sold indicates. When, however, the question arises whether an article is of a particular quality or degree of excellence, unless it is designated by some term which is descriptive of the article and calls for a particular quality, the general rule is that no warranty of quality will be implied. In Wolcott v. Mount, supra, it was said: "In general, the only contract which arises on the sale of an article by a description, by its known designation in the market is that it is of the kind specified." In Winsor v. Lombard, 18 Pick. (Mass.) 57, it was held that, where a large number of barrels of mackerel branded under the inspection laws as No. 1 and No. 2 mackerel were sold in the spring with that description of them in the bill of parcels, it was not a warranty that the mackerel were free from rust, although it appeared that mackerel affected by rust are not considered as No. 1 and No. 2. In Gossler v. Refinery, 103

Mass. 33, it was held that "one who agreed to sell 'Manilla sugar' to refiners, and delivered to them what is usually called in commerce by that name, can, in the absence of fraud, misrepresentation, or warranty, recover the agreed price, though the article delivered contained more impurities than sugar known under that name usually does."

The case of Shisler v. Baxter, 109 Pa. 443, 58 Am. Rep. 738, seems to be opposed to White v. Miller, supra, holding that the sale of seed as Wakefield cabbage seed did not amount to a warranty that it was such, but was a representation as to quality. In Towell v. Gatewood, 2 Scam. Ill. 22, 33 Am. Dec. 437, a bill of sale of good first and second rate tobacco was made. The court refused to treat this as a warranty, but rather as an expression of opinion as to the quality of the article sold, concerning which the buyer should have relied on his own judgment or obtained an express warranty. "The mere description of iron sold as mill iron in a bill rendered to the purchaser will not amount to a warranty that the same is of the quality or grade described, but will be regarded as a mere statement or expression of opinion as to the quality." Iron Works v. Moore, 78 Ill. 65. See, also, Ryan v. Ulmer, 108 Pa. 332, 56 Am. Rep. 210; Dounce v. Dow, 64 N. Y. 411.

In Fraley v. Bispham, 10 Pa. 320, 51 Am. Rep. 486, it was held that a sale bill of superior sweet-scented Kentucky leaf tobacco affords no evidence from which the jury may infer a warranty that it is either superior or sweet scented. The case of Shaw v. Smith, 45 Kan. 334, 25 Pac. 886, was on a contract for the sale of flaxseed, which the buyer agreed to sow, and sell the crop to the seller on certain terms stated in the contract. The seed proved worthless, and did not grow. It was held that under the contract, and in view of the purposes for which it was purchased, the buyer might recover as upon a warranty. In that case the purposes of the contract did not end with the delivery of the seed to the buyer, for he was obligated to sow the seed, and to sell the crop which it might produce to the vendor. Under such a contract, it was held that a warranty of the fitness of the seed for the purposes specified in the contract would be implied.

In the case under consideration the plaintiffs ordered a fireproof safe. There is no proof, nor was it in fact claimed at the trial, that the article delivered did not answer the description; that is, that it was not such an article as is generally known and designated as a "fireproof safe." The evidence shows that it was manufactured and placed on the market in the same way that other fireproof safes were made. "Fireproof" is defined by Webster: "Proof against fire; incombustible." The case of Hickey v. Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824, was an action against a warehouse man to recover for goods destroyed by fire in a warehouse represented to have a fireproof exterior. It appeared that the window frames and sash were wooden, and that there were no outside shutters, and it was held that the building could not be deemed fireproof. In the course of the opinion it is said: "Here the allegation is that the exterior of the building is fireproof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fireproof conveys no other idea than that the material out of which it is formed is incombustible." In the case of Insurance Co. v. Hird, 4 Tex. Civ. App. 82, 23 S. W. 393, in an action on a fire insurance policy which stipulated

"that the assured would keep his books in a fireproof safe, and that in case of loss he would produce the books, and on failure to so produce them the policy would become void. The books were in good faith kept in a safe of the kind generally known and reputed as fireproof, but which failed to preserve them from destruction by fire. Held, that the insured had not warranted the safe to preserve the books, and that he complied with the condition."

It is not claimed in this case that the safe itself was constructed of combustible materials, nor that it was burned, or even greatly damaged by fire. The plaintiffs seek to recover solely for damages resulting from the burning of articles deposited in the safe. There was no contract or representation with reference to the degree of heat, or the length of time when exposed to a fire, against which the safe would afford protection. Safes denominated as "fireproof" are made of various sizes, capacities, and styles. If the outside be made of iron, while that metal is commonly regarded as incombustible, because it will not burn, it yet is not indestructible by fire. It is a matter of common knowledge that iron will melt when subjected to a sufficient degree of heat. To imply a warranty that the safe would protect its contents against any given exposure to fire, we think, would be to imply a warranty of quality, and that altogether indefinite in its terms, and imposing a liability which might be immensely disproportionate to the sum received. The recovery in this case was for more than three times the price of the safe.

We are of the opinion that it was incumbent on the plaintiffs to inspect the safe, when they received it, for the purpose of ascertaining whether it was of the kind specified in the order; that, if it was so, no warranty of quality was implied, and no recovery can be had for the destruction of its contents. The judgment is reversed.

LISSBERGER v. KELLOGG et al.

(Supreme Court of New Jersey, 1909. 78 N. J. Law, 85, 73 Atl. 67.)

Action by Edmund Lissberger against David M. Kellogg and others. Verdict for plaintiff, and defendants obtained a rule to show cause why a new trial should not be granted.

SWAYZE, J. The action is for damages caused by the failure of the defendants to deliver wool in accordance with the contract between them and the plaintiff. The plaintiff is a wool merchant in New York. The defendants are wool brokers and dealers at Buenos Ayres in the Argentine. In the summer of 1905 the plaintiff ordered some 30 bales of wool, of which 10 bales were to be Lincoln, 10 bales ¼ blood. and 10 bales ⅜. The order was accepted, but 35 bales were shipped instead of 30. The invoice described the wool as composed of Lincoln ¼ blood, ⅜, ½, and ⅝, and the specifications described them as 10 bales Lincoln, 11 bales ¼ blood, 10 bales ⅜ Lincoln, 4 bales ½ Lincoln. This wool arrived in New York December 26, 1905. Prior to its arrival, and on December 5th, the plaintiff ordered defendants to buy 200 bales, one-half of which was to be ⅜ and half of which was to be ¼; and on December 18th ordered them to buy 100 bales, half of which was to be ⅜ and half ¼. These orders were duly accepted, and the wool shipped in January, arriving in New York in February. The two lots of 200 and 100 bales were sold in advance

of their arrival, by the plaintiff, to the Cleveland Worsted Mills of Cleveland, Ohio, and shipped through to them directly from the steamer, in bond. The wool proved to be inferior in quality to the description. * * *

The defendant next contends: That the sale in this case was a sale by sample, and, so far as the 300 bales is concerned, that they were equal to the sample of 35 bales; that, so far as the 35 bales was concerned, they were a mere sample shipment, and the quality was immaterial. We think the defendant is wrong in both contentions. The letter ordering the first shipment distinctly said that the wool was to be one-third Lincoln, one-third ¼ blood, and one-third ⅜, and this order was accepted. It was clearly a sale by description. So, too, the cables did not order the wool similar to the sample lot. In fact, it would have been impossible, for at the time the cables were sent the first shipment had not arrived in New York. Both the cables ordered wool half ⅜ and half ¼. This also was clearly a sale by description, and the trial judge should so have charged. Instead of doing so, he charged that it was for the jury to say whether the plaintiff was to get the grades generally known to the trade by the description, or whether he was to get the same kind or similar kinds that he had been receiving in prior years. This error, however, was injurious to the plaintiff, and not to the defendants. He further charged that "the rule as to selling by sample is this: That what is sent thereafter must substantially comply with the sample, and, if it does not, the purchaser is under no obligation to keep it."

As applied to the present case, this charge also was inaccurate. The true rule prior to our codification of the law relating to sales is thus stated in the last English edition of Benjamin on Sales (page 616): "The implied condition that goods bought under specified commercial description should conform therewith is not excluded by the fact that the sale is by sample, or even after an inspection of the bulk. A sample is looked on in such case as a mere expression of the quality of the article, and not of its essential character, and notwithstanding the bulk be fairly shown, or agree with the sample, yet, if the bulk does not reasonably answer to the description, the seller is liable." * * * The same rule of law is stated in Sales Act 1907 (P. L. p. 316) § 14. This act did not take effect until after the transactions now in question, but it was a mere codification of the then existing law in this respect. The charge of the court, while erroneous, was injurious only to the plaintiff, and the defendant is not injured thereby. * * *

The plaintiff was allowed to recover the following items: (1) The difference between the purchase price paid by him and the amount received on the sale; (2) the loss of profits on the sale to the Cleveland Worsted Company; (3) damages paid that company to settle its claim against him; (4) freight on wool shipped from Cleveland to Boston for resale. It was proper to include all of these items in the plaintiff's claim for damages. * * *

The rule is discharged, with costs.

SECTION 6.—IMPLIED WARRANTY THAT THE GOODS SHALL CORRESPOND TO THE SAMPLE

Sales Act, Section 16. In the case of a contract to sell or a sale by sample—(a) there is an implied warranty that the bulk shall correspond with the sample in quality. (b) There is an implied warranty that the buyer shall have reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in Section 47(3). (c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Where a sample is exhibited by a seller to a buyer and a sale results we may have one of three situations which are distinguishable:

(1) If the seller has said: "I warrant the goods which I am offering you to be precisely like this sample both as to kind and quality," we then have an express warranty, where the sample has merely performed the same function that, in the absence of a sample, would have been performed by words descriptive of the kind and quality.

(2) If the seller, although exhibiting a sample, does not employ language during the negotiations which amounts to an express warranty, there may or may not be an implied warranty that the goods will all be like the sample. As a general rule, no doubt, the exhibiting of the sample would be under circumstances where it was reasonable to infer that the representation thus made was that the goods would be like the sample. Whenever we may interpret the negotiations in this manner we have what the Sales Act calls "a contract to sell or a sale by sample." The situation is closely analogous to the warranty that the goods shall correspond to the description, in contracts to sell or a sale by description. By "description" here was meant the language which furnished other means of identifying the goods. If there were statements added regarding quality for the purpose of inducing the purchase these statements would constitute express warranties. So in contracts to sell or sales by sample, the implied warranty that attaches is not one of quality, but of identity—i. e., that the bulk of the goods will be like the sample. True subsection (c) of Section 16 does add a warranty of quality in certain cases; i. e., where the sale was by a dealer, but not otherwise. This is the warranty of merchantability, but it owes its existence solely to subsection (c) and not to subsection (a), just as there is added the warranty of merchantability in sales by description by dealers in Section 15 (2); Section 14 not imposing it.

The warranty of merchantability, in sales by description and in sales by sample, is the subject of the next section. The analogy

between sales by description and sales by sample is simply that, in the former, words identify the kind of goods; in the latter, a physical specimen identifies. Presumably the same mental picture is aroused in the buyer, whether it be produced by words or by physical objects.

(3) It is possible for the seller to exhibit a sample, and a sale by sample, such as described above, would not result. If it did not so result, it would be because the seller made it clear that he was not representing all of the goods to be like the sample. He exhibits the specimen not as the sole means of describing the goods for he chooses to do that by words. The sample merely aids in making the description.

Subsection (b), providing that the buyer shall have the opportunity of comparing the goods with the sample, states a general rule which is taken up in detail in Chapter VII. Clause (b) merely shows that the duty of the seller to afford the buyer an opportunity for inspection is not dispensed with in sales by sample.

Subsection (c) adds a warranty of merchantability in sales by sample, when the sale was by a dealer. This is the subject of the next section.

BORDEN v. FINE et al.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 425, 98 N. E. 1073.)

Action by Thomas S. Borden against Samuel Fine and another. There was a finding for plaintiff, and defendants bring exceptions.

This was an action of contract to recover a specified sum on an alleged special promise by defendants to reimburse plaintiff. Plaintiff offered evidence to show that at the request of one of the defendants he went to defendants' place of business and was shown cotton sweepings, that plaintiff was then taken into the office of defendants and there shown a sample, that after some talk as to price it was mutually agreed that the sample would be a fair sample of the sweepings after they were sorted, and that defendants would sell all of the cotton sweepings until further notice for five cents a pound, and that the goods would be shipped from time to time in accordance with plaintiff's directions.

BRALEY, J. The contract for the purchase of the cotton sweepings being oral, its terms are to be ascertained from the evidence, which would have warranted the judge before whom the case was tried without a jury in finding that the sale had been consummated upon the representations of the defendants that the goods in bulk to be delivered in the future should be like the sample exhibited. * * * And there would be a breach of the implied warranty, entitling the plaintiff to rescind upon reasonable notice to the defendants, if the four shipments in question fell below the quality bought, or he might retain the cotton and recover damages. * * * The sample must be deemed as having been one of the essential terms of sale, and although the plaintiff availed himself of the opportunity for inspection before the shipments to his consignee, the cotton had been bagged by the defendants, and he testified, that during the customary examination he rejected such portions as he observed to be defective, but the bags

were not emptied, and the remainder was expected to be in conformity with the sample. It was a question of fact, independently of the place of delivery, whether the plaintiff waived the warranty, and accepted the contents of the bags, and whether after arrival at the place of business of the consignee the cotton upon assortment proved to be of inferior quality. * * *

The plaintiff's evidence, if believed, having supported his contention that there had been a breach, and that he had not relinquished his right to insist upon performance of the contract, these issues of fact, as well as the further issue whether after receiving information from the consignee he seasonably inspected the cotton, and gave notice to the defendants of the deficiency, with his claim for reclamation, are settled conclusively in his favor by the judge's finding. * * *

Exceptions overruled.

GASCOIGNE et al. v. CARY BRICK CO.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 302, 104 N. E. 734, Ann. Cas. 1917C, 336.)

Action by Joseph Gascoigne and another against the Cary Brick Company. There was a verdict for plaintiffs, and both parties bring exceptions.

BRALEY, J. It is unquestioned that delivery was free on board at the place where the bricks were to be used, and that after its erection, and because of the variation in color, the wall proved unacceptable to the supervising architect, and the plaintiffs under their contract with the owner were obliged to demolish and rebuild it. The defendant, although promptly notified of the imperfections upon discovery, contends that the sale was for a quality of bricks known to the trade as "up and down hard brick," wherein uniformity of color is not contemplated, and asked the presiding judge in the first, second, third and sixth requests to rule that, as there was no express or implied affirmation of quality, and the defendant not having been charged with fraud, the plaintiffs must be presumed to have bought on their own judgment. * * * But these requests could not be given. The contract was not confined to the correspondence. The letters as the jury properly could find were merely preliminary to the interview between the plaintiffs and the defendant's representative, when the terms of sale were settled, and the order for the bricks given. It is in the evidence of what then took place that the contract must be sought. The testimony is irreconcilable, and the jury were to determine whom they would believe. If they accepted the plaintiffs' statements, the defendant's agent having been informed that, as both sides of the wall would have to be faced, the facings necessarily would have to be of a uniform shade or appearance, similar to the brick exhibited which the architect had accepted as of the required color, replied that he knew what the requirements were, and the defendant would furnish the bricks accordingly. The order thereupon given and accepted the jury could say constituted a sale, where the plaintiffs relied on the statements of the seller, and the defendant impliedly warranted that the bricks delivered in bulk should correspond with the sample. * * * St. 1908, c. 237, § 16. If these terms were found to constitute the contract, the evidence was plenary that the shipments did not conform to the sample

in quality; the plaintiffs therefore could recover damages, and the fourth and fifth requests were inappropriate. * * *

The plaintiffs, although they prevailed, are dissatisfied with the rulings as to the measure of damages. By acceptance of title the plaintiffs did not as matter of law release the defendant, or bar their claim for damages. St. 1908, c. 237, § 9. It was a question of fact whether they waived the warranty and took the bricks as they found them on the cars, which has been established in their favor by the verdict. * * * But if they knew or ought to have known of the defective coloring, no damages caused by the use of the bricks can be recovered. * * * The jury were to determine if by reason of moisture caused by the weather the bricks at the time of delivery, and when placed in the wall had taken on and retained a darker appearance, rendering it difficult to ascertain their true or natural color, and if this appeared, whether the plaintiffs, who might rely on the presumption that the defendant would perform its contract, had acted with reasonable diligence in using the bricks without further inspection, or whether the general appearance was such that imperfections would not have been disclosed by an extended examination. A conclusion that no negligence had been shown, in connection with the uncontradicted evidence, that notice was promptly given to the defendant who declined further performance, would warrant the assessment of damages for not only the difference between what the plaintiffs bought, and what they received, but also the expense of taking down and rebuilding the wall. * * *

The judge whose attention had been directed to the rule to be applied by the plaintiff's request, and in his rulings upon the exclusion of evidence should have so instructed the jury. * * * But instead he charged that the plaintiffs could recover only a sum equal to the difference between the value of bricks the color of the sample, and the value of the bricks actually delivered. * * * A majority of the court are accordingly of opinion that the defendant's exceptions should be overruled, but the plaintiffs' exceptions must be sustained.

E. EISING & CO., Inc., v. AMERICAN ALCOHOL CO., Inc.

(Supreme Court of New York, Appellate Term, 1918. 168 N. Y. Supp. 682.)

Action by E. Eising & Co., Incorporated, against the American Alcohol Company, Incorporated. From a judgment dismissing the complaint, plaintiff appeals.

LEHMAN, J. The plaintiff has brought this action to recover damages for an alleged breach of contract whereby the defendant agreed to sell and deliver to the plaintiff 100 barrels of high proof grain spirits at the price of 67 cents per gallon. * * *

Plaintiff's president testified that the defendant offered to sell him 100 barrels of high proof grain spirits and that after some conversation with the defendant's vice president he agreed to buy these goods for 67 cents in bond, the goods to be carted to the freight station free of charge: He testified further: "I said, 'I have never seen your goods, and I have never made any purchases from you, and have never seen any kind of goods you serve.' He said, 'Our goods are standard, but I can divert a barrel to you from one of my customers who is getting a shipment to New York; I will divert a barrel of it and send it

to you.' And I said, 'Very good;' and I said, 'Now we definitely understand it that I will buy those 100 barrels from you at 67 cents in bond; he said, 'Yes;' and I said, 'Confirm this purchase to me by letter, so that we shall both understand the terms and conditions of it.'"

Thereafter the defendant wrote to the plaintiff the following letter: "* * * Messrs. E. Eising Co., 51 Water Street, New York City —Gentlemen: This will confirm offer made to you on 100 barrels of H. P. grain spirits at 67¢ per gallon in bond. We will deliver the goods alongside steamer free of charge after you pay the tax. We understand that this offer is accepted by you subject to a trial sample of one barrel, and we believe we can have this barrel for you some time this week. Awaiting in anticipation, we remain, * * * American Alcohol Company, Inc., A. Balinsky, V. P."

The plaintiff did not answer this letter, but on April 19th wrote defendant as follows: "The American Alcohol Co., 60 Wall. St., Mr. A. Balinsky, V. P., City—Dear Sir: We have not as yet received the trial sample of one barrel of high proof grain spirits as per your letter of April 10th, and wish you would advise us when delivery will be made. We remain, * * * E. Eising & Co., Inc., Per Ebe."

In answer to this letter the defendant wrote: "Messrs. E. Eising & Co., 51 Water Street, New York City—Gentlemen: Yours of the 19th reached me this morning on my return from the West. I was somewhat surprised to hear from you at this late date, inasmuch as my letter is dated the 10th. In view of the fact that you have not seen fit to answer my letter before the 19th, the company has not booked your order. * * * A. Balinsky, Vice President."

It seems to me that these facts establish a complete cause of action. The parties in their conversation had agreed upon a complete contract. The plaintiff's president asked the defendant to send him a trial sample barrel of the spirits, not in order to enable him to make up his mind as to whether he would agree to buy the spirits, but merely to enable him to determine that the spirits he had actually agreed to buy were standard high proof grain spirits. Under any fair construction of the conversation, the plaintiff reserved no right to reject the goods, if the sample consisted of standard high proof spirits; but it did reserve the right to determine by means of this sample whether the goods complied with the description in the contract without being obliged to examine the goods then in bond in New Orleans, or to pay the government taxes to release them from bond and ship them to New York before having the opportunity to examine them. * * *

If defendant refused to furnish the goods described, he broke his contract to sell and deliver; if plaintiff refused to proceed with his contract, after receipt of a proper sample, he broke his contract to accept and pay for the goods. In other words, the term "subject to a trial sample of one barrel" does not mean that the minds of the parties have not fully met on all terms of the agreement, but is only a provision of the agreement fixing the rights of the parties thereunder.

Judgment should therefore be reversed, and a new trial ordered.

* * *

SECTION 7.—IMPLIED WARRANTY OF MERCHANTABILITY

Sales Act, Section 16. In the case of a contract to sell or a sale by sample— * * * (c) if the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Sales Act, Section 15. (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

JAMES DRUMMOND & SONS v. E. H. VAN INGEN & CO.

(House of Lords, 1887. 12 App. Cas. 284.)

The respondents, in July, 1883, ordered from the appellants, who are worsted cloth manufacturers at Bradford, certain goods, described in the contracts as "mixt worsted coatings," which were to be, in "quality and weight," equal to certain numbered samples, which the appellants had previously furnished to the respondents. The goods were of a class well-known in the trade under the denomination of "corkscrew twills." They were delivered to the respondents, whose object (known to the appellants) was to sell them to clothiers or tailors in the United States of America. All, or great part of them, were, in fact, disposed of to various customers of the respondents in the United States; but they were returned upon the respondents' hands, as not suitable for the purposes of that trade. They were afterwards sold by auction, at a loss; and an action (for the price of the goods) having been brought by the appellants against the respondents, a counterclaim was made by the respondents to recover damages against the appellants, on the ground that the goods were not merchantable, as they ought to have been.

The goods were, in point of fact, made exactly in the same manner as the samples; and the defect alleged to exist in them, viz., that of "slipperiness" (or want of such cohesion in the texture of the cloth, between the warp and weft, as was requisite to prevent them from giving way under the strain of ordinary wear when made up into coats in the usual manner) existed equally in those samples. * * *

An order having been made for the trial of certain preliminary issues in fact by Day, J., without a jury before any of the other questions of fact, that learned judge found upon the issues as follows:

1. That there was an implied warranty on the sale of the goods that the cloth should be merchantable generally as worsted coatings, and should be properly manufactured, and should be suitable to be made up into coats in the ordinary course of tailors' work. 2. That the plaintiffs did sell the cloth for the purpose of being made up into coats in the ordinary course of tailors' work. 3. That it was an

express term of the contract of sale that the cloth should be efficiently woaded and dyed so as not to fade unduly. 4. That the cloth was not merchantable as worsted coating, and was not properly manufactured and suitable to be made up into coats in the ordinary course of tailoring, and was not efficiently woaded and dyed within the meaning of the contract. 5. That the cloth was sold by sample in the sense that it was to be similar to a sample produced in respect of weight and quality, and that the term "quality" covers strength as distinguished from rottenness in cloth, but the judge is not satisfied that the term quality has been ordinarily applied to such a defect as is alleged to exist in the cloth delivered under the contract, that is to say, slipperiness of weft under warp. 6. That the cloth did correspond with the sample. 7. That the sample was made to the defendants' order, and was seen and approved of by them as to pattern, colour, and generally as to handle. 8 and 9. That the defects both of structure and colour in the cloth and in the sample were latent, and were not apparent or discoverable upon such inspection as was ordinary and usual upon sales of worsted cloths of this class.

The Court of Appeal (Lord Esher, M. R., and Fry, L. J.) affirmed the findings of Day, J. * * * From this decision the present appeal was brought. * * *

EARL OF SELBORNE. * * * As to so much of this defence to the counterclaim as turns on the question of fact, whether the alleged defect in the cloth existed or not (by which I mean existed as a defect, causing coats made of it in the manner usual among clothiers and tailors to give way under a strain which goods of the same class, such as were generally known and used in the trade, ought to resist) I think your Lordships must, on the principle on which the Court of Appeal acted, take the existence of the defect, in a degree sufficient to render the cloth unmerchantable for the purposes for which goods of the same general class had previously been used in the trade, to have been sufficiently established. That question depended in part on practical demonstration by skilled witnesses in the presence of the Court, followed up and further verified by the judge himself. Of all possible kinds of evidence, this appears to me to be the most unfit for review by a Court of Appeal. So far, therefore, I think the fact must be assumed in the respondent's favour, on whom the burden of proof, upon that point, undoubtedly lay.

It remains to be considered, whether this was a defect of quality against which there was an implied warranty by the appellants, under all the circumstances of the case. That it was a defect of quality seems to me indisputable; and, if it was known to the respondents when they gave the order, or if (as between themselves and the appellants) they ought to be taken as having discovered, or as having had means which they ought to have used of discovering it from the samples, I should hold, that it was covered by the word "quality," as used in the contracts, and that there was no implied warranty against it. But, if it was a latent defect, of which knowledge, or means of knowledge which ought to have been used, could not properly, under the circumstances, be imputed to the respondents, then I think that the word "quality" as used in the contracts, ought to be restricted to those qualities which were patent, or discoverable from such examination and inspection of the samples as, under the circumstances, the respondents might reasonably be expected to make; and that it cannot be extended

to defects in the texture of the samples, rendering the cloth so manufactured unmerchantable for the purposes for which the order was given, of which such examination and inspection would give the merchants, practically, no notice. * * *

In the present case the defect arose out of the want of sufficient connection or cohesion in the texture of the cloth between the warp and the weft. In all goods of the class called "corkscrew twills," the weft lies hidden inside, the surface on both sides being warp. * * * There was, in point of fact, nothing to put the respondents on their guard against any such defect; and they had, in my opinion, a right to assume that the appellants, accepting the order, could and would produce and deliver a good article, having the weight and all the other apparent qualities of the samples, which would be as merchantable for coatings as other articles of the same class previously known in the trade. * * *

LORD HERSCHELL. My Lords, I think that the general principles of law which have to be applied to the facts of this case are well settled and beyond question. It was laid down in Jones v. Bright (1) that where goods are ordered of a manufacturer for a particular purpose, he impliedly warrants that the goods he supplies are fit for that purpose. This view of the law has been constantly acted upon from the time of that decision, and was not impeached by the learned counsel for the appellants. It is equally well settled that upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description. This doctrine was laid down in Jones v. Just, L. R. 3 Q. B. 197, where all the previous authorities on the point were reviewed. In the case of Mody v. Greyson, L. R. 4 Ex. 49, in the Exchequer Chamber, the decision in Jones v. Just was approved of and acted upon, and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think that the law enunciated in these cases is sound and not open to doubt. * * *

The question arises whether, in these circumstances, the plaintiffs have complied with their contract by delivering coatings precisely corresponding in quality and weight with the patterns, or whether they are liable to the defendants. * * *

It is true that the purpose for which the goods were required was not, as in Jones v. Bright, 5 Bing. 533, stated in express terms, but it was indicated by the very designation of the goods, "coatings." I think that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation ordinarily would be used. I think too that where the article does not comply with such a warranty it may properly be said to be unmerchantable in the sense in which that word is used in relation to transactions of this nature. * * *

There is no doubt that the implied warranty will be excluded as regards any defects which the sample would disclose to a buyer of ordinary diligence and experience. The inquiry, therefore, arises whether the defendants by "due diligence in the use of all ordinary and usual means" would have detected in the patterns the defects of which they now complain. I think not. What is "due diligence" must depend upon the circumstances. Having regard to the order given in the previous year, and the mode in which that order was fulfilled, I think that when the defendants made the contract there was nothing which could reasonably lead them to anticipate that the patterns represented goods possessing the defect which was, in fact, inherent in them. And I am satisfied upon the evidence that the defendants who, undoubtedly, did not discern the defect, did not fail to do so from neglecting to use the means usually adopted by buyers under like circumstances.

I have therefore arrived at the conclusion that the learned judge who tried the case took a correct view of the facts on this part of it, and that his decision was properly affirmed by the Court of Appeal.

* * *

SECTION 8.—IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

Sales Act, Section 15. (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

Section 15. (3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

Section 15. (4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

One may desire to purchase some article to be used in the accomplishment of a certain result. He may not know what article is best suited to his purpose. The prospective purchaser may explain this situation to some one competent to select the particular article. During the negotiations it is easily conceivable that the seller will make an express warranty but if he does not do so the law implies a warranty that the goods sold are reasonably fit for the particular purpose.

This warranty has a very wide application. It applies to all sellers. The question whether it is to be implied in a particular case is essentially a question of fact. It is easier to conclude that the buyer relied upon the seller's skill or judgment in contracts to sell and of sale of goods identified by description than it is when the contract to sell or sale concern goods identified in some other way, as when the subject of the bargain is physically present and open to actual examination by the buyer. When the goods are to

be identified by description and the seller makes known the particular purpose for which the goods are required, evidence that the buyer asked for something by its patent or trade name would be almost conclusive evidence that the buyer relied upon his own judgment. Even in a sale of goods, physically present, it is still possible for the buyer to rely upon the seller's skill or judgment. This opportunity for inspection or actual inspection is evidence that the buyer relied on his own judgment, but it is not conclusive. In sales of machinery and mechanical devices the warranty of reasonable fitness for a particular purpose is common. This warranty should not be confused with that of merchantability. The warranty of fitness for a particular purpose, in some cases, will be the equivalent of merchantability, in others, it may be greater or less than that of merchantability. If a buyer desired a machine which could be used to thrash wheat, oats, barley and flax. and the machine would properly thrash the grains but would not thrash flax, there would be a breach of the warranty though obviously the machine was merchantable. It is a question of fact in each case. For what purpose were these goods intended? Did the buyer rely upon the seller's skill or judgment? Were the goods reasonably fit for the purpose made known to the seller?

HOYT v. HAINSWORTH MOTOR CO.

(Supreme Court of Washington, 1920. 112 Wash. 440, 192 Pac. 918.)

MAIN, J. This is an action for damages for breach of an alleged implied warranty in the sale of an automobile. The case was tried to the court and a jury, and resulted in a verdict for the plaintiff. * * * The defendant appeals. * * *

The appellant is * * * engaged in the business of selling automobiles at Seattle, Wash. On April 5 it sold to the respondent a new 1918 model, six-cylinder Oldsmobile. At the time the car was sold the appellant had on the floor of its showroom this particular car. It did not, however, sell this car, but sold a car of the model described. The respondent saw and looked at the car that was in the showroom. A few days after the respondent had agreed to purchase a car, the appellant delivered to him the car which he looked at in the showroom, and then told him that it was the same car. The respondent operated the car after it was delivered to him for a period of approximately 11 months. The car was defective, in that the pistons were a little too small for the cylinders. The car did not prove to be satisfactory, and after having operated it for the time mentioned the present action was instituted, for the purpose of recovering damages for a breach of implied warranty. It should be noted and kept in mind that the appellant was not the manufacturer of the automobile, but simply a dealer. The theory of the respondent that the sale was not of a particular car, but of a particular model will be adopted.

The appellant claims that, since it was a dealer, and not a manufacturer, in selling the car there was no implied warranty against latent defects. The respondent claims that, since he purchased, not a specific car, but a car of a particular model, even though the appel-

lant were a dealer, there would be an implied warranty against latent defects, such as ordinary inspection would not disclose. The defect in this car was latent, and one that ordinary inspection would not disclose. The controlling question is whether, under the facts stated, the appellant as a dealer is liable upon an implied warranty; there being no express warranty. Upon the question as to whether the dealer is liable upon an implied warranty for a latent defect in an article sold, the decisions of the various courts that have passed upon the question are divided. In some it is held that there is such an implied warranty. The majority of the courts, however, in this country hold that in the case of the dealer, as distinguished from the manufacturer, there is no such implied warranty. Williston on Sales, § 233. This court, in Hurley-Mason Co. v. Stebbins, Walker & Spinning, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915B, 1131, Ann. Cas. 1916A, 948, has adopted the majority rule; that is, that a dealer does not impliedly warrant against defects not discoverable by ordinary inspection and tests. * * *

Under the undisputed facts in the present case, there was a sale of an automobile of known manufacture. There is a rule collateral to that above referred to as the majority rule, to the effect that where an article of known manufacture is made by one not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer against latent defects. * * *

There is no escaping the conclusion that the appellant in this case sold to the respondent an article of known manufacture, of which the vendor or dealer was not the builder. The case comes squarely within this rule. The appellant relies upon the rule that, where goods of some specific kind are ordered of the manufacturer or dealer, which the buyer has neither inspected nor selected, there is an implied warranty that the article delivered shall be of fair average quality or goodness according to its kind, and free from remarkable defects. Mechem on Sales, § 1340. But under this rule, as pointed out by the same author in section 1345, before a dealer can be held liable on an implied warranty, the conditions stated in the rule must be present, "* * * namely, an executory agreement by the dealer to supply an article not yet ascertained, but left to be determined by him according to his own judgment, in view of the purpose to be subserved by it as communicated to him by the buyer." This case, however, does not come within this rule. Nothing was left to be determined according to the judgment of the appellant, and his duty was fulfilled when he delivered a car of the particular model contracted for.

To review the many authorities cited in the respondent's brief and distinguish them seriatim would extend this opinion to an unreasonable length and serve no useful purpose. Generally speaking, it may be said that the cases cited fall into one of the four following classes: First, they are cases that have adopted what is called the minority rule, and not the rule of the majority, as adopted in the Hurley-Mason Case. Such cases would not be persuasive in this jurisdiction, so long as the rule of the case referred to stands. Second, cases where there is an express warranty. Third, cases where the purchaser desires an article for a specific purpose, and communicates this purpose to the dealer, and the latter undertakes to furnish an article suitable for the purpose specified. * * * Fourth, where goods of

some specific kind are ordered of the manufacturer or dealer which the buyer has neither inspected nor selected. As already pointed out the present case does not fall within this rule. * * *

The judgment will be reversed, and the cause remanded, with directions to the superior court to dismiss the action.

WARD v. GREAT ATLANTIC & PACIFIC TEA CO.

(Supreme Judicial Court of Massachusetts, 1918. 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242.)

Action by Bliss B. Ward against the Great Atlantic & Pacific Tea Company. On report, on an agreed statement of facts, to the Supreme Judicial Court. Judgment ordered for plaintiff.

Action based on an implied warranty as to the proper condition of goods sold. Plaintiff suffered injuries in consequence of the presence of stones in a can of baked beans sold by defendant to plaintiff. In the superior court, on an agreed statement of facts, the case was reported to the Supreme Judicial Court.

RUGG, C. J. The defendant conducts a retail grocery store at Ipswich. It had for sale at this store beans in sealed all tin cans, bearing this label: "Grandmother's Brand A & P Beans & Pork with Sauce, contents 2 lbs. 1 oz." "Remove contents of this can as soon as opened and place in earthenware dish." "The Great Atlantic & Pacific Tea Co., Incorporated, Distributors, Jersey City, N. J., U. S. A."

These cans of beans were purchased by the defendant from the Thomas Canning Company, of Grand Rapids, Mich, after canning. It furnished the labels which were affixed to the cans by the manufacturer. The defendant had no supervision of the process of canning and no knowledge or means of knowledge that any foreign substance was in the cans. Such cans are always sold to the public in a sealed condition. * * * At no time after the sealing of the can until it was opened by the plaintiff was there visible indication that the contents were in any way defective or that the can contained any foreign substance. The can contained baked beans, among which was a small pebble. The plaintiff was ignorant of its presence and, while eating the beans, broke his tooth on the pebble and later, on account of this injury, was obliged to have the tooth extracted. * * *

The transaction between the plaintiff and the defendant as to the can of beans necessarily involved a purchase of food to be eaten. That need not be stated in precise words. It was an underlying and essential condition of the contract, implied without expression. It arose from the nature of the goods, the size of the purchase and the terms of the label. It is provided by the Sales Act (St. 1908, c. 237) § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

That provision governs the relations of the parties in the case at bar. In this respect the statute is in substance, so far as concerns a dealer such as the defendant, simply a codification of the common law. It was said in Farrell v. Manhattan Market Co., 198 Mass. 271, 279,

280, 281, 84 N. E. 481, 485 (15 L. R. A. [N. S.] 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076) a case arising before the Sales Act:

"Finally, provisions may be ordered by the purchaser in person in the dealer's shop, in such a way that it is made known to the dealer that his knowledge and skill are relied on to supply a wholesome food, and, if they are so ordered, he is liable if they are not fit to be eaten. * * * If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food whether supplied under a pre-existing contract * * * or in response to an order not given in person * * * or even when the order is given in person in the dealer's shop, provided * * * that the selection is left to the dealer. * * * But, even when the sale is by a dealer, if the provisions are selected by the buyer and the selection is not left to the judgment and skill of the dealer, the general rule applies and the dealer is not liable (in the absence of knowledge by the dealer that the provisions are unsound) if provisions are not fit for food." * * *

That statement of the law, which is but an amplification so far as relates to the case at bar of the terms of the Sales Act, governs the facts here presented. The defendant was a dealer, the plaintiff a buyer at retail. There arises inevitably the implication that the plaintiff made known to the defendant that he was purchasing the beans for consumption as food and that he was relying, because from the character of the transaction he was bound to rely, upon the skill of the defendant in selecting the can which was offered to him.

It is not expressly stated in the agreed facts that the defendant selected the can for delivery to the plaintiff, or that the latter relied upon the skill and judgment of the defendant in selecting the can for delivery. But that he did so rely seems an almost irresistible inference from the facts stated. The cans in the defendant's stock were all alike in label, and in general appearance. The cans were sealed. Their contents could not in the nature of things be open to inspection before the sale. There could be no intelligent selection based upon any observation by the purchaser. There is no room for the exercise of individual sagacity in picking out a particular can. The customer at a retail store is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase, unless he demands goods of a definite brand or tradename. The situation is quite different from the choice of a fowl or a piece of meat from a larger stock, all open to inspection, where there is opportunity for the exercise of an independent judgment by both the buyer and the seller, and where, therefore, the fact as to the one who makes the selection is of significance, as in the Farrell Case. The case at bar must be treated on the footing, as matter of necessary inference arising from the relation of the parties, so far as that is material in view of the other facts, that the plaintiff relied upon the knowledge and trade wisdom of the defendant in purchasing the can of beans. In the absence of an express statement to the contrary, this must be regarded as a necessary inference from the relation of parties.

There appears to us to be no sound reason for ingrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, who is not the manufacturer, any more than of the buyer. It doubtless still re-

mains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser. But the principle stated in Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076, is a general one. It has long been established. Simply because it may work apparent hardship in certain instances is no reason for changing it to fit particular cases. It is a salutary principle. It has become wrought into the fabric of the law as the result of long experience. It may be assumed that the affairs of mankind have become adjusted to it. It has recently been adopted by the Legislature in codifying the law as to sales. It imposes liability in the absence of an express contract between the parties governing the subject. It places responsibility upon the party to the contract best able to protect himself against original wrong of this kind, and to recoup himself in case of loss, because he knows or comes in touch with the manufacturer. In the case at bar the plaintiff had no means of ascertaining the manufacturer from inspection of the goods bought. The retail purchaser in cases of this sort ordinarily would be at some disadvantage if his only remedy were against the manufacturer. * * *

No discussion is required to demonstrate that canned beans and pork are not fit for consumption if they contain a pebble of sufficient size to break a tooth. It is matter of common knowledge that pebbles often are found in raw and uncleaned beans. In domestic use, careful sorting is required to free them from such substance. * * *

It follows that the plaintiff is entitled to recover, and since it is agreed that his damages are $350, judgment may be entered in his favor for that sum. * * *

COMMERCIAL REALTY & CONSTRUCTION CO. v. DORSEY.

(Court of Appeals of Maryland, 1910. 114 Md. 172, 78 Atl. 1099.)

Action by William C. Dorsey against the Commercial Realty & Construction Company. From a judgment for plaintiff, defendant appeals.

SCHMUCKER, J. The appeal in this case was taken from a judgment of the superior court of Baltimore city against the appellant company in a suit on a contract for the supply of building materials.

The company, on the eve of the erection of a row of small buildings in Baltimore city, entered into a written contract with the appellee, William C. Dorsey, on December 9, 1908, to supply it with the requisite quantity of certain kinds of lumber and millwork, at specified prices, for the buildings. The negotiations were made, and the contract was signed on behalf of the company by Abel Rosenthal, its president, and its corporate seal was affixed thereto. It was also signed, but not sealed, by Dorsey. * * *

There is evidence in the record on behalf of the plaintiff tending to show that Rosenthal, when he looked at the lumber in Dorsey's yard for the purpose of purchasing material to be used in the erection of the houses, informed Dorsey that the company wanted cheap lumber, and that he was then shown by Dorsey the identical lumber which was afterwards delivered under the contract, and that he agreed to buy it, and that the contract prices for it were made low because of its low quality. * * *

The fourth paragraph denied the defendant's right to recoup either the item of $75 of alleged loss from the defective quality of certain joists supplied by the plaintiff. * * * The law upon this subject received consideration by us in Queen City Glass Co. v. Clay Pot Co., 97 Md. 429, 55 Atl. 447, where we, quoting with approval from the cases of Jones v. Just, L. R. 3 Q. B. 197, and Rice v. Forsyth, 41 Md. 403, and relying upon other cases there cited, said: "Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own." We have held with equal clearness that, where the seller is not the manufacturer of the article sold and the buyer has an opportunity of examining it, there is no implied warranty, in the absence of fraud, that it shall be fit for the purpose for which it was bought. In such cases, if there be no express warranty, the doctrine of caveat emptor applies, and the buyer, not having seen fit to exact a warranty, takes upon himself the risk as to quality. Horner v. Parkhurst, 71 Md. 116, 17 Atl. 1027. * * *

In the case now before us it is not contended that the contract sued on contained any express warranty, and, as the joists, alleged to have been defective, were merely commercial lumber, and not goods manufactured by the seller, and the buyer had ample opportunity to inspect them after they were delivered before using them, there was no implied warranty, but he must be regarded as having assumed the risk of their quality. * * *

For the reasons mentioned by us, we will affirm the judgment appealed from. * * *

AMERICAN SODA FOUNTAIN CO. v. SPRING WATER CARBONATING CO.

(Supreme Judicial Court of Massachusetts, 1911. 207 Mass. 488, 93 N. E. 801.)

Action by the American Soda Fountain Company against the Spring Water Carbonating Company. Heard on exceptions by defendant to ruling on offer of proof.

LORING, J. This is an action on a written order for 100 special draught arms to be manufactured "as per drawing submitted." At the trial it was admitted that 100 special draught arms manufactured according to the "drawing submitted" had been delivered to the defendant, and that $272 of the purchase price had been paid by it on account. But the defendant contended that the contract was procured by fraud and that it had been avoided on that ground. It set this up in defense to the action for the unpaid balance of the purchase price, and filed a declaration in set-off to recover back the $272 paid by it to the plaintiff on account.

In support of the contention the defendant offered to prove: "That during preliminary negotiations and at the time this order or contract was signed the plaintiff represented to the defendant that it would manufacture special draught arms to be used for the purpose of drawing root beer from wooden kegs, which would deliver, automatically, two streams of different volume and at different degrees of velocity

and which would be durable and practical for the purpose for which they were designed, and submitted to the defendant a drawing or plan of a draught arm, claimed by the plaintiff to be durable and practical for the purpose aforesaid, and represented that it would manufacture for the defendant special draught arms, in accordance with said plan, which would accomplish the purposes aforesaid; that the defendant, relying upon said representations and believing them to be true, ordered the plaintiff to manufacture for it one hundred (100) of said special draught arms, made according to said drawing or plan." The judge ruled "that the offer of proof, if maintained, did not constitute a defense to the action and did not entitle the defendant to recover on its declaration in set-off." The case is here on an exception to that ruling.

It is stated by the defendant in its bill of exceptions that it was induced to give the order sued on "by certain false representations, not fraudulent in fact, but amounting in law to fraudulent representations"; and its sole contention is that the representations of the plaintiff which it offered to prove were representations of fact made by the plaintiff as of its own knowledge and so of themselves fraudulent without proof of a scienter. * * *

To make out a fraud of that kind the defendant had to prove that the plaintiff had in fact tested the special draught arms made according to the "drawing submitted," or represented that that had been done, and that the result of the test was that they would do what the defendant wished them to do. Or the defendant had to prove something equivalent to that. What he offered to prove manifestly was short of that if it had stood by itself. But it did not stand by itself in the case at bar. Witnesses called by the plaintiff had testified "that the defendant desired to procure a faucet through which both still and live beer could be drawn; that the draughtsman of the plaintiff made a working drawing of a draught arm designed to draw both still and live beer, and submitted it to Mr. Flynn. It appeared that Flynn, the defendant's manager, examined this sketch and signed and delivered to the plaintiff" the order sued on, and there was no offer to contradict this. On this bill of exceptions it must be taken that the plaintiff caused its draughtsman to design the arm shown in the "drawing submitted" for the purpose of accomplishing what the defendant wished, and that the representations which the defendant offered to prove were not representations by the plaintiff as of its own knowledge as to what these special draught arms had done, but a representation of its opinion as to what they ought to do. Such misrepresentations "not fraudulent in fact" are not ground for rescinding a contract. * * *

Exceptions overruled.

SPENCER HEATER CO. v. ABBOTT.

(Court of Errors and Appeals of New Jersey, 1918. 91 N. J. Law, 594, 104 Atl. 91.)

Action by the Spencer Heater Company against Randolph Abbott, trading, etc., as the Park Floral Company. Judgment for defendant, and plaintiff appeals.

TRENCHARD, J. This action was brought on a mechanics' lien claim to recover the price of certain Spencer steam heaters furnished to the

defendant, together with some smaller items of labor and expense. The defendant is a florist. He admitted that the claim was unpaid, and, with his answer, filed a counterclaim for loss of profits on plants, and for expenses, caused by the alleged failure of the plaintiff to perform its contract to furnish heaters adequate to heat the defendant's greenhouses. The jury rendered a verdict for the defendant, and the plaintiff appealed from the consequent judgment. * * *

The evidence tended to show that what occurred was this: * * * The plaintiff, at the request of the defendant, sent its salesman to the defendant's place for a consultation as to the number and sizes of heaters required for the defendant's purposes. The salesman went there, examined the premises, took measurements, and told the defendant, who disclaimed any knowledge of the number and sizes required, that a No. 11 and a No. 12 would supply the heat required, and agreed to furnish them. Now the question whether or not a statement or affirmation accompanying a sale is a warranty depends upon whether the conditions were such that the vendee had a right to understand, and did understand, that what was said by the vendor was meant as a warranty. A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not. * * * Tested by that rule, it was open to the jury to find, as they did, that the plaintiff warranted the heaters to do the work the defendant required. * * *

In the present case the evidence tends to show that after the heaters furnished had failed to do the work, the facts and circumstances were brought to the attention of the manager of the plaintiff. * * * He acknowledged that the trouble was due to the mistake of their agent, offered to pay the expense of a temporary makeshift, proceeded to install adequate heaters, and all without any repudiation of the acts of their salesman. We think, therefore, that the motion for a direction was properly denied.

But we think the learned trial judge erred in his charge respecting the measure of damages. It was a part of defendant's business to force plants into bloom to make them ready for the winter and early spring markets, and for that purpose he required heat in his greenhouse of a certain temperature. It was open to the jury to find that the plaintiff knew this, and contracted to furnish heaters for that purpose, and failed in the performance of that contract. The trial judge directed the jury to consider the retail price of the flowers, what it would cost to replace them, and all the surrounding circumstances. But we think that was an inaccurate and misleading statement of the measure of damages in a case of the retardation in the development of plants for a particular market. The true measure of damage was the difference between the market value of such plants in the winter and early spring markets and their market value when they were in fact matured. * * *

The judgment will be reversed and a venire de novo awarded.

CENTURY ELECTRIC CO. v. DETROIT COPPER & BRASS ROLLING MILLS.

(United States Circuit Court of Appeals, Eighth Circuit, 1920. 264 Fed. 49.)

SANBORN, Circuit Judge. This is an action by the vendee in a written contract of sale, at prices therein stated, of 400,000 pounds of brass rods, of sizes and other qualities therein specified, to recover back the purchase price, $8,506.03, of 27,504 pounds thereof, which the vendee returned, because, as it claims, they were too hard to be cut and made into brass primers by automatic screw machines. The vendor defended on the ground that it was under no obligation to make the rods of such a degree of hardness that they could be so machined. The written agreement contained no covenant of that nature. The vendee offered to prove that in the negotiations for the contract, just before it was made, the vendor made a parol agreement to that effect. The court ruled out this evidence, because it varied the written contract, by adding a new covenant to it. The vendee contended that there was an implied warranty to that effect, but the court held otherwise, and directed a verdict for the vendor. These rulings are assigned as error. * * *

The written contract clearly describes the ingredients, 60 parts copper and 40 parts spelter, of the mixture from which the brass rods were to be produced, the size and shape of the rods, and the vendor made and delivered rods which filled the requirements of the writing. When the parties were negotiating for the contract, the vendee might have required, and, if the vendor had consented, might have obtained, a provision in the written agreement that the vendor would sell and deliver brass rods that could be readily cut and made into Russian primers by the use of automatic screw machines, but it did not do so. * * *

Counsel, however, maintain that, out of the rejected testimony that the vendor, before it made the contract, knew the custom of cutting and making the rods into Russian primers by the use of automatic screw machines, that the vendee was buying the rods to be eventually made into primers, that the vendor represented that it could produce the goods to make such primers, that the rods made by it could be machined readily, that it had sold brass rods for this purpose to another concern, which had bought brass rods from another brass company, which were defective, and had finally come to it to get the proper kind of brass, there arose an implied warranty that the brass it sold to the Century Company would be of such a degree of hardness that the rods could be readily machined. If the vendee had employed the vendor to manufacture and deliver to it brass rods to be cut and made into Russian primers by automatic screw machines, and had intrusted to the judgment and skill of the vendor the ingredients and composition of the mixture from which the rods should be made and the percentage of lead which the rods should contain, such a warranty might have arisen. It did not do so. * * * The vendor made and delivered rods which complied with all requirements of the contract, and this case falls under the rule that, when a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular use, yet if the known, described, and definite thing be actually supplied,

there is no implied warranty that it shall answer the particular purpose intended by the buyer. * * *

The judgment below must be affirmed.

SECTION 9.—IMPLIED WARRANTIES MAY ARISE FROM THE USAGE OF TRADE

Sales Act, Section 15. (5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

PROCTER et al. v. ATLANTIC FISH COS., Limited.

(Supreme Judicial Court of Massachusetts, 1911. 208 Mass. 351, 94 N. E. 281.)

Action by Joseph O. Procter and another against the Atlantic Fish Companies, Limited. Verdict for plaintiffs, and defendant brings exceptions.

LORING, J. This is an action for breach of warranty in the sale of 350 barrels, and for the breach of an executory contract for the sale by description of 41 barrels of salt mackerel. The plaintiffs' firm did business in Gloucester and the defendant company in Lunenburg, Nova Scotia. One of the plaintiffs' employés, McKinnon by name, had seen the 350 barrels on a wharf in Lunenburg in the first week of November, 1906. By an interchange of telegrams between the parties on November 10, 1906, the plaintiff bought the 350 barrels, agreeing to pay $14 a barrel for large mackerel and for the medium and small "what they are worth." It is stated in the bill of exceptions "that several small lots of salt mackerel came to the defendant's place of business within a few days after McKinnon's visit, and that these lots were sent to Yarmouth and shipped with the larger lot." All the mackerel were shipped from Lunenburg to Yarmouth, Nova Scotia, where they were put on the Boston steamboat. The invoice of both lots was as follows: Large mackerel: 350 barrels and 18 half barrels, at $14 a barrel, amounting to $5,026. Medium mackerel: 8 barrels and 8 half barrels, at $10 a barrel, amounting to $120; and small mackerel, 19 barrels and 2 half barrels, at $7.50, amounting to $150; the whole price being $5,296, to which was added $2.50 for consular papers, making a total of $5,298.50. For this the defendant drew two drafts on the plaintiffs which were paid.

By direction of the plaintiffs the fish were shipped to a Boston firm who were instructed to sell them for the plaintiffs. The plaintiffs' Boston agents sent to the plaintiffs' customers half a dozen samples of 5 barrels each, which were returned as rusty mackerel. Thereupon one of the plaintiffs "examined the lot of mackerel" and found it to be a fact that rusty mackerel were packed in the middle of all of the barrels, with clear fish at each end. On finding this the plaintiffs shipped the fish to their wharf in Gloucester at a cost of $114.50, and there unpacked, resorted and repacked them at a cost of $177.75. One of the plaintiffs testified that there was no place in Boston where that could be done economically. The same plaintiff also testified that, "the fish

were not salable except as rusty mackerel until they were repacked and that after repacking, the clear fish were salable as clear mackerel and the discolored ones as rusty mackerel." * * *

At the trial the plaintiff was allowed to prove that in the fish trade "the custom is when a party purchases a lot of mackerel he is supposed to receive clear fish. If he finds they are rusty fish he is entitled to cull out the rusty fish and have an allowance of half price for the rusties." What the plaintiff was allowed to prove by the first part of this custom was that the word mackerel in the fish trade has a trade meaning, namely, clear mackerel, not rusty mackerel. That was admissible. * * * The second part of the custom is to supply by usage a basis of settlement in case of breach by delivering rusty in place of clear fish. Such an arrangement could have been made by an express agreement and the existence of the usage dispensed with the necessity of making it expressly. In our opinion it is not a usage which is contrary to the rule of law and so bad within Dickinson v. Gay, 7 Allen, 29, 83 Am. Dec. 656. See in this connection Barrie v. Quinby, 206 Mass. 259, 92 N. E. 451.

The defendant objected to the evidence on the ground that this was a sale of specific barrels which McKinnon saw and inspected, and that the plaintiffs received those barrels and consequently that is an end of their case. In any event this reasoning applies to the 350 barrels only and not to the 49 barrels. But that is of no consequence because it is not correct. It is settled in this commonwealth that in the sale of specific goods as goods of a specified description, the description amounts to a warranty that they are as described. It is also settled that the fact that the specific goods were open to inspection and were in fact inspected by the buyer does not deprive him of his right to rely on such a description as a warranty if the difference between the specific goods and the description of them would not have been and was not detected on the inspection. * * *

The sixth ruling asked for by the defendant was in these words: "A warranty as to quality or condition of the mackerel cannot be implied into this case by evidence of custom or usage." This was not given in terms but the judge told the jury that if they found the custom testified to they could allow one half the cost price for the rusty mackerel. Under the custom clear mackerel and rusty mackerel are in the trade different grades of mackerel, not different qualities of the same grade of mackerel; and so this case does not come within Dickinson v. Gay, 7 Allen, 29, 83 Am. Dec. 656. The rule adopted in that case never was law in many jurisdictions (see Williston on Sales, § 246) and has been changed by the sales act. St. 1908, c. 237, pt. 1, § 15 (5). * * *

The result is that there must be a new trial on damages unless the plaintiffs remit $292.15 with interest from the date of the writ. The order will be that unless that sum be remitted within 30 days the exceptions shall be sustained, the new trial being confined to damages only.

So ordered.

SECTION 10.—IMPLIED WARRANTIES MAY BE NEGATIVED BY AGREEMENT

ROSS v. NORTHRUP, KING & CO.

(Supreme Court of Wisconsin, 1914. 156 Wis. 327, 144 N. W. 1124.)

Action by Samuel C. Ross against Northrup, King & Co. From a judgment for plaintiff, defendant appeals.

The defendant is a wholesale dealer in garden and field seeds. It advertised its seeds quite extensively; such advertisements suggesting to prospective purchasers of seeds that they send for defendant's catalogue, and also advise it of the name of the prospective purchaser's local dealer. The plaintiff is a farmer who, in the spring of 1911, was intending to plant about 20 acres of tobacco. He saw one of defendant's catalogues in which was advertised "Comstock Spanish Tobacco Seed." He desired to raise the variety of tobacco produced from this seed, and called on three local dealers in Viroqua in the spring of 1911 to purchase the same. None of these dealers had any of this seed in stock, so he called on a fourth dealer, one Morton, who also advised him that he did not have any of this seed on hand. The plaintiff then stated that he would himself order the seed from the defendant. Morton then informed him that he was handling some seeds of the defendant, and would send and get the tobacco seed for him, and it was finally arranged between them that Morton should order one pound of this variety of tobacco seed. The order was dated on March 27th. When the order was received, the defendant did not have any of this particular variety of seed on hand, and sent to Virginia for it. This order apparently was promptly filled, except that the tobacco seed which was sent in response thereto was not Comstock Spanish tobacco seed. It was not possible to tell from an examination of the seed itself that it was not of the variety ordered. The defendant shipped this seed to Morton on April 8, 1911, who thereafter notified the plaintiff of its arrival. The seed was taken by the plaintiff and planted by him, and proved to be an inferior variety of tobacco, or one which was not adapted to the soil in which it was planted. The defendant did not know of the circumstances under which the seed was ordered, and so sold the same to Morton in the ordinary course of business. Plaintiff brought action against the defendant to recover damages for breach of warranty.

BARNES, J. * * * The defendant advertised its seeds in the Wisconsin Agriculturist and other papers. Such advertisements requested prospective purchasers to send for its catalogue. A blank coupon to be used in ordering the catalogue was included in the advertisement. "In the coupon there was a blank space in which was to be inserted the "local dealer's name," and in the advertisement proper this sentence was used: "Use the coupon or write us a postal, giving the name of your dealer, and sign at the bottom of the card with your own name." * * *

In disposing of the case we will assume that the evidence was sufficient to warrant a court or jury in finding that the relation of buyer and seller did not exist between the plaintiff and Morton, and that Morton acted as the agent of the plaintiff, an undisclosed principal, in

ordering the goods. This is the most favorable view for the plaintiff that the evidence will warrant.

It is apparent that the material question in the case is whether the tobacco seed was sold to Morton with or without a warranty that it was true to description. Defendant knew nothing of the plaintiff in the transaction. Plaintiff's rights against the defendant are no greater than Morton's would be if he had been the real instead of the ostensible principal. This is frankly conceded by respondent in the brief filed, and advisedly so.

Leaving any question of custom out of consideration, where a certain variety of seed is called for, and seed is furnished in response to such call, there is a warranty that it is true to description, unless the seller advises the purchaser that the sale is made without warranty. * * * Were the goods so sold to Morton? He had the defendant's catalogue before him when he placed the order and ordered from it. He so testifies. The defendant knew that he ordered from the catalogue, because one of the two items called for was ordered by the catalogue number. Between the cover and the first page of the catalogue there was a blank order sheet for customers to detach and use in ordering seeds. Immediately above the blank spaces in which the order was to be written was a printed statement to the effect that defendant gave "no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds * * * they send out, and will not be in any way responsible for the crop."

On the first page of the catalogue proper there was printed in large type the words "General Suggestions to Customers." There were a dozen such suggestions made; the first word or words in each instance, indicating the nature of the suggestion, being printed in large, heavy type. One of these headings consisted of the word "Disclaimer" so printed, and immediately following it was a statement substantially like the one quoted above.

The two packages ordered from the defendant were wrapped in one bundle, and shipped by express. One side of the shipping tag contained the name and address of the consignee. On the reverse side there was printed in red ink and in conspicuous type the following words, which were underscored as indicated: "Northrup, King & Co. do not give, and their agents are forbidden to give, any warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds, bulbs, or plants they send out, and will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned, and money paid for same will be promptly refunded." * * * Morton testified that he did not read or pay any attention to any of these non-warranty provisions. If Morton had observed the conditions printed on the invoice, it would certainly have been his duty to inform his principal of them.

The defendant having the right to sell without warranty, it seems clear that it did all that could in reason be required of it to advise the purchaser of the condition upon which the seed was sold. Of course it is easy to imagine other things which it might have done which would be better calculated to give notice; but, if those things had been done, and had proved inefficacious, still other things might be suggested which would surely acquaint Morton with the conditions of sale. The business was transacted by mail. Where the book from

which the order was given, the shipping tag, and the invoice, all stated these conditions, it would seem to be unreasonable to hold that any blame attached to the defendant, if Morton failed to observe all of these things. The evidence is quite convincing to show that there was a disclaimer of warranty printed on the bag containing the tobacco seed also; but there was a sufficient conflict in the evidence on this point to make the question one for the jury, and it found that there was none.

Mr. Morton could not close his eyes to the information that was literally staring him in the face, and then hold the defendant liable because he did so. In matters of contract one must observe what he has reasonable means of knowing. The law for the protection of persons even against fraud will not be extended to those who, "having the means in their own hands, neglect to protect themselves. * * * The law requires men, in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not close their eyes to the means of information which are accessible to them." * * *

In the absence of fraud, "a man cannot relieve himself from the obligation of a written agreement by saying he did not read it when he signed it, or did not know what it contained." Deering v. Hoeft, 111 Wis. 339, 87 N. W. 298. * * *

The presumption arises from the delivery and acceptance of a bill of lading that the party receiving it assented to its terms. Ignorance of its contents "arising from failure to read it, or to make some reasonable effort to obtain information in that regard, in the absence of any evidence of fraud, * * * or of the use of any means to deter the shipper from fully understanding the contract, is not sufficient to overcome it. " * * *

There is still another insurmountable difficulty in the way of plaintiff's recovery. The jury found that at the time of the sale there was "a general custom in the Northwest, including Wisconsin, among seedsmen such as the defendants, to refuse to warrant seeds." The jury also found that the plaintiff did not know of such custom. The jury made no such finding in reference to Morton. There is no evidence to show whether he knew of such custom or not. He did testify that he had no notice from any source that the defendant would not sell its seeds with a warranty. This might all be true, and still the general custom such as the jury found might not only exist, but Morton might have knowledge of it. It is probable that, had he been asked the direct question, he would have denied all knowledge of the custom, and we will assume that on the evidence referred to the court might have found lack of knowledge, and that it actually did so find.

It is not the law that ignorance of a general trade custom relieves a party from the effect of it. If there was a general custom among seedsmen such as was found, Morton, as a retail dealer in seeds, was bound to know of it. "The object of proving a general custom is not to contradict or change a contract made between the parties, but to interpret it to the court and jury as it was understood by the parties at the time it was made; and this evidence of a general custom, when it does not contradict or change the express terms of the written contract, is admitted for the purpose of showing what the real contract between the parties was. * * * And, when it is clearly proven, the parties

are supposed to have contracted with reference to such custom, unless such custom changes the express terms of the written contract." * * * "A uniform trade custom is readily accepted by courts to define what is ambiguous or is left indeterminate in a contract, where both parties have knowledge of the custom, or are so situated that such knowledge may be presumed, for the reason that the majority of such transactions are had in view of the custom, and the agreement on which the minds of the parties actually met will thereby be carried into effect. * * * Where the custom is proved to be known to both, it may even add terms to the contract. * * * Where the custom is general, it will be presumed to have entered into the contract, and one may be bound thereby, although ignorant, unless the other party be shown to have knowledge of his ignorance." * * *

Replying to the argument of counsel in another case, that a custom in order to be binding must be known to both parties to the contract, or it must have existed a sufficient length of time to raise a presumption of knowledge, the court said: "That rule, of course, prevails in case of an attempt to annex to a contract some incident not expressed therein, as in the case of Hewitt v. John Week Lumber Co., 77 Wis. 548 [46 N. W. 822], where the question was whether the owner of a sawmill, under his contract to saw logs by the thousand, was entitled to the slabs. There is a difference between evidence of usage to establish a custom for the purpose of annexing that as an incident to a contract and the same kind of proof to show the meaning of some word or term used in a contract. In the latter situation the meaning of the term as understood at the time and place of the contract governs, whether both of the parties knew of such meaning or not. They are presumed to contract with reference to the meaning of words and terms used by them, as such words and terms are understood at the place of their contract." Shores Lumber Co. v. Stitt et al., 102 Wis. 450, 455, 78 N. W. 562, 564.

The case at bar is in its facts very much like one recently decided by the Supreme Court of Iowa, from which we quote the following: "The alleged liability of the Younkerman Seed Company may be considered first. The evidence that a general custom, such as pleaded, prevails in the seed trade was conclusive. The particular package had the printed matter thereon, and, though this may not have been noticed, the sale is presumed to have been negotiated with reference to the general custom of the trade. * * * This being so, a warranty that the seed was true to name could not be inferred, and the court rightly found in favor of the Younkerman Seed Company." Blizzard Brothers v. Growers' Canning Co., 152 Iowa, 257, 259, 132 N. W. 66, 67. * * *

Speaking of a general custom pertaining to the manner in which mines were operated, the Iowa court in another case said: "Again, it is said there is no showing that defendant had notice or knowledge of the custom. This is not necessary. The custom or usage being shown by competent evidence, the defendant is presumed to have had knowledge thereof. This is fundamental." Thayer v. Smoky Hollow Coal Co., 121 Iowa, 121, 127, 96 N. W. 718, 719.

The rules of law applicable to a general custom should not be confounded with those applicable to a local custom. * * * It is argued that the evidence was not sufficient to warrant the finding of a general custom. We think it was.

The conclusions which follow from the foregoing discussion may be summarized as follows: (1) The defendant offered the tobacco seed in question for sale without a warranty, as it had the right to do, and adopted reasonable and adequate means of advising the purchaser Morton that the seed was so offered, and in so doing performed its full duty to the purchaser, there being no evidence of fraud or bad faith; (2) Morton was chargeable with knowledge of the condition upon which the sale was made; and (3) Morton was chargeable with knowledge of the general custom which the jury found to exist. Under these conditions Morton would have no right of action against the defendant, and therefore his undisclosed principal would have no such right. These conclusions would, we think, follow if Morton acted as the agent of both parties, because it would be his duty as agent of the plaintiff to communicate to him the knowledge with which he was chargeable. * * *

In the present case the pound of tobacco seed was sold to Morton for $2.25. The damages recovered were $1,015. It may seem unjust that the purchaser should suffer this loss. But it is apparent that, if seedhouses warranted their seeds, they would have to sell at a very much higher price than if no warranty were given. If the defendant had sold 100 pounds of this seed instead of one pound, it would receive therefor $225, and on the basis of plaintiff's recovery would be liable for over $100,000 damages. It purchased the seed in Virginia, and admittedly ordered the variety which the plaintiff desired. The evidence shows that there was no way in which the substitution could be discovered until the tobacco plants were pretty well grown. Large seedhouses who draw their supply of seeds from different parts of this and perhaps other countries cannot well grow all the seeds which they handle. They are liable to be imposed on, and must either adopt the practice of selling without warranty or of selling with one, and imposing on the consumer an added price sufficient to make good the losses sustained by reason of the failure of the seed sold to comply with the warranty. * * *

Judgment reversed, and cause remanded, with directions to dismiss the complaint.

Sales Act, Section 15. (6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

SECTION 11.—RIGHTS OF SUB-VENDEES AGAINST FORMER WARRANTORS

WELSHAUSEN v. CHARLES PARKER CO.

(Supreme Court of Errors of Connecticut, 1910. 83 Conn. 231, 76 Atl. 271.)

Action by William Welshausen against the Charles Parker Company. From a judgment refusing to vacate a judgment of nonsuit, plaintiff appeals.

THAYER, J. The complaint alleges that the plaintiff purchased of the defendants a gun of their own manufacture with an express war-

ranty by their agent that the same was sound, of best quality, and fit to stand the strain of proper and ordinary use, and that the barrels thereof were of the best Damascus steel. It also alleges negligence on the part of the defendants in manufacturing the gun and putting it on the market and allowing it to go into the hands of customers without proper supervision and inspection in the manufacture of the same and during and after its manufacture before it was sold, and that the gun was weak, insufficient, badly constructed, and of poor quality of steel, and that because of such defect the left barrel burst when the plaintiff was using it in the ordinary manner and with due care, and injured him. In compliance with an order of the court, the complaint was so amended as to show wherein the gun was defective, weak, and badly constructed. There is no allegation expressly stating a breach of the warranty. Upon the motion to set aside the nonsuit the plaintiff claimed that there was evidence from which the jury could find the express warranty or an implied warranty that the gun was fit for the purposes for which it was sold, and the breach of such warranty, also that there was sufficient evidence that the gun was defective in the respects alleged, and the defendants' negligence in putting it upon the market in that condition to warrant a verdict upon that ground.

To sustain a finding that there was a breach of warranty express or implied, there must have been evidence of a contract between the parties, for without a contract there could be no warranty. There was no evidence which would justify the jury in finding any contract between the parties. The evidence did not show that the plaintiff purchased the gun from the defendants. On the contrary, it showed that they sold the gun to the Simmons Hardware Company, by whom it was sold to one Koenig, who sold it to the plaintiff. The evidence of this was so clear that, had the jury found that the sale was made by the defendants to the plaintiff, the finding must have been set aside. The warranty, if one was given, was to the hardware company, and not to the plaintiff. And he, as subvendee, has no cause of action upon the warranty.

Upon the other branch of the case, there was no evidence to justify the jury in finding that the gun was defective in the respects set forth in the amended complaint. The gun was in evidence, and there was some evidence that the cartridges fitted the left barrel somewhat loosely. But the jury would not be permitted from these facts alone to conjecture that the gun was defective or unsafe. Those facts laid the foundation for the introduction of further evidence by experts to show that the thickness of the barrels as shown by the exhibit was insufficient for safety, or that the quality of the steel was poor, or that the barrels were improperly and irregularly bored, and that the looseness of the fit of the cartridge was liable to cause a disruptive explosion. If such were the fact, it was easy to produce witnesses having knowledge derived from experience and study to testify to it. The jury could not properly be allowed to guess or surmise that it was so. * * * There was an entire failure of evidence to prove that the defendants broke any warranty or negligently placed the gun upon the market, and the motion to open the nonsuit was properly refused.

There is no error. * * *

ROBERTS v. ANHEUSER-BUSCH BREWING ASS'N.

(Supreme Judicial Court of Massachusetts, 1912. 211 Mass. 449, 98 N. E. 95.)

Action by Joseph E. Roberts against Anheuser-Busch Brewing Association. A verdict was directed for defendant, and the case reported to the Supreme Judicial Court.

The action was for ptomaine poisoning from a bottle of Malt Nutrine, whereby plaintiff's wife was made very ill and his young son died. The druggist from whom plaintiff bought the bottle testified that it had not been in his place more than eight months.

SHELDON, J. While there may be no inherent difficulty in maintaining an action of tort upon a false warranty, * * * it yet remains true that there cannot be a warranty where there is no privity of contract. It cannot be found that there was a particular contract where there was no contract whatever. As there was here no contractual relation between the plaintiff and the defendant, the action cannot be maintained upon the ground that there was any warranty by the defendant of the good qualities of its mixture. * * * Nor did the plaintiff state such a cause of action. His declaration is in tort.

There was evidence that the defendant had by advertisements represented that its mixture was healthful, free from all injurious substances, beneficial to women and children and to those needing strength and nourishment, and that it was compounded with great care. These representations could be found to have been made as of the defendant's own knowledge. It could be found that the plaintiff had seen some of these advertisements, and we cannot say that the jury might not have found that his purchase of a bottle of the mixture was upon the faith of and in reliance upon these representations. There was also evidence, although meager, tending to show that this bottle had been put upon the market by the defendant and had come from it through a wholesale dealer to the druggist who sold it to the plaintiff. It also could be found that the sickness of the plaintiff's wife and child was due to ptomaine poisoning, caused by the contents of this bottle, though as to the last point it is true that the evidence was but meager. Still it was for the jury to pass upon. If this sickness was due to ptomaine poisons contained in a bottle which had come from the defendant, there was evidence of the falsity of its representations.

If these facts were found in accordance with the plaintiff's contention, there might have been a verdict in his favor. If the defendant made such representations as of its own knowledge, and put its mixture upon the market to come through wholesale and retail dealers to the ultimate consumers, who in reliance upon such representations bought and drank the mixture in the manner intended by the defendant, these representations must be regarded as continuous, intended to be accepted and relied on by all who finally should purchase the article for their own consumption. This rule often has been declared. * * *

But it is claimed that these representations should not be given an indefinite continuance, and that this bottle either was or might have been so long out of the possession of the defendant that its representations ought to have been regarded as no longer in force when the plaintiff made his purchase. There may be a lapse of time after which this fairly could be maintained; but it cannot be held as matter of law that such was the case here. The bottle was corked with a stopple

which had to be pulled out by the plaintiff after the seal over it had been removed by his wife. This would indicate that any outside contamination had been guarded against, and might tend to relieve a purchaser from any fear of such contamination. This contention presents only a question of fact.

In our opinion the case should have been submitted to the jury. * * * As the case stands, we are of opinion that there should be a new trial. * * *

DAVIS v. VAN CAMP PACKING CO.

(Supreme Court of Iowa, 1920. 176 N. W. 382.)

PRESTON, J. The original petition alleges substantially that on July 24, 1916, a can of Van Camp's pork and beans was eaten by certain members of the Davis family, of whom Alfred Davis, plaintiff, was a member; that as a result of eating said beans, plaintiff sustained damage by reason of ptomaine poisoning; "that the said defendant was guilty of negligence, false representations, and breach of implied and expressed warranty, in placing in the said can and container said pork and beans, containing poisonous, deleterious, noxious, and unwholesome substances which rendered the contents of said can unwholesome and dangerous to human life and health." * * *

At the close of plaintiff's evidence, defendant moved that plaintiff be required to elect whether he would proceed upon the theory of breach of warranty, express or implied, or upon the grounds of negligence in tort. Plaintiff was required to elect, and at first elected upon breach of implied warranty and tort, but was further required by the court to elect, and he then elected to stand on a tort action. * * *

Appellee contends that the evidence is not sufficient to show that the eating of the pork and beans caused, or was the proximate cause of, plaintiff's sickness; that under the law there is no warranty, and that the evidence shows that there was no negligence.

There is but little dispute in the evidence. Defendant is engaged in the manufacture of pork and beans. * * * Defendant, in July, 1916, was jobbing canned pork and beans to the Ft. Dodge Grocery Company, for distribution to retailers and consumers. This was known to defendant company. On July 4, 1916, the can of beans in question was received by said grocery company in a consignment from the defendant company. July 12th, the grocery company sold to Munn, a retail grocer at Gypsum, five miles east of Ft. Dodge, the can of beans in question, with others. July 24, 1916, this can of beans was sold by Munn to the mother of plaintiff. This was Monday. The can appeared to be all right. The beans were eaten for the evening meal, within an hour after they were brought by Mrs. Davis to the home. When the beans were opened they were emptied into a bowl. They were not left standing in the can. This evening meal consisted of crackers, bread and butter, potatoes which had been dug that morning from the garden, boiled for dinner, and fried for supper, also the can of beans in question, and nothing else. * * * The family consisted of the father and mother, and seven children. Three of the children were not at home for the meal at which the beans were eaten, and did not partake of any of the beans, nor did the father and mother. One of the younger children ate nothing but beans for that meal.

This one subsequently died from ptomaine poisoning, and the other three children who ate of the beans were taken sick soon after. Some of them were seriously ill for several weeks. All who ate of the beans were sick after eating. The father and mother and the three other children who did not eat of the beans were not sick. * * *

Without restating the evidence, we are of the opinion that the jury could have properly found therefrom that the eating of the beans by plaintiff was the proximate cause of his illness. As before stated, the medical testimony is to that effect. * * *

Counsel for appellee argues at considerable length that there was no express warranty. They argue, that there can be no warranty, express or implied, because there is no privity of contract between the defendant and plaintiff. They cite authorities, some of which are by this court, to the further point, holding, as appellee claims, that there cannot be both an express and implied warranty involving the same subject-matter, to wit, quality or character of goods sold; that when the express warranty does not provide as to the same obligation it excludes the implied. The Iowa cases cited on this point were not cases involving food products. One was the sale of a threshing machine, another, piling, and the other, the sale of sheep, and the warranty had to do with the breeding, health of the sheep, etc. For reasons, appearing later we do not determine this point. The cases cited by appellee, for the most part at least, hold that the action sounds in tort. We understand their argument to be that it is a tort action, but they contend that under the record, there was no negligence shown, and that their evidence shows there was no negligence. Without citing the cases on the question as to express warranty, it seems to us that the language on the label does not constitute an express warranty that the food is wholesome and fit for use. The substance of it is, that the can contains Van Camp's Pork and Beans, prepared with tomato sauce; that the meat has been inspected and passed at an establishment where federal inspection is maintained; the contents are ready for the table; directions are given how to serve hot; the quantity; and where it is prepared. From appellant's argument, we think they do not seriously contend that there is an express warranty. The part of the printing on the label relied upon as an express warranty is, "The contents of this can are ready for the table, and can be served hot or cold." This, we think, means no more than that the beans may be used without cooking. Doubtless it should be construed to mean that it is for human consumption. But it is shown in other ways that it was so prepared, and that defendant knew it was to be sold for that purpose. We think we should spend no more time on this phase of the case.

It must be admitted that there is much confusion in the authorities as to the theory of the liability of defendant, if any, in this class of cases. Some of the cases hold that the action is bottomed upon negligence alone; others that there is an implied warranty; and still others that there is an implied warranty, and that, if in addition it is found that the seller was negligent in selling food products that were dangerous to those who ate them, he would be liable for the consequences if, by proper care, he could have known of the condition. There is a conflict in the decisions. * * *

From the decisions, and particularly the later decisions, we think there is an implied warranty as contended by plaintiff, and that the question as to privity is not controlling. The case should have gone to

the jury on that question. We are of opinion, too, that on the whole case there was sufficient evidence to take the case to the jury on the question of negligence, and that it was for the jury to say whether plaintiff's prima facie case had been negatived or overcome by the testimony introduced on behalf of the defendant. The court erred in requiring plaintiff to elect as between implied warranty and negligence. While it is true that no particular act of negligence is shown by plaintiff, in the very nature of the case that could not be done. It is also true that, according to the defendant's evidence, its plant and method of manufacture is good, probably as good as any, still, it does appear that the method was not always adhered to by defendant's employés. We think, from all the circumstances shown by the evidence, the jury could have properly inferred and found that the can of beans in question, and perhaps a batch, as one of defendant's witnesses calls it, were defective. * * *

If we call it a duty to use care in the preparation and manufacture, then in that sense a breach of that duty would constitute negligence. Or it may be treated as a representation or a warranty that, because of the sacredness of human life, food products so put out are wholesome. In either event, a failure in this respect is a breach of duty and a breach of warranty, and the plaintiff, suing, may rely on either or both, and when he makes a prima facie case he is entitled to go to the jury on the question as to whether defendant's evidence negatives plaintiff's prima facie case. * * * For an interesting discussion of this subject and the citation of many cases, see Iowa Law Bulletin, vol. 5, p. 86. * * *

The question of caveat emptor has been referred to in some of the cases; in the earlier cases, and perhaps followed by some of the later ones, when a person went to market with a market basket on his arm, and could examine the food, the doctrine was held to apply, in the absence of a warranty. But the business of canning food products of almost every kind has increased enormously in recent years. The purchaser has no opportunity of examination, until opened for use, and, under the circumstances of this case, we think the doctrine does not apply. It is possible that when Mrs. Davis purchased this can, had it had the appearance of being old, and the label soiled, or the ends swollen, or something of that kind, the doctrine might apply.

For the reasons given, the judgment is reversed and remanded for a new trial.

CHAPTER VII

RIGHTS AND REMEDIES OF THE BUYER

Section
1. Introduction.
2. Buyer's Right to Examine the Goods.
3. Nature and Consequences of an Acceptance of the Goods.
4. Buyer under No Duty to Return Goods Not Accepted Because of Non-Compliance with the Contract.
5. Remedies of the Buyer for Breach of Warranty.
6. Buyer's Right to Recover Damages for Breach of the Contract to Sell.
7. Right of the Buyer to Sue the Seller for Conversion of the Goods.
8. Buyer's Right of Specific Performance.

SECTION 1.—INTRODUCTION

In Chapter V there was discussed at some length the special rights and remedies of an unpaid seller. It was there noted that, in addition to the ordinary remedies for breach of contract, the unpaid seller had three special rights against the goods. In one special case the seller is allowed to recover the price, even though title has not passed. In the present chapter we enter upon a similar discussion of the special remedies of the buyer. The remedies of the buyer for breach of warranty are of particular importance here. Also it will be found that the buyer may, in a special case, recover possession of the goods, even though title has not passed to him, a remedy which is similar in nature to that special case in which is accorded to the seller the right to recover the price, although title has not passed.

SECTION 2.—BUYER'S RIGHT TO EXAMINE THE GOODS

Sales Act, Section 47. (2) Unless otherwise agreed, where the seller tenders delivery of the goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery" or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Subsection 2 imposes upon the seller of goods an obligation to afford the buyer a reasonable opportunity of examining the goods, and gives to the buyer the correlative right to examine the goods, unless the parties have, by express or implied stipulation, de-

stroyed such right to examine the goods. Subsection 3 presents one situation where it is presumed that the parties have waived the buyer's right of examination.

Of what value is this right to the buyer? Where is the examination to be made? In studying the nature of the buyer's right of examination, or of inspection as it is sometimes called, it is desirable to keep two different situations in mind. The general problem is to discover the effect upon the rights and liabilities of the parties as they are affected by the right of examination. These two situations are: (1) A case where the goods do in fact comply with the terms of the contract; and (2) a case where the goods in fact do not comply with the contract. The buyer's right of examination, obviously, exists in each case, for the very purpose of the right is to enable the buyer to learn whether the goods do conform to the contract.

Let us take as an illustration the case of a shipment of a carload of goods sent under a straight bill of lading to the buyer. Let us suppose, further, that these goods do in fact comply with the terms of the contract. The buyer has a right of examination. Waiving, for the time being, the question as to where the examination should take place, whether at the point of origin or of destination, our question is: Of what value to the buyer is his right of examination? The law is that, if the buyer has not yet paid for the goods, he is under no duty to pay for them until he has had a reasonable opportunity of examining them; that is, the buyer will not break his contract by refusing payment until he has had this opportunity. Stating it in another way, the seller cannot sue the buyer for failure to pay until this opportunity has been given the buyer. The act of affording a reasonable opportunity to examine the goods is a condition precedent to the buyer's duty to pay. Notice that the giving of such an opportunity is not a condition precedent to the passing of title. From a rule already discussed we know title passed on delivery to the carrier. The buyer owns the goods; the risk of loss has passed to him. He simply is not required to pay for them until he has had an opportunity of examining them, assuming that he has not waived this right.

Assume, now, that an opportunity is given the buyer to examine, but that he does not avail himself of it. This is a very common case, not so common in carload shipments, but certainly quite common where the goods are packed in boxes or otherwise concealed. The normal thing done by the buyer is to take them from the freight office to his place of business and leave them there until he is ready to use or display them. Having had an opportunity to examine, it is evident that, just as soon as there is a failure to take advantage of the opportunity, at that moment the buyer is under a duty to pay for the goods. The contract, of course, may provide otherwise as to time of payment.

Taking up the second situation, where we are assuming that, the goods, at the time of delivery to the carrier, were not in conformity

with the contract. This is the more important case. We have already noted that the delivery to the carrier, or any other act of unconditional appropriation of goods not in accordance with the contract, does not pass title nor risk of loss to the buyer. Therefore, in this case, the giving of an opportunity to examine the goods is not only a condition precedent to the buyer's obligation to pay the price, the contract not providing otherwise, but it is also a condition precedent to the passing of title to the buyer. If he examines and accepts, title passes to him, and his duty to pay then arises. If he examines and rejects, that act terminates his duties under the contract, and perfects his right to sue the seller for his breach. The scope of the buyer's duty to care for rejected goods will be noted in section 4. If the buyer does not examine, having the opportunity of examining, but receives the goods, perhaps taking them from the carrier and storing them in his own place of business, title to the goods passes at that moment, carrying with it the risk of loss, in spite of the fact that they are not in compliance with the terms of the contract. It is only fair to the seller to hold that, even if he has been guilty of a breach of contract, and the buyer has taken the goods to his own establishment, and then retained them for a time without examination, the title and risk of loss is in the buyer. But the buyer will, upon opening up the boxes, discover that the goods are not what he ordered. What are his rights? Has he lost everything by failing to examine when he first had the opportunity? No; because he has not yet accepted the goods. The buyer may then reject them. The act of rejection has the effect of casting back title and risk of loss to the seller. The buyer's right to so reject is founded on a condition subsequent, very similar to the case where the buyer holds goods under a contract "on sale or return."

The above comment explains in general the nature of the right of examination; but this right does not always exist, because the parties have contracted it away. This may be done in various ways, but the situation presented, described in subsection 3, is of outstanding importance here. It is illustrated in the next case. The dissenting opinion in this case was inserted because it contained a more complete explanation of the facts and of the general principle of law involved. The majority and dissenting opinions do not differ in their explanation of the rule. It will be noticed that they differed only as to whether the contract called for shipment in the manner adopted; i. e., the majority affirming that "there was no agreement that the shipment should be made 'collect on delivery,'" while the dissenting opinion states that "it was the agreement of the parties, as evidenced by the written contract, that the delivery should be by carrier," etc., and that "the agreement was a cash sale."

IMPERIAL PRODUCTS CO., Inc., v. CAPITOL CHEMICAL CO.

(Supreme Court of New York, Appellate Division, 1919. 187 App. Div. 599, 176 N. Y. Supp. 49.)

Action by the Imperial Products Company, Incorporated, against the Capitol Chemical Company. From a determination of the Appellate Term, reversing a judgment of the City Court, plaintiff appeals.

PAGE, J. Four conditions must exist to bring a case within subdivision 3 of section 47 of the Sales Act: (1) Goods must be delivered to a carrier, (2) with instructions that the carrier is not to deliver the goods to the buyer until paid for; (3) this must have been done pursuant to an agreement between the buyer and seller; (4) such an arrangement may be indicated by the marking of the goods "collect on delivery" or otherwise. In my opinion, this subdivision does not apply to every shipment by a carrier, but only to such shipments when the terms of the contract of sale provide that the carrier shall collect on delivery. The controlling element is the agreement of the parties, and not the method of shipment by the seller.

In this case there was no agreement that the shipment should be made "collect on delivery," nor was there any agreement that the buyer would pay the purchase price by sight draft to be attached to the bill of lading. No terms of payment were specified in the agreement between the parties. Under such a contract, delivery and payment are concurrent obligations. * * * This is very different from payment of the purchase price by sight draft with bill of lading attached. In the first, the buyer has the right of inspection to ascertain whether the goods are in conformity with the contract, when the seller tenders delivery, before he is required to accept and pay for the goods. In the latter, payment is a condition precedent to delivery, and hence inconsistent with the right of inspection. * * * Inasmuch as there was no provision in the agreement between the parties inconsistent with the right of inspection before acceptance and payment, the seller could not deprive the buyer of that right by adopting a method of collection not provided in the agreement. * * *

In my opinion the judgment of the City Court was right, and the determination of the Appellate Term should be reversed. * * *

DOWLING, J. (dissenting). This action was brought to recover damages for the breach of a contract whereby plaintiff agreed to purchase and accept from the defendant one car, standard quality, white napthalene flakes, in barrels or in paper-lined boxes, at 8 cents per pound, f. o. b. West Elizabeth, N. J., prompt shipments from defendant's plant at Birmingham, Ala. The contract is in writing and is not disputed. The question involved in this appeal is whether the purchaser, the plaintiff, had the right to inspect the goods shipped it by the defendant pursuant to this agreement of sale.

The bill of lading issued by the Pennsylvania Railroad Company for the goods in question, covering the car Rutland filled with napthalene and routed to the plaintiff at West Elizabeth, N. J., the invoice for said goods covering said carload, aggregating 33,127 pounds, at 8 cents a pound, $2,650.16, and the sight draft on plaintiff for such sum of $2,650.16, were all sent to the Chase National Bank for presentation and collection, and were regularly presented and demand for the payment of the draft made on plaintiff by the bank. There is no dispute as to these facts, and upon the trial plaintiff's counsel admitted

that a tender of the goods had been made. Plaintiff, however, refused to take up the draft unless an opportunity was given it to inspect the goods. The plaintiff's counsel asked the court to charge the jury that, as a matter of law, the plaintiff had a right to inspect the merchandise before delivery. The court charged that plaintiff had the right to ask for a certificate for the inspection of the merchandise before delivery, to which exception was duly taken. The sole question for determination is whether, under the contract between the parties for the purchase and sale of these goods, the purchaser had a right of inspection before paying therefor.

No terms of payment were specified in the agreement between the parties; therefore the sale was a cash sale, where payment for goods must be made upon delivery. The shipment was by carrier, as the agreement contemplated, and the payment was to be of a sight draft against the bill of lading and invoice, which was the equivalent of cash on delivery. This case comes within subdivision 3, section 47, of the Sales Act. * * *

It was the agreement of the parties, as evidenced by the written contract, that the delivery should be by carrier. The law treats this sale under the agreement in question as one for cash, where the goods are not to be delivered by the carrier to the buyer until he has paid the drafts, and these terms were indicated by the fact that the buyer was to meet the sight draft before it became entitled to the invoice and bill of lading, which were its sole authority to take possession of the goods. There was no special agreement permitting an examination before acceptance. Under these conditions the provisions of the subdivision referred to are literally and completely applicable to this case, and the plaintiff had no right to an inspection of the goods and the tender therefore was good. In Williston on Sales, p. 840, the rule is recognized that sending goods forward with a draft attached to a bill of lading is the equivalent of sending them forward C. O. D., and both involve the loss of the buyer's right of inspection. No great hardship is worked by the rule laid down by the statute in question, as it is always competent for the parties to provide for an inspection by special agreement.

It follows, therefore, that the charge of the learned trial court was incorrect, and that, plaintiff not having the right of inspection which it claimed, the tender made by defendant was effective, and the determination of the Appellate Term, reversing the judgment in favor of the plaintiff, was correct. * * *

CLARKE, P. J., concurs.

At what point is the buyer entitled to examine the goods? Subsection 2 states that the buyer is to afford the seller a reasonable opportunity of examining the goods "when the seller tenders delivery of the goods to the buyer." But when does the seller "tender delivery"? In the case of shipment by carrier, section 46 of the Sales Act provides that "delivery of the goods to a carrier * * * is deemed to be a delivery of the goods to the buyer * * * unless a contrary intent appears." The duty to examine the goods at the seller's place of business, or at the office of the carrier located there, would be a right of little value to the buyer.

Therefore, in the very circumstances of the case, delivery to a carrier, for purposes of affording an opportunity to the buyer to examine the goods, is not a delivery to the buyer, as the word "delivery" is used in section 47. The general presumption stated in section 46 does not govern here, because a contrary intent does appear. The next case discusses this rule, and also points out that the parties may expressly or impliedly designate any place as the place for making an examination.

EATON v. BLACKBURN et al.

(Supreme Court of Oregon, 1908. 52 Or. 300, 96 Pac. 870, 20 L. R. A. [N. S.] 53, 132 Am. St. Rep. 705, 16 Ann. Cas. 1198.)

Action by A. E. Eaton against Edward Blackburn and another, partners as Blackburn & Breck. From a judgment for defendants, plaintiff appeals.

This is an action to recover the purchase price of two car loads of hay. The defense is that the hay, which plaintiff agreed to sell and deliver to defendants, was to be "good, number one, merchantable hay," and that furnished was not of this quality, for which reason it was rejected. The defendants are commission merchants, residing and doing business in Baker City. Plaintiff resides in Union county, some miles distant from Baker. In March, 1906, he contracted and agreed to sell to defendants five car loads of hay, for use in their business, at $11.50 per ton, f. o. b. cars, Nodine Spur, Union county. The contract was made at Baker City, and defendants were to pay the freight from place of shipment to that point, but nothing was said about the time or place of payment, or the inspection or acceptance of the hay. Shortly after making the contract, plaintiff loaded two cars with hay at Nodine Spur, and the same were carried by the railroad company to Baker, reaching there Sunday morning, March 25th. On the morning of the 27th, in company with Abercrombie—a prospective purchaser—Mr. Breck, one of defendants, opened the cars, in which the hay had been shipped, and examined it, but Abercrombie was unwilling to purchase. In the afternoon of the same day they made a further and more careful examination, and Breck, claiming that the hay was not of the kind and quality contracted for, refused to accept it, and so notified plaintiff and the railroad company on the following morning.

At the time of the trial it was contended by plaintiff that, under the contract between him and defendants, it was the duty of defendants to inspect and accept or reject the hay at Nodine Spur, where it was to be loaded on the cars; and, if they neglected to do so, they were bound to receive such hay as was actually shipped, and rely upon a claim of damages for breach of contract, if it was of inferior kind and quality, but, if this was not so, defendants' conduct, after the hay reached Baker City, was such as to amount, in law, to an acceptance thereof. The court instructed the jury that if the hay, delivered on the cars by plaintiff at Nodine Spur, was substantially the kind and quality called for by the contract, it would amount to a full and complete performance, and enable him to recover the contract price, whether the hay was subsequently accepted by defendants or not; and, if the hay was different or inferior to that which plaintiff agreed to sell, not-

withstanding which the defendants accepted it, or did something amounting to an acceptance, they could not thereafter repudiate their liability by returning or tendering a return of the hay, but that defendants had a reasonable time in which to inspect the hay after it reached Baker City, and if it was, in fact, of an inferior quality, and not according to the contract, they could reject it, and refuse to accept or pay for it, and if they did so, plaintiff could not recover in this action.

BEAN, C. J. The principal point relied upon by plaintiff for a reversal of the judgment is the ruling of the court that, under the contract for the sale of hay in question, defendants had a right to inspect it after it reached Baker City, and, if it did not conform to the contract, to refuse to accept or pay for it. The argument is that the place of inspection and acceptance or rejection was at Nodine Spur, where the hay was to be delivered by the plaintiff, f. o. b. cars; and, if defendants neglected to exercise the right of inspection at that time and place, they were liable for the value of the hay so delivered. But we do not so find the law. No place or time of payment or of inspection or acceptance was stipulated in the contract. All parties concur in this point. The contract was made between plaintiff and defendant Breck. These gentlemen both say that Breck met plaintiff at the depot at Baker City, and inquired of him if he had any hay for sale, and that he (plaintiff) said he had; that the price was $11.50 per ton, f. o. b. cars at Nodine Spur, and that Breck said he would take five car loads at that price, and under the conditions named. * * *

The payment, therefore, became due and payable on a complete delivery, and there could be no such delivery without an opportunity for inspection. Under an executory contract for the future sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them; and, unless he does so, he is not liable therefor. This necessarily gives to the vendee the right, and imposes upon him the duty, of inspection, and he must therefore be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides; and where articles are to be delivered to a common carrier by the vendor, to be forwarded to the vendee at a distant point, and no provision is made for inspection and acceptance before or at the time of shipment, the vendee is entitled, under the law, to a reasonable time, after the goods arrive at their destination, in which to exercise the right of inspection, and to accept or reject them, if they do not comply with the contract. * * *

In Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831, the court said: "The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule—more injurious even to the dealer or manufacturer than to the purchasers—if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered." * * *

We are of the opinion, therefore, that no error was committed by the court below in its ruling on this phase of the case. In Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co., 97 Md. 1, 54

Atl. 634, 62 L. R. A. 795, cited by plaintiff, the contract required payment to be made for the goods at the place of shipment, which the court held was necessarily inconsistent with a right of inspection at another place. But here, as we have seen, no time or place of payment was specified, and therefore it did not become due until the goods were delivered. * * *

It is also insisted that defendants waived the right to reject the hay for defective quality, by their action and conduct in relation thereto after it reached Baker City. But this question was for the jury, and, we think, was fairly submitted to them. The defendants were not precluded from rejecting the hay by merely receiving it. They still had a reasonable time in which to inspect and reject it, if not according to the contract. Nor did their offer to sell and dispose of the hay, before they had examined it, amount to an acceptance. This was before they ascertained that it was of an inferior quality, and was on the assumption that plaintiff had complied with his contract, and shipped hay of the kind and quality agreed upon. It was therefore not conclusive in law of an intent to accept the hay, in performance of the contract. * * *

Finding no error in the record, the judgment is affirmed.

SECTION 3.—NATURE AND CONSEQUENCES OF AN ACCEPTANCE OF THE GOODS

There are two principal questions here raised: (1) What constitutes an acceptance? (2) What is the legal effect, especially upon the rights and obligations of the buyer, of an acceptance?

In answer to the first question, What constitutes an acceptance? the Sales Act makes two provisions. Section 47, subsection 1, provides:

Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

The effect of this section is that an act which under some circumstances might be deemed an acceptance under the definition prescribed in Section 48, next to be noticed, will not be construed as an acceptance unless the buyer has had a reasonable opportunity of examining the goods. This subsection in a sense, therefore, recognizes an exception to Section 48. It is to be noticed that it is the reasonable opportunity of examining the goods, not an actual examination which section declares must occur before the buyer may be deemed to have accepted. Our discussion, in the preceding section, of the nature and legal effect of the buyer's examination and of his failure to examine, makes it unnecessary to discuss this subsection further, though its importance should not be overlooked.

In direct answer to the first question, what constitutes an acceptance, the Sales Act, Section 48, provides:

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of reasonable time, he retains the goods without intimating to the seller that he has rejected them.

The question raised is essentially one of fact. It is to be noticed that two very different types of conduct may be deemed an acceptance: (1) An affirmative act, done intentionally or unintentionally, which is substantial evidence of an assertion of ownership in the goods, is an acceptance. This is well illustrated in the next case. (2) A negative act—i. e., a failure to reject when continued an unreasonable time—is construed as an acceptance. This rule is another manifestation of a very broad doctrine of the law, that a person who fails to exercise a legal right promptly will, in one way or another, be penalized by his failure to act. Generally the right is taken from him. Statutes of limitation furnish an important and very common illustration of this broad doctrine.

WHITE v. SCHWEITZER et al.

(Court of Appeals of New York, 1917. 221 N. Y. 461, 117 N. E. 941.)

Action by William E. White against Nathan Schweitzer and others. From a judgment for defendants, plaintiff appeals.

McLAUGHLIN, J. The action was brought to recover the purchase price of a carload of turkeys shipped by plaintiff's assignor, the Keystone Commercial Company, from Maysville, Ky., to the defendants in New York City. They were shipped on November 17, and arrived November 23, 1908. There was a dispute between the parties as to the terms of sale; that is, whether the turkeys were to be "dry-picked" or "scalded." Those shipped were scalded, and the verdict has settled the disputed question in favor of the defendants. When the car arrived in which the shipment was made, the turkeys were examined by defendants, and it was then discovered they were scalded, instead of dry-picked, and also that they were in bad condition. About half past 7 o'clock in the morning of that day the defendants wired plaintiff's assignor at Maysville: "Your car arrived scalded, instead of dry-picked. Stock sticky and cannot use it. Wire instructions."

About two hours later on the same day, not having received an answer to the first telegram, they sent another, saying: "Having railroad inspector examine car. Will put in claim for you. Have turned car over to house that can sell such stuff."

Both telegrams were delivered to plaintiff's assignor at the same time, and neither of them was answered. At the time the second telegram was sent defendants delivered the turkeys to commission merchants for sale, and the same were on that day sold for $729.69, which sum was subsequently tendered to the plaintiff's assignor, and by it refused. At the time the turkeys were delivered to the commission merchants, one of the defendants wrote plaintiff's assignor, confirming the telegrams, and saying, among other things: "I do not know just how I will make out with the sale of these goods, but in the event of any deficiency I will expect you to make good."

The principal question presented upon the appeal is whether the trial court erred in charging the jury, to which an exception was taken, that there was no evidence upon which it could find that the defendants accepted the turkeys. I am of the opinion the exception was well taken. * * * It is not at all times easy to determine whether a purchaser's retention, sale, or disposition of property constitutes an acceptance, but as a general rule it must be determined as a question of fact. * * * It may be, and usually is, indicated by exercising acts of ownership; e. g., where one resells the goods, as such action would be improper except on the assumption that the buyer had acquired title. That necessarily indicates an assent on the part of the buyer to become the owner. * * * If the article purchased is not in accordance with the contract, then the purchaser must, upon discovering that fact, do nothing inconsistent with the vendor's ownership. * * * So it has been held that an acceptance is made out by action of the vendee in insuring the goods or offering to mortgage them (Georgia v. Augusta, 74 Ga. 497), or by loaning them (Hensen v. Beebe, 111 Iowa, 534, 82 N. W. 942), or by directing an agent to sell them (Brown v. Nelson, 66 Vt. 660, 30 Atl. 94), or, while disclaiming a purchase, permitting a third person to select and retain a portion of the goods upon his promise to account to the seller for them (Bartholomae v. Paull, 18 W. Va. 771). Mere complaint by the vendee that the goods do not come up to the contract does not amount to a rejection. Something more is required. If the goods received do not conform to the contract as to quality or kind, the purchaser must, as a general rule, within a reasonable time after such facts have been ascertained, return or offer to return them. Mason v. Smith, 130 N. Y. 474, 29 N. E. 749. In case the goods are in such condition that they must be speedily disposed of, or else there will be a total loss, then there is an exception to the general rule which permits the purchaser to dispose of them. This right is implied from the necessity of the case and to make the loss as small as possible. But the exception only applies where the seller cannot be communicated with and instructions from him quickly obtained.

Applying the rule laid down in the authorities cited to the evidence adduced at the trial, it at once becomes apparent that the question of acceptance was at least one of fact. It might well be doubted whether the uncontradicted facts did not show as matter of law an acceptance. * * * That question, however, is not presented on the appeal, and we do not pass upon it. The defendants ascertained, about 7 o'clock on the morning of the 23d, when the goods were received, that the quality did not correspond to what they had purchased. They communicated that fact by a telegram to the seller, but did not state that they refused to receive or offer to return them; on the contrary, without waiting until an answer to the telegram could be received from the seller (at most three or four hours), they proceeded to treat the goods as their own by delivering them to commission merchants for sale, and so informed the seller. Respondents suggest that the seller did not answer either telegram. There was no necessity for its doing so. Both telegrams were received at the same time, and the second was to the effect that the goods had then been disposed of.

For the reasons stated, it follows that the court also erred in instructing the jury they must find a verdict for the defendants if the

contract were for dry-picked turkeys. Such instruction also withdrew from the jury the question of an acceptance.

It follows that the judgment appealed from should be reversed, and a new trial ordered.

SECTION 4.—BUYER UNDER NO DUTY TO RETURN GOODS NOT ACCEPTED BECAUSE OF NON-COMPLIANCE WITH THE CONTRACT

Sales Act, Section 50. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

This section, in connection with other principles of law produces these effects: (1) The failure of the buyer to return the goods which do not comply with the contract, after notice to the buyer of his rejection, cannot be construed as an acceptance; (2) nor does such failure constitute a breach of contract. (3) The buyer does owe the same duty which any gratuitous bailee owes to the bailor; that is, the buyer must use a certain degree of care over the goods. (4) In some cases the buyer could recover from the seller the damages to which he was put in caring for the property. (5) In some cases, the buyer would have the legal right to sell the goods for the seller's account, the proceeds being thereafter held in trust for the seller. This situation would arise where the goods were of perishable nature, or in any other case where from a business standpoint a sale would be for the best interests of the seller.

Some phases of the application of the general principle here involved are presented in the following case.

RHEINSTROM et al. v. STEINER et al.

(Supreme Court of Ohio, 1904. 69 Ohio St. 452, 69 N. E. 745, 100 Am. St. Rep. 699.)

Action by Wm. Steiner Sons & Co. against Rheinstrom Bros. Judgment for plaintiffs, and defendants bring error.

The defendants in error brought action against plaintiffs in error, in the court of a justice of the peace of Hamilton county, to recover $247.50, the agreed price of certain labels claimed to have been sold and delivered to Abraham and Isaac Rheinstrom at their request.

SPEAR, J. * * * Did the trial court apply the wrong rule of law to the evidence respecting the acceptance and retention of the goods? Without question, the burden was upon the defendants in error to establish acceptance. To determine this with fairness to them, it is proper to recite the evidence adduced by them to support that contention—not that the evidence is to be weighed, but, taken all together, does the evidence tend to show such acceptance, or does it show the contrary?

On the day the goods were received by defendants below, they acknowledged receipt, under date of January 31, 1900, by the following letter, viz.: "Dear Sirs: We received to-day the shipment of Jed Clayton labels, but regret to find that the work is not properly carried out. Please return to us the original sketch and we will point out to you in detail the defects. Yours truly, Rheinstrom Bros."

To this the plaintiff below responded as follows: "Gentlemen. We beg to acknowledge receipt of your favor of the 31st ult. in regards to 'Jed Clayton' labels, that same have reached you, but that the work is not properly carried out. We are again very sorry to hear your complaint, and herein enclose the sketch which was submitted to you, with one of the labels, and no doubt our Mr. Steiner will be in your city by the time these few lines reach you, and you can explain matters to him personally. We remain yours very truly, Wm. Steiner Sons & Co."

Some time after the above date, Mr. Isadore Steiner, one of the plaintiffs below, called at the office of Rheinstrom Bros.; and his account of the conversation then had is, in substance, that "Mr. Rheinstrom then told me that he received our labels, but will not use them. I asked him why, and he said they were too far away in color from his original label. * * * I pleaded with him, saying, 'The labels are no earthly good to me.' He said he couldn't help that. 'The best thing you can do is to put them in the fire and burn them up while you wait here.' I said: 'You cannot burn them. They are my property until they are paid for.' Then I tried to get him to accept them. He said he would not accept them labels for any price—not for ten cents a thousand. I put on my hat and coat and walked out." There is no other evidence by plaintiffs below bearing on the question of acceptance than the foregoing, and no evidence at all of use by defendants below of any of the labels. Mr. Abraham Rheinstrom testified, in substance, that the labels were defective in drawing, color, and workmanship. "We could not use them at any price. We never accepted these labels, but wrote immediately rejecting them. * * *"

The burden was upon plaintiffs below to prove a compliance with their contract. * * * Their own evidence shows conclusively that the buyers did not accept, unless a failure to manually return the rejected goods is, in law an acceptance. Is it? From the standpoint of ordinary fairness, how is it? The buyers had ordered labels of a specified kind. The sellers had delivered labels of a different kind, not conforming to the agreement, of which facts the sellers were at once, by letter, fully apprised, to which they responded that, by the time their letter should reach the buyers, one of their firm would call, and matters could be explained. He did call, and was distinctly notified that the labels were wholly useless to the buyers, and as distinctly informed that they were rejected. On what principle of commercial dealing could they ask the buyers to take further trouble in the matter, at the peril of being compelled to pay for a wholly useless article, and one which they had not purchased? We can conceive of no rule of business comity which would justify such a claim. If maintainable at all, it must be by force of some rigid rule of law. * * *

Without doubt, the rule is well settled that the buyer's retention of the goods beyond a reasonable time for examination and communication with the seller, standing alone, will be regarded as warranting the conclusion that he has accepted, and thus become liable, especially if the delay has worked prejudice to the seller. But we find no case,

either among those cited or elsewhere, analogous to the case at bar on its facts, and none in which the mere failure to make manual return of the goods after a timely and explicit rejection of them, and where it appears that no prejudice to the seller has been caused by the delay, is held to make the buyer liable under the contract. On the contrary, there is abundant authority for the proposition that, unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he informs the seller that he refuses to accept them. * * *

True, it does not appear that it was stated to him in words that the goods were held subject to his order, but any intelligent business man could not fail to draw the conclusion that such was the fact, and his own declarations show that he regarded the labels as still the property of his firm. And such, indeed, was the law of the situation; the rule being that where there is a contract for sale of specific goods, and the seller is bound to do something to put them in a deliverable state, the property does not pass until that is done, and the buyer has notice. * * * To have shipped the goods to the Steiners, without direct orders to do so, would have made the Rheinstrom Bros. liable, in the first instance, for drayage and freight; and this burden the Steiners had no right, either in morals or in law, to place upon them. * * *

We are of opinion that the court of common pleas applied the correct rule of law to the evidence on the question of acceptance and retention of the goods and that the reversal of its judgment by the circuit court was erroneous. Its judgment will therefore be reversed, and that of the common pleas affirmed.

SECTION 5.—REMEDIES OF THE BUYER FOR BREACH OF WARRANTY

Assuming that there has been a breach either of an express or of an implied warranty, what are the remedies of the buyer? May he refuse to take, or must he take them and content himself with a deduction from the purchase price which measures the extent of his loss? The law confers upon the buyer, two remedies: A right to refuse the goods and thus to destroy his obligation to pay the price, and also the right, if the buyer chooses to accept the goods, to take the goods at a reduced price. From the legal standpoint it is necessary to regard each of these two remedies as further divided into subordinate groups. It is commonly said that the buyer has four remedies for breach of warranty. The four remedies are provided for in the Sales Act, Section 69:

(1) Where there is a breach of warranty by the seller, the buyer may, at his election (c) refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for breach of warranty; (d) rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been

paid; (a) accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price; (b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.

These four subsections show: (1) That the buyer may refuse to take the goods, or, if he has already taken them, he may undo what he has done and in neither case will he be liable to pay for the goods. But it is only in the first case, where he has refused in the first instance to take the goods, that the buyer will have the right to sue the seller for the damages caused by the seller's breach of contract. If he has already taken the goods and then rescinds, the buyer may recover no damages from the seller. Of course, if the buyer has paid the price, or part of it, he may sue the seller and get that money back. (2) The two remaining subsections show that the buyer may, if he cares to, keep the goods, and then, if he cannot agree with the seller as to the amount which should be deducted from the price, he may wait until the seller sues him and in this suit set up in a cross-action a claim for the damages sustained by the breach. The judgment against the buyer will then be the amount of the purchase price less the amount of the damages.

Having now sketched the remedies of the buyer in outline form, we may now devote some attention to some of the details connected with these four remedies, and we shall take them up in the following order: (1) The right of the buyer to refuse to take the goods and to sue the seller for damages; (2) the right of the buyer to rescind the contract; (3) the right of the buyer to accept the goods and to set up breach of warranty by way of recoupment; (4) the right of buyer to accept the goods and to sue the seller for damages for breach of warranty.

(a) BUYER MAY REFUSE TO ACCEPT THE GOODS

It is to be noticed that subsection (c) authorizes the buyer to refuse to accept the goods if the title has not passed. If the title has passed to the buyer, subsection (c) does not govern. It is true that title to goods, which, because of a breach of warranty, do not comply with the contract, will not pass to the buyer merely by reason of an act of unconditional appropriation, or because the sale was of ascertained goods in a deliverable state, because, as has already been seen, these presumptions do not govern where there is a breach of warranty. We have seen that a buyer has the right of examination, and that until the opportunity to examine has been given him, he will not be deemed to have accepted the goods. Acceptance of the goods is an acceptance of title. The reason for recalling this matter here is for the purpose of making it clear that the buyer's right to refuse the goods exists when and only when he has not accepted.

We have previously discussed what constitutes an acceptance as defined in section 48 of the Sales Act, and it there appeared that a

buyer is deemed to have accepted the goods (1) when he intimates to the seller that he has accepted them; or (2) when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller; or (3) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. If the buyer has done any of these things which amount to an acceptance, he no longer has the right to treat the breach as an excuse for non-performance. If a buyer desires to avoid payment of the price and also to recover damages for the breach he must act promptly and should manifest unequivocally that he refuses to accept.

It should also be noted here, merely for the purpose of showing that the rule laid down in subsection (c) is but another manifestation of another rule of much wider scope which was discussed in Contracts. That rule is that, where a party to a contract has broken a material promise made by him, such breach gives to the other party two rights: (1) The right to refuse to go on with his part of the contract; and (2) the right to sue the party in default for breach. A breach of warranty is therefore a material breach of contract.

As to the measure of damages which would apply in a suit brought against the seller, those rules will be discussed in connection with subsections (b) and (a). The same measure of damages is applicable, whether the buyer is proceeding under subsections (a), (b), or (c).

(b) BUYER'S RIGHT OF RESCISSION

Several subsections of Section 69 deal with various aspects of the buyer's right of rescission. They are as follows: Subsection

(d) Where there is a breach of warranty by the seller, the buyer may, at his election rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much

thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

It appears from subsection (d) that there are two kinds of contractual obligations which may be rescinded by the buyer for breach of warranty: (1) Contracts to sell; and (2) contracts of sale. As regards the first class, in many instances there can be no breach of warranty so long as the contract is a mere contract to sell, because the goods have not as yet been ascertained. Even after they become ascertained, and there is an attempt to appropriate them to the contract, title will not pass until after inspection and acceptance by the buyer. Up to this point it is not necessary for the buyer to rescind the contract, for he has a better remedy by proceeding under subsection (c), where he is allowed to refuse to accept the goods and sue for damages. The same is true with respect to executory contracts to sell ascertained goods; there is no necessity for rescinding, for the title, which, if there were no breach by the seller, would pass just as soon as the goods were in a deliverable condition, will not pass, if the goods are not in conformity with the contract, until after an opportunity to examine, followed by acceptance. Still it is worth while to note that the buyer, if he is willing to give up his right to sue the seller for breach of warranty, may rescind. If he does rescind, the buyer gives up this right which he has under subsection (c).

In the second case we are dealing with the right of rescission of contracts of sale. Title is now in the buyer. He has lost his right to proceed under subsection (c), permitting him to refuse to accept. He has, by hypothesis, already accepted, and the title to the goods is in the buyer. Under section 48 a buyer accepts if he (1) intimates to the seller that he has accepted them; or (2) if he does any act in relation to the goods which is inconsistent with the ownership of the seller; or (3) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. It is very easy, therefore, for a buyer to have accepted when it would have been much better for him not to have accepted, for by not accepting he could have avoided liability for the price and also have sued the seller for damages. Still the law gives the buyer who has accepted some consideration, by allowing him to undo his act of accepting the goods, and allows him to get his money back, if he has paid any part of it, but that is all.

But notice the series of very important qualifications. It is not in every case that a buyer who has accepted is given even this much consideration. In many cases the buyer who has accepted will have no right even to rescind. He must keep the goods, or at least he cannot get his money back. What are these situations? Obviously all of them should arise out of those kinds of acceptances made under circumstances which make it reasonable to suppose that the goods were accepted by the buyer **with an intention to keep and use them.** This does not mean that the buyer has accepted the goods in **full satisfaction** of the contract. He may accept with an intention to keep and use, or resell the goods without accepting in full satisfaction. He may lose his right of rescission, and still hold the seller for damages; but this is another question next to be taken up. The point involved here is that the buyer will lose the right to rescind an executed sale in three cases, all of which carry evidence of the buyer's intention to keep the goods permanently. As provided in subsection (3) these cases where there is no right of rescission are: (1) Where the buyer, at the time he accepted the goods, **knew of the breach of warranty;** (2) where the buyer did not know of the breach of the warranty at the time he accepted the goods, but later discovered the defect in the goods—the breach of warranty—and then made up his mind to rescind, **but failed to notify the seller within a reasonable time of his election to rescind;** and (3) where, even after the buyer has, within a reasonable time, notified the seller of his election to rescind, **has failed to return the goods or to offer** to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer.

Extended comment on these three exceptions to the rule allowing rescission for breach of warranty is not necessary, except to call attention in (1) to the fact that when the law speaks of accepting goods with knowledge of a breach of warranty, the law does not mean **actual knowledge** but it means that the facts constituting the breach of warranty must have been so apparent that a reasonably careful man would have known of the breach. This shows that the right of rescission is of practical importance only in the case where the breach of warranty consisted in a latent defect not discovered until after acceptance.

The second exception calls attention to a general doctrine of the law that some rights can be lost by delay in enforcing them. The seller is entitled to prompt notice, after the buyer has discovered the latent defect. If he does not receive the notice, the buyer should sustain the loss. With respect to the third exception, the buyer is under a duty of (a) retaining the goods; or (b) offering to return the goods. In this connection it will be recalled that section 50 provides that, "unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept

them." These two sections are not in conflict, for section 50 applies only when the goods **have not been accepted.** Section 69 (3) applies only when the goods **have been accepted.** It is altogether just to say that, where the buyer has not accepted because of breach of warranty, he should be under no duty to return or offer to return the goods. He is but a gratuitous bailee. His only duty in addition to the observance of that degree of care which a gratuitous bailee owes the bailor is to give notice that he refuses to accept. It is entirely a matter for the seller to make all arrangements for their return, and if the seller requested the buyer to return them, and the buyer did so, the buyer would be entitled to compensation. But where the buyer has accepted the goods, and later discovered the defect in them, there is more reason in placing a duty on the buyer to return. It is not necessary that the buyer box them up and send them immediately. The buyer performs his duty in the first instance by communicating with the seller and **offering** to return the goods. The seller may not care to have them returned. He may prefer to employ the buyer to sell them for him to other persons. But the buyer has made an **offer** to return. If the seller accepts this offer, there is a contract, and then there is a duty on the buyer to return, so that it is correct to say that where a buyer has **rescinded** a sale he must return if the seller wishes the goods returned.

Notice one further detail in connection with the duty to return: Subsection (3) provides that the buyer must offer to return the goods in substantially as good condition as they were in at the time the property was transferred to the buyer. Suppose that a carload of meat were bought under an express warranty that the car should be kept iced during transit. The seller failed to give icing instructions to the railroad company. The meat may have been in good condition at the time of acceptance by the buyer, but the meat rapidly deteriorates, owing to heated conditions. It is now impossible for the buyer to offer to return the meat in as good condition as it was in when he accepted it. The last sentence in subsection (3) makes provision for this kind of situation by stating that, "if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods and rescinding the sale." Of course, if the buyer has damaged the goods himself, then he has made it impossible for him to rescind.

In the above paragraphs dealing with the duty of the buyer to return, it has been assumed that the seller was willing to have the goods returned to him. It very often happens that, after the buyer has notified the seller that he will return, the seller will refuse to accept them. The situation usually is that at this time the seller is quite convinced that there has been no breach of warranty, and the buyer is equally convinced that there is a breach of warranty. The seller does not want them returned, for fear that he will lose rights against the buyer. In other words, the seller wants to

force the sale through. What is the position of the buyer in such a case? Subsection 5 covers this situation and expressly provides that the buyer is a bailee for the seller. The goods must not be handled negligently. The section also gives a lien to the buyer, entitling him to hold the goods to secure repayment of the price if it has been paid, and, as an incident of the lien, the buyer will have the remedy of resale just as an unpaid seller has.

We have reserved for the last the comment on the more detailed legal effect of the right of rescission, although in all the preceding discussion the nature of the right appears, and also we have reserved the statement concerning the state of the law on the matter of rescission before the adoption of the Sales Act. By a rescission of a contract is meant the doing of an act the legal effect of which is the restoration of the condition of affairs as they existed before the sale was made. Rescission may be a voluntary act of the parties, or it may arise as a result of the act of one of the parties alone, the justification therefor being proved on the part of the adverse party, or some kinds of mistake, or for material breach. Here we are interested in rescission by the buyer because of the seller's breach of warranty. Any lawsuit between buyer and seller will not be for breach of the contract, because after rescission there is no contract, but the suit will be brought for the recovery of what has been parted with. This explains why subsections 1 (d) and (4) refer only to the recovery of the price, and do not refer to an independent claim for damages. The buyer, who has accepted the goods and who later discovers that they are not in conformity with the contract, has but one right; i. e., to recover the money he has paid upon his return of the goods. It is to be noticed here, in comparison with the unpaid seller's corresponding right of rescission, that the buyer's right of rescission differs from the seller's right of rescission. The unpaid seller may rescind either (1) the transfer of title, or (2) the entire contract, while the buyer is allowed only the right to rescind the entire contract. It makes this difference: That an unpaid seller, who rescinds transfer of title, may still sue the buyer on the contract for the breach, while the buyer, who rescinds, rescinds the entire contract, and hence cannot sue the seller for damages.

Before the Sales Act there was a conflict of authority as to the right of the buyer to rescind. About half of the states in this country allowed rescission, just as is allowed under the Sales Act, while the other half, and also the English courts, held that the buyer, who had accepted, could not rescind. The following case illustrates the exercise of the right of rescission.

KELSEY v. J. W. RINGROSE NET CO.

(Supreme Court of Wisconsin, 1913. 152 Wis. 499, 140 N. W. 66.)

Action by George W. Kelsey, Junior, against the J. W. Ringrose Net Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff purchased from the defendant a power-driven tipping machine, which was calculated to automatically place metal tips on the ends of the strands of horse fly nets, which plaintiff was engaged in manufacturing. The purchase price of the machine was paid in advance, and the plaintiff endeavored for a considerable length of time to operate it, and finding that it would not work satisfactorily, tendered the machine to the defendant, and gave notice that he elected to rescind the contract to purchase. This action was brought to recover the purchase price. The court directed a verdict in favor of the defendant, and from the judgment entered in accordance with such ruling the plaintiff appeals.

BARNES, J. * * * The machine involved was built for a special purpose. There were only about a half a dozen such machines in use when the plaintiff made his purchase. It was not sold under any express warranty. It is settled in this state that under such circumstances the law implies a warranty that the machine will do the work which it was intended to do. * * *

Where such an article is sold without express warranty, the purchaser has a reasonable time within which to test it, for the purpose of determining whether or not it complies with the warranty which the law implies. If it does not, he has an election of remedies. He may affirm the contract and recover the legitimate damage occasioned by the breach of the warranty, or he may rescind the contract and tender back the article and recover the purchase price, if it has been paid. If it has not, he may successfully defend an action to recover it.

The cases last cited further hold that what is a reasonable time within which to make a test is usually a question of fact for a jury to decide, but that the time may be so long that a court can and should say, as a matter of law, that it was not made within a reasonable time.

As a corollary to what has already been said, it is held that, where the defects are such that the purchaser, in the exercise of ordinary care, should have discovered them, it is his duty to do so; and that failure to observe such duty and to rescind with reasonable promptness will defeat the right of rescission. * * *

Any use of an article purchased under an implied warranty, after it has been ascertained that it does not fulfill such warranty, and which is not made for the purpose of testing, is an acceptance of the article and a waiver of the right to rescind. * * *

After it is ascertained that the article does not comply with the warranty, timely notice must be given that it will not be accepted as a compliance with the contract, or the right to rescind is waived. * * *

In a case involving a sale of vanilla, it was held that only so much of it should be used for testing purposes as was fairly and reasonably necessary; and that where an excessive quantity was used the right of rescission was lost. Zipp Mfg. Co. v. Pastorino, 120 Wis. 176, 97 N. W. 904.

The concrete question before us is: Did the court err in not allowing the jury to say whether the offer to rescind was made within a reasonable time, in view of the principles of law above referred to?

The plaintiff used the machine all, or nearly all, of the month of December. During that time he could not get it to work properly. Indeed, he says he did not succeed in putting tips on a single fly net with it that he would place on the market. He then returned it to the maker, who was also a manufacturer of fly nets. It showed evidences of hard, though, no doubt, well meant, usage. It also showed evidences that it had been experimented with, even to the extent of putting a set screw in an oil hole in the loose pulley. Defendant overhauled and adjusted it, and set it up in its factory and ran it for some time and returned it, according to the evidence, in first-class condition. It was set up in plaintiff's factory as early as February 6th, and was thereafter tested until March 25th, according to plaintiff's evidence. At no time did it do any satisfactory work, or tip a single fly net that plaintiff felt he could place upon the market for sale. The attempted rescission was made on March 25th.

In behalf of the appellant, it is urged that the plaintiff was attempting, in good faith, to try out the machine and get it to work properly; that it was somewhat complicated; and that it was for the jury to say whether he retained it an unreasonable length of time for the purpose of testing.

On the other hand, the plaintiff had used the machine during the month of December, and failed to get it to work. After it was overhauled and put in what the manufacturer claimed was perfect running condition, he continued to experiment for about six weeks without results. The trial judge, in deciding the case, said that it was obvious that a week's trial after the machine was returned would have been ample; and that an offer to return after six weeks of alleged trial came too late.

The case is a reasonably close one. Had the trial judge submitted the case to the jury, we might not be disposed to hold that it was error to do so; but we are far from being convinced that the circuit judge was clearly wrong in arriving at the conclusion which he did. A period of 2½ months experimentation would seem to be an unreasonable length of time, considering the character of the machine and the further fact that at no time did the quality of the work turned out show any material improvement.

Judgment affirmed.

(c) BUYER MAY ACCEPT AND SET UP BREACH OF WARRANTY BY WAY OF RECOUPMENT.

The two preceding remedies of the buyer were alike in that, in the end, the buyer did not keep the goods. In the first of these, where he had not accepted, he was entitled to damages; in the second, he was not entitled to damages. We pass, now, to the two cases where the buyer elects to keep the goods in spite of the breach of warranty, and seeks to obtain a deduction from the purchase price. The first of these rights is known as recoupment. This merely means that, when the seller sues the buyer, the buyer can recover an amount equal to the reasonable value of the goods

as they were when delivered to the buyer. The right is not identical with that of set-off, where the buyer prosecutes a cross-action; but the buyer's right of recoupment is a right to discharge his debt to the seller by the payment of the reasonable value of the goods. If it be viewed as the prosecution by the buyer of a cross-action for breach of warranty, there would be little difference in the amount of money which the buyer would be required to pay, in most cases; but in some cases, doubtless, there would be a difference

(d) BUYER MAY ACCEPT AND MAINTAIN AN ACTION FOR BREACH OF WARRANTY

If the buyer has already paid the price, his only method of obtaining reimbursement for breach of warranty will be by an independent action against the seller. If he has not paid, then he may wait until sued—that is, if he cannot compromise with the seller, a procedure which from a financial standpoint is a great deal better—and in this suit by the seller against him he may put in his claim for damages arising from the breach. Subsection (b) gives the buyer this right. In this connection we should again refer to section 49 of the Sales Act, which asserts in greater detail the same right as that provided for in subsection (b) of section 69. Section 49 provided that:

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Looking at these sections from the business point of view, the things that stand out distinctly are: (1) The right of the buyer to keep the goods and still reserve his right to recover damages from the seller; but (2) in order to preserve this right to recover damages the buyer must give notice to the seller of the breach of warranty. The buyer must do this just as soon as he learns of the breach. Not only that, but the buyer must take some care to find out whether there is a breach of warranty, for the section states the buyer will lose his right to sue for damages if he waits to notify the buyer beyond a reasonable time.

Before the Sales Act, just as in the case of rescission, where it was found that some courts held that the buyer had no right of rescission, others that there was such a right, so here some courts held that, if a buyer accepted the goods, he must be deemed to have accepted them in full satisfaction of the obligation of the seller. The states which adopted this rule commonly expressed it by saying that an action for breach of warranty did not survive acceptance, but these courts worked out several exceptions to this general rule. Other states held that the mere fact that the buyer

accepted the goods was not in itself to be deemed a waiver of his right to sue the seller for damages. This rule was adopted by the Sales Act.

One further point should be here adverted to with respect to the measure of damages to be applied when the buyer sues the seller for breach of warranty:

Sales Act, Section 69. (6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

Section 69. (7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

The next case illustrates how the right of the buyer may easily be lost by the failure to give notice. The case following it, that of Paul Gerli & Co. v. Mistletoe Silk Mills, contains a discussion of the various remedies of the buyer for breach of warranty.

REGINA CO. v. GATELY FURNITURE CO.

(Supreme Court of New York, Appellate Division, 1916. 171 App. Div. 817, 157 N. Y. Supp. 746.)

Action by the Regina Company against the Gately Furniture Company. From a judgment sustaining plaintiff's demurrer to the alleged defense and counterclaim, defendant appeals.

WOODWARD, J. The complaint alleges the incorporation of the plaintiff and defendant, and then sets forth that the defendant ordered from the plaintiff, on several dates, vacuum cleaners of different types, and that the said cleaners were shipped to the defendant, and were of certain agreed values; that these cleaners were received by the defendant, and that the latter agreed to pay for the same, but that no such payments had been made; and that the defendant was indebted for the aggregate of these shipments, amounting to $162.75. The answer admits the formal averments. * * * The defendant then attempts to set up a counterclaim for breach of warranty. * * *

To this alleged counterclaim the plaintiff demurred, * * * and the learned court * * * sustained the demurrer. There is no allegation of any express warranty; but, as the plaintiff was a dealer in the kind of goods being sold, there was, of course, an implied warranty that the goods should be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. * * * At common law an express warranty survives acceptance, but an implied warranty does not. Ferguson v. Netter, 204 N. Y. 505, 510, 98 N. E. 16. Section 130 of the Personal Property Law has, however, extended the rights of purchasers, and it is there provided that: In "the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale."

This places the warranty, whether expressed or implied, upon the

same foundation, but as a condition of this change it is provided, in the same section, that: "If, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

Obviously the buyer takes this additional right to the survival of a warranty, expressed or implied, upon the condition that he shall give notice of a breach of the warranty within a reasonable time. Such notice is therefore a condition precedent, and this he is obliged to plead. There is nothing said in the alleged counterclaim of any notice having been given to the seller of any alleged breach of warranty, and in the absence of such an allegation there is a failure to state the facts necessary to constitute a counterclaim. * * *

The interlocutory judgment appealed from should be affirmed. * * *

PAUL GERLI & CO. v. MISTLETOE SILK MILLS.

(Supreme Court of New Jersey, 1910. 80 N. J. Law, 128, 76 Atl. 335.)

Action by Paul Gerli & Co. against the Mistletoe Silk Mills. Verdict for defendant.

TRENCHARD, J. This is an action for the purchase price of a bale of raw silk delivered by the plaintiff to the defendant. The defense is that it was sold as "best classical Italian silk for single weaving," and did not answer that description. The defendant counterclaimed for profits lost and for expenses incurred in the attempt to weave the silk and recovered a verdict. Thereupon the plaintiff was allowed this rule to show cause why the verdict should not be set aside. At the trial at the Hudson circuit no loss of profits was proved, but there was evidence that the defendant had incurred expenses to the amount of $224.81. The purchase price of the silk was $872.22 and it was undisputed that it was worth $721.30 as waste. The defendant claimed that it had rescinded the contract and offered to return the goods and held them subject to the plaintiff's order. The verdict was for $224.81, the exact amount of the expenses incurred by the defendant in attempting to weave the silk. It is clear, therefore, that the jury took the view that the contract had been rescinded.

The charge of the learned trial judge did not permit the jury to allow for damages for breach of the contract in case they found it had been rescinded. Such a charge would have been erroneous in law. Under the sales act (§ 69[1]d), in case of a rescission of a contract to sell or a sale, the buyer is entitled to recover the price or any part thereof which has been paid; and this remedy is made exclusive by paragraph (2) of the same section. It is a logical consequence that, where the purchase price has not been paid, the buyer's only remedy in case of rescission is to withhold the price. Such is the view of the learned author of our sales act (Williston on Sales, § 612), and the rule recently expressed in one of our sister states. Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925. * * * The verdict, therefore, cannot be sustained and the rule must be made absolute. Since the case must be tried again, it may serve a useful purpose to call attention to the questions which seem likely to arise.

The first question for the jury will of course be whether the con-

tract was for "best classical Italian silk for single weaving." If it was not, there seems to be no defense. If it was, the question is, Did the silk delivered comply with the contract? If it did, the plaintiff is entitled to recover. If it did not, the question arises whether the defendant accepted it. The defendant had a right to inspect and examine (Sales Act, § 47), and, if necessary, to test the goods even though the test involved destruction of a part. Williston on Sales, § 475. If, however, the defendant intimated to the plaintiff that it had accepted the goods, or if the defendant did any act inconsistent with the ownership of the plaintiff, or if, after the lapse of a reasonable time, it retained the goods without intimating to the plaintiff a rejection, then the defendant must be deemed to have accepted the goods and the right of rescission is gone. Sales Act, § 48. If the defendant had the right to rescind and had not lost it when it finally notified the plaintiff that it had rejected the goods, and has actually rescinded, the verdict should be for the defendant, but not a verdict for damages.

If, however, the goods were not in accordance with the contract, and the defendant had accepted them, there would still be open the remedies allowed for breach of contract. The defendant, if such are found to be the facts of the case, had the option to recoup in diminution or extinction of the purchase price or to maintain a distinct action against the plaintiff for all its damages including loss of profits and expenses to which it had been put. Sales Act, § 69 (1) (a) and (b). The remedy under subdivision (a) is recoupment in the strict sense of that word, and involved merely an abatement of the purchase price which can amount to the whole purchase price only where the goods are worthless. The remedy under subdivision (b) is that which formerly was the subject of a cross-action, but it is now available by way of counterclaim under section 105 of the practice act. * * * This remedy is inconsistent with the claim of a rescission of the contract, and at the trial it will be necessary for the defendant to elect whether to stand upon the theory of a rescission and abandon its claim to damages or to abandon the claim of rescission and rely upon the contract as subsisting and insist on damages for the breach. If it adopts the latter course, the plaintiff will be entitled to recover the value of the silk, which will be the full purchase price, unless the defendant establishes that it was of inferior quality, in which event it will be the actual value as proved (Sales Act, § 48; Williston on Sales, § 488), from which may be deducted such loss as the defendant may prove it has sustained directly and naturally resulting in the ordinary course of events from the breach of warranty.

SECTION 6.—BUYER'S RIGHT TO RECOVER DAMAGES FOR BREACH OF THE CONTRACT TO SELL

Sales Act, Section 67. (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery. (2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances, showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver.

N. P. SLOAN CORP. v. LINTON et al.

(Supreme Court of Pennsylvania, 1918. 260 Pa. 569, 103 Atl. 1011, 6 A. L. R. 633.)

Assumpsit for breach of contract for the sale of personal property by the N. P. Sloan Corporation against Ross B. Linton and W. Horace Linton, copartners trading as Josiah Linton & Co. Verdict for plaintiff for $2,300, and defendants appeal.

POTTER, J. The N. P. Sloan Corporation brought this action of assumpsit to recover damages from the firm of Josiah Linton & Co. for the breach of a contract for the sale of cotton linters. Plaintiff's claim was based upon a letter dated October 25, 1916, from defendants to plaintiff, in which they stated that: "We have sold to you as brokers per contracts turned over to us, cotton linters as follows: Quantity, 475 bales. Quality, clean mill run. Price, 6.18 f. o. b. cars mills." It was further stated that the linters sold consisted of 250 bales at Columbia, S. C., and 225 bales at Cheraw, S. C. The letter contained the following clause: "You have the privilege of examining stock at point of shipment, but shipping instructions to be given to us immediately."

The record shows that shipping instructions were promptly given to defendants, and plaintiff sent its agent to Columbia and Cheraw, S. C., to examine the goods sold, but none could be found at either place, and therefore he could make no inspection. On November 1, 1916, defendants notified plaintiff that they could not deliver the goods sold, and stated that they had sold them as brokers on account of the Corey-Bickmore Corporation of New York, and that their interest in the matter had ceased. In plaintiff's statement damages were claimed on the basis of the difference between the contract price and the market value of cotton linters on November 1st, the date of the breach, at New York, less the cost of transportation from Columbia and Cheraw, S. C., to that city. At the trial, defendants contended: * * * That the measure of damages set up in the statement was not the true measure under the law. There was a verdict for plaintiff, and from the judgment entered thereon defendants have appealed. * * *

Upon the trial, both parties agreed that the damages in such a case are to be measured by the difference between the contract price and the market value at the date of the breach. But they differed as to the method of ascertaining that value. Plaintiff proved the market value at the place of delivery by showing the market value in New York City and deducting therefrom the cost of transportation from the places of shipment. Counsel for appellants contend that this method was erroneous.

The general rule is stated in 35 Cyc. L. & Pr. 633, as follows: "Where the breach consists in the failure of the seller to deliver the

goods, the measure of damages is ordinarily the difference between the contract price and the market price of the goods at the time and place of delivery, provided there is a market price for goods of the character and quality contracted for by the buyer at such time and place, and interest thereon from the time of the breach." And on page 638, it is said: "The market price must be determined as of the place of delivery, provided the goods have a market price at such place. If there is no market price at the place of delivery, the true value is to be shown by the best evidence possible, and in such cases the market value at other places, plus the expense of transportation to the place of delivery, may be used as a basis for computation; and if the market price in the vicinity of the place of delivery is shown to depend on the market price at a large, well-known and active market, the market price at such place plus transportation charges may be considered. If the place of delivery and place of destination are different, the market price at the destination less the cost of transportation may be resorted to."

Here there was testimony tending to show that the market price of cotton linters throughout the country is based on New York prices, that being the largest and most active market for that class of goods. There was also testimony from which the jury were justified in finding that the market value at Columbia and Cheraw, S. C., was based upon the market price in New York, being determined by the cost of transportation to that point.

Under Sales Act May 19, 1915 (P. L. 543) § 67, referring to the measure of damages where the seller has wrongfully refused to deliver the goods, it is provided: "Third. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

It will be noted that it is an "available market" to which resort is to be had for a price, and no mention of the place of delivery is made in that connection in the act.

We find no merit in any of the assignments of error in which complaint is made of the rulings of the learned trial judge upon the admission of testimony as to the market value of the goods. * * *

The judgment is affirmed.

BIRDSONG & CO., Inc., v. MARTY.

(Supreme Court of Wisconsin, 1916. 163 Wis. 516, 158 N. W. 289.)

Action by Birdsong & Co., Incorporated, against Jacob Marty, doing business as Jacob Marty & Co. Judgment for plaintiff, and defendant appeals.

Action for damages for breach of contract. Plaintiff is a corporation engaged principally in the business of buying and selling cheese and other edible products, with its principal office at Philadelphia. The defendant is a maker and dealer in cheese, doing business as Jacob Marty & Co. at Brodhead, Wis.

The case was tried before the court without a jury. The trial court held that the correspondence constituted an unqualified contract of

purchase and sale, by which the plaintiff purchased of the defendant 25 tubs of No. 1 cheese at 16½ cents a pound, and a sufficient amount of No. 2 at 13 cents to make a minimum carload; that a minimum east-bound car contains 20,000 pounds; that the average weight of a tub of Swiss cheese in August is approximately 775 pounds, and that the contract therefore called for 19,375 pounds of No. 1 and 625 pounds of No. 2; that at Brodhead and in Southern Wisconsin generally the market price on August 17th was 17½ cents to 18 cents for No. 1 and 15½ cents for No 2; that at the time plaintiff received defendant's letter canceling the contract the price had advanced to 20 cents for No. 1 and 16½ cents for No. 2, and plaintiff had judgment accordingly for $700. From such judgment, defendant appeals.

ROSENBERRY, J. * * * The only question remaining is that relating to the measure of damages. The defendant having refused to deliver the goods, and the title thereto not having passed to the plaintiff, the measure of damages in harmony with the decisions of this court is stated by Uniform Sales Act, § 67. * * *

The court found the market price on August 19th, the day the plaintiff received the defendant's letter in which the defendant stated that he would not deliver the goods, to be for No. 1 cheese 20 cents a pound, and for No. 2 16½ cents a pound, and found that the amount designated in the telegram was 25 tubs of No. 1 and just enough No. 2 to make 20,000 pounds. * * *

Defendant's proposition was, "Offer you good sound number two at thirteen to make minimum car," to which plaintiff replied, "Complete minimum car with twos per your wire." The term "minimum car" refers to the smallest amount of the specified article which will take the carload rate, and is shown in this case to be 20,000 pounds on cheese east-bound. Under the terms of this contract we think that plaintiff would not have been required to accept more than the amount stated. Plaintiff therefore was entitled to receive 19,375 pounds of No. 1 and one tub of No. 2 to make out a carload lot, or 775 pounds of No. 2.

While the trial court found the market price, it appears from all the evidence without dispute that there was, in fact, no market for cheese in or about Brodhead, the place of delivery, or in or near Southern Wisconsin, in the latter part of August, 1914. The defendant himself testified: "On account of the war you know we simply had no market price through our section in the Swiss cheese." "The farmers got hold of theirs and they would not sell at any price, and some that had sold it backed out on it." "We could not get any what we had bought." "For ten days or two weeks you could not get it at any price, no matter what you offered."

Another witness testified: "There wasn't practically any market there. It was in such a fluctuating state." And the testimony of all of the other witnesses is substantially to the same effect. There was some evidence as to deliveries made during the latter part of the month, mostly on orders taken earlier, but a careful examination of the evidence shows that there was no market at the time, and hence there could be no market price. Market price is not an imaginary fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question.

The burden was upon the plaintiff to establish the amount of its damages. This it did by showing that there was no available market

in which the cheese could be purchased, and that it was obliged to pay for 6,500 pounds of No. 1 cheese 20 cents a pound, and for 12,875 pounds of No. 1 cheese 23 cents a pound, in order to fill contracts which it had made with its customers. This made a prima facie case for the plaintiff. If the damages could have been minimized by purchase of the cheese in the open market, the burden was then upon the defendant to show that there was such an available market in which the goods could have been purchased. As has been said by this court, the idea that there can be a real substantial market price for a given commodity when there is no such commodity for sale in the market is absurd. Cockburn and Another v. Ashland Lumber Company, 54 Wis. 619, 12 N. W. 49. The defendant in this case made no such showing, and, as has been pointed out, it was, on the contrary, established that no market existed.

The trial court therefore was in error in assessing the damages at the difference between the contract price and the so-called market price. The rule stated in subdivision 3, can only be applied under the conditions therein prescribed. In other cases, where the property in the goods has not passed to the buyer, and the seller refuses to deliver the goods, the rule laid down in subdivision 2 establishes the measure of damages, which is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of the contract.

* * *

The evidence in this case shows that the plaintiff purchased 6,500 pounds of No. 1 cheese at 20 cents, and was obliged to pay for the remainder, 12,875 pounds, 23 cents a pound, and that the lowest price quoted for 775 pounds of No. 2 was 17 cents a pound. It does not clearly appear whether plaintiff purchased the 775 pounds at that price or not, but he might have done so. On this basis the plaintiff was entitled to judgment for the sum of $1,095.37, with interest from August 19, 1914.

The judgment appealed from should be modified as stated in the opinion, and as so modified it is affirmed, with costs to the respondent.

SECTION 7.—RIGHT OF THE BUYER TO SUE THE SELLER FOR CONVERSION OF THE GOODS

Sales Act, Section 66. Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

For the moment we leave the subject of the law of contracts and sales, and note one phase of the law of torts. The nature of a tort, and the scope of the field of tort liability was sketched in the general introduction and in the chapters on Agency. We there saw that the wrongful interference with one's property is a tort. When the wrong done is with respect to tangible personal property, or even sometimes to the written evidence of intangible claims, the injury done is known as a conversion. Conversion is a wrong, not only to the owner of the property, but also to the one who has legal

possession. Here we are concerned only with the nature of the right conferred by the law upon the owner to recover damages from a person who has committed an unauthorized act with respect to the property. We know that there are cases where the buyer is the owner of the property, but where the possession is still in the seller. The opportunity afforded the seller for committing a wrong with respect to the goods is present. He may refuse to surrender them when the law directs him to do so. In this case the buyer, by the above section, is entitled to enlist the aid of the court to recover possession of them. Such an action is often called an action of replevin. The seller may use the goods, damage them, or dispose of them, so that the buyer cannot locate them. In these cases the buyer may choose to recover damages to reimburse him for his wrong. The above section recognizes the existence of this right. Such an action is oftentimes called an action of trover, or of conversion, or of trover for conversion.

SECTION 8.—BUYER'S RIGHT OF SPECIFIC PERFORMANCE

Sales Act, Section 68. Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages, the judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as the court may think just.

SOUTHERN IRON & EQUIPMENT CO. v. VAUGHAN.

(Supreme Court of Alabama, 1918. 201 Ala. 356, 78 South. 212, L. R. A. 1918E, 594.)

Bill in equity by the Southern Iron & Equipment Company against W. H. Vaughan. Decree for defendant, and plaintiff appeals.

THOMAS, J. The suit, which was by appellant as complainant below, was to restrain appellee (respondent) from making disposition to others than complainant of certain railroad material alleged to have been theretofore purchased by complainant from respondent; and it is prayed in the bill that, upon final hearing, a decree be entered directing specific performance of the contract on the part of respondent. The bill does not aver the insolvency of the respondent. The court is sought to be given jurisdiction of such matter by the averment: "That the nature of the contract now existing between it and the respondent is such that by a breach thereof by the respondent your orator will have no complete and adequate remedy at law, and if such a breach thereof is permitted, it will suffer great and irreparable injury thereby. Your orator avers that the kind and character of rails sold by the respondent to your orator cannot be procured by your orator in the open

market, and, despite diligent efforts, your orator has not been able to procure them from any other source; that the market value of said rails cannot be ascertained; that if a breach of said contract is permitted, there will be no way to ascertain readily and completely and adequately the amount or extent to which your orator has been damaged. * * *

The general rules obtaining, for specific performance, are that: "Equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality. Where, however, particular chattels have some special value to the owner, over and above any pecuniary estimate—pretium affectionis—and where they are unique, rare, and incapable of being reproduced by money damages, equity will decree a specific delivery of them to their owner, and the specific performance of contracts concerning them."

For example, paintings, statuary, an ancient horn which has gone along with plaintiff's estate (Pusey v. Pusey, 1 Vern. 273), an old silver patera dug up on plaintiff's estate (Duke of Somerset v. Cookson, 3 P. Wms. 389), a peculiar tobacco box belonging to a club (Fells v. Read, 3 Ves. 70), the dress and regalia of a Lodge of Free Masons (Loyd v. Loaring, 6 Ves. 373), family pictures (Lady Arundel v. Phipps, 10 Ves. 139), title deeds and valuable paintings (Lowther v. Lord Lowther, 13 Ves. 95), a finely carved cherry stone (Pearne v. Lisle, Amb. 75, 77), two very valuable jars (Falcke v. Gray, 4 Drew. 651), and a newspaper business, printing plant, and material used in said business (Williams v. Carpenter, 14 Colo. 477, 24 Pac. 558; Brady v. Yost, 6 Idaho, 273, 55 Pac. 542). * * *

While complainant in the instant case does not aver the price at which it had resold the property in question to L. B. Foster Company of Pittsburgh, Pa., yet such sale is specifically averred, and the price thereof fixed by complainant is easy of ascertainment for submission to a jury for estimation of damages for a breach of the contract under the rules of law obtaining in such matters.

The further averment that "said Foster Company are demanding" fulfillment of their contract with complainant for said rails, and that if complainant does not secure said rails from respondent to make delivery of the same in accordance with its contract with said Foster Company, complainant will be unable to carry out its contract with that company, and will be "irreparably damaged," does not make a case of irreparable damage, that may not be fixed by a jury at law. * * * The contract, specific performance of which was sought in Black Diamond Co. v. Coal Co., 200 Ala. 276, 76 South. 42, was for the purchase and sale of coal, and required the defendant to sell to the plaintiff all of its output, to a stated daily average, for which the plaintiff was to pay monthly a stated amount per ton, etc., thus contemplating a continuous daily operation of the mine, requiring special skill, knowledge, and direction, over a period of months, and stipulating for a succession of acts that cannot be consummated by one transaction. The relief sought was denied.

Under the averments of the bill the act of delivery of the railroad material was to embrace a series of installments extending over the period from October 2 to November 2, 1917, necessitating the removal of such material from its present location along a right of way of 14 or

more miles in length, and delivery f. o. b. the cars at Perry's Mills, Ala. Thus the contract, by its terms, stipulated a succession of acts, to be continued through the reasonable period required, to move to and deliver at point of destination the property in question. If specific performance of such contract be required by the court, a more or less protracted supervision and direction would be necessary to consumate such removal and delivery as per contract stipulations. And it may be that on this ground the decree of the court should be sustained, but this is not decided.

However, we prefer to justify the ruling of the court in dismissing plaintiff's bill, on the ground that the insolvency of Vaughan is not alleged, and that compensation for the breach of the contract will give ful and complete redress, from the nature of the contract itself and the character of the subject-matter thereof. That is, by a verdict at law the complainant will obtain all that it was the object, by resale of the property in question, to obtain. * * *

The result is unchanged by Lewman & Co. v. Ogden, 143 Ala. 351, 42 South. 102, 5 Ann. Cas. 265. There one of the parties had a contract with the United States for the erection of certain locks and dams on the Warrior and Tombigbee rivers, and sublet the contract to the other party under the written agreement to do the work by a designated time, and to furnish all necessary labor, teams, machinery, and appliances, etc.; and it was averred that said sublessee had ceased to work, and was attempting to remove such personal property necessary to the prosecution of the work, and to its completion "at the present season of the year, and at the present stage of the water." The bill, "in substance and in spirit" one for specific performance, was held to be without equity. The court said that specific performance might be decreed of a contract for the delivery of chattels, which no one but the defendant can supply, and which are necessary to enable the plaintiff to fulfill an engagement with a third party, "but not where the delivery of the chattels by the defendant was a mere question of convenience." It may be that where goods of special value have been sold, and there are no other similar goods in the market, a contract for the delivery of them would be specifically performed. * * *

The bill does not show that the complainant is not provided with a plain and adequate remedy at law for the breach of the contract by respondent Vaughan, but that a breach of such contract is fully measurable by a money standard. The present temporary economic condition, brought about by the pending war, does not bring the instant case within an exception to the general rules hereinabove adverted to.

The decree of the Montgomery circuit court in equity is affirmed.
* * *

PART V

PARTNERSHIP

Chapter
Introduction.
I. What Constitutes a Partnership.
II. Relations of the Partners Between Themselves.
III. Relations of Partners to Third Persons.
IV. Causes of Dissolution.
V. Effect of Dissolution upon the Relations of the Partners Between Themselves.
VI. Effect of Dissolution upon the Relations of the Partners to Third Parties.
VII. Limited Partnerships.

INTRODUCTION

The preceding portions of this volume, in the main, have dealt either with the general law of contracts or with the rules applicable to particular kinds of contracts. This is particularly true of Parts I, III, and IV. Part II dealt with the law of agency. To a great extent this topic also concerned the application of the principles of the law of contracts to a special relationship. The primary object of study was, however, this relationship and its consequences. It was necessary to draw upon the principles of the law of contracts to determine the nature and consequences of the relationship, but other departments of the law were also involved. And so with respect to the law of partnership. The object of study is the relationship.

A partnership is one form of business organization. It is one method by which two or more persons may combine their services and property for business purposes and for common ends. The relationship is usually created by contract, but this relationship is something separate and distinct from the contract which created it. A contract to enter into a partnership and an actual partnership are two different things. The law of partnership is concerned with the solution of the special problems which arise out of and because of the form of organization in which the business is carried on. As in other branches of the law, the first question to arise is: What groups or combinations of facts will create a partnership? Persons may intend to enter into a partnership, but fail to do so. Their acts may have created a different relationship. Conversely, persons may intend not to enter into a partnership, but actually form one.

After determining what facts are sufficient to create a partnership, and what facts may or may not be present without affecting the existence of the relationship, the questions then arise as to the nature and extent of the legal consequences which follow the

formation of a partnership. There are a great number of general and specific problems which arise naturally out of the situation. Prominent among them is the series of problems which, either directly or indirectly, arise out of the fact that the partners have combined their individual properties to be employed in a common enterprise. The law of property defines with considerable particularity the legal relations which one has with respect to property. But when two or more persons unite their properties, employ it for business purposes, exchange the original properties for other properties, accumulate surplus and sustain losses, a situation is created which makes it impracticable, if not impossible, to regard the original relation which each contributor to the capital originally possessed as still continuing. Each partner owns the property which he contributes to capital, but after the contributions have been made each partner's relations with respect to the property which he contributed necessarily have changed. Much of the law of partnership is concerned with the problem: What is the relation of an individual partner with respect to the property employed in the enterprise?

The ascertainment of the interest of each partner with respect to partnership property has a double aspect. It is necessary to determine what the relation is as between the partners themselves and as between the partners and third parties. If the capital of a partnership consists of land, buildings, machinery, and merchandise, is any particular machine owned by one partner just as it was before he employed it in the business? May he sell it otherwise than in the course of the partnership business? May a creditor of one of the partners, with respect to a debt not contracted in the course of the partnership business, seize the machine which was contributed to the working capital of the business? These are some of the detailed questions which involve the determination of the nature and extent of the interest of the individual partners in the partnership property.

Another question concerns the relations of firm creditors with respect to the individual members of the firm. If a firm creditor sues all the members of the firm, it logically follows that firm property is liable to seizure for satisfaction of the debt. But is it necessary that the firm creditor proceed against firm property? May the creditor sue an individual partner alone? If he sues all of the members of the firm, will he be permitted to take out execution against individual property of the partners? The relation of firm creditors and individual creditors with respect to property employed in the business and to the individual properties of each member constitute an important part of the law of partnership.

A partnership is a relation voluntarily entered into by the members. A great many changes in their relations, among themselves and as regards third parties, arise as a result of their joint undertaking. Whatever changes are thus worked, it is apparent that the new relations will not continue indefinitely. These new re-

lations may be destroyed. Another group of problems concerns the question: What acts will operate as a dissolution of the partnership relation? The term "dissolution" has a technical meaning. As there used, it indicates that something has occurred which has materially changed the legal relations between the partners and as between the partners and third parties. This question divides into two parts: What facts will operate as a dissolution, and to what extent are the partnership relations changed? A new member comes into the firm; an old member withdraws; one of the partners dies; what effect is thereby produced upon the partnership relations?

The principal problems of the law of partnership are therefore: (1) What facts will create a partnership? (2) What legal relations arise therefrom (a) as between the partners; (b) as between the partners and third parties? (3) What facts will cause a dissolution? (4) What is the legal effect of a dissolution (a) as between the partners; (b) as between the partners and third parties?

The Uniform Partnership Act, approved by the National Conference of Commissioners on Uniform State Laws in 1914, has been adopted in Idaho, Illinois, Maryland, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Tennessee, Utah, Wisconsin, Wyoming, and Alaska.

The Uniform Limited Partnership Act, approved in 1916, has been adopted in Idaho, Illinois, Iowa, Maryland, Minnesota, New Jersey, Pennsylvania, Tennessee, Utah, Wisconsin, and Alaska.[1]

[1] The notes appended to the various sections of the acts are the work of Professor William Draper Lewis, the able draftsman of the Partnership Acts. See texts of the Acts issued by the National Conference of Commissioners on Uniform State Laws.

CHAPTER I

WHAT CONSTITUTES A PARTNERSHIP

Section
1. Partnership the Result of Intention.
2. Partnership by Estoppel.
3. Partnership by Operation of Law as to Third Persons.
4. Partnerships Distinguished from Trusts for Business Purposes.

SECTION 1.—PARTNERSHIP THE RESULT OF INTENTION

Uniform Partnership Act, Section 6. (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.[2]

[2] *Lewis' Note to Section 6 (1).*—The first inquiry is, Why say a partnership is "an association of two or more persons"? In view of the fact that the word "association" itself implies the acting together of two or more persons, why not merely say that a partnership is an association to carry on business in which the members are co-owners of the business? The word "person" includes, as stated in section 2, supra, "individuals, partnerships, corporations, and other associations." The definition as worded thus asserts, what would be doubtful if the words "of two or more persons" were omitted, namely, that any one of these associations may become members of a partnership. It is true that if two or more corporations attempt to form a partnership the contract may be ultra vires as to both (Boyd v. American Carbon Black Co., 182 Pa. 206, 37 Atl. 937 [1897]); but the capacity of corporations to contract is a question of corporation law. Under the present law it appears that a partnership can, as such, be a member of another partnership, if that was the intent of the parties. Raymond v. Putnam, 44 N. H. 160 (1862); Cheap v. Cramond, 4 Barn. & Ald. 663 (1821); In re Hamilton (D. C.) 1 Fed. 800 (1880); Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282 (1890).

The words "to carry on as co-owners a business" remove any doubt in the following case: A. and B. sign partnership articles and make their agreed contributions to the common fund. A. refuses to carry on business as agreed. Is there a partnership to be wound up in accordance with the provisions of Part VI, "Dissolution and Winding up"? The words quoted require an affirmative answer to this question. If the words "carrying on business" had been used, in the case given, no partnership would exist, and Part VI would not apply.

The definition asserts that the associates are "co-owners" of the business. This distinguishes a partnership from an agency—an association of principal and agent. A business is a series of acts directed toward an end. Ownership involves the power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control.

Lastly, the definition asserts that the business is for profit. Partnership is a branch of our commercial law; it has developed in connection with a particular business association, and it is, therefore, essential that the operation of the act should be confined to associations organized for profit.

In view of the many definitions of a partnership which have been proposed, it is desirable to note the reasons for the omission of certain ideas expressed in some of the definitions cited by Lindley in his work on Partnership, pp. 11, 12.

It is not indicated that the association must be a voluntary one. In the domain of private law the term association necessarily involves the idea that the association is voluntary.

To say that the association must be created by contract is not only unnecessary, but in view of the varied use of the word "contract" in our law, if the word is used an explanation would have to be made as to whether the

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.[3]

Section 7. In determining whether a partnership exists, these rules shall apply:

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise;

(b) As wages of an employee or rent to a landlord;

(c) As an annuity to a widow or representative of a deceased partner;

(d) As interest on a loan, though the amount of payment vary with the profits of the business;

(e) As the consideration for the sale of the good will of a business or other property by installments or otherwise.

contract could be implied, and, if so, whether it could be implied in law or only implied as a fact. By merely saying that it is an association these difficulties are avoided.

Again, it is not said that the business must be a lawful business. The effect of the unlawfulness of the business is dealt with under Part VI, "Dissolution and Winding Up." Section 31 (3), infra, provides that dissolution is produced "by any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership." If the business is wholly unlawful, then the partnership is dissolved the moment it is created. The omission of the word "lawful" in the definition does not prevent this result. Very often, however, a business may be in part lawful and in part unlawful. Hotel keepers may run a "dive." Placing the word "lawful" before the word "business" in the definition would tend to throw a doubt on the propriety of the orderly winding up of such a business as a partnership.

[3] *Lewis' Note to Section 6(2).*—The reason for not following the English Act, and attempting to enumerate the associations which are excluded because formed under special statutes, is because such an enumeration is unnecessary, and because the paragraph would have to be differently worded for each state. The paragraph as drawn makes any association formed under a statute a partnership, if it would have been a partnership in the state if the act had not been adopted. If the association would not have been a partnership had the act not been adopted, the adoption of the act does not make it a partnership. In short, the adoption of the act does not change the legal status in the state of any association formed under a statute.

ASH et al. v. GUIE.

(Supreme Court of Pennsylvania, 1881. 97 Pa. 493, 39 Am. Rep. 818.)

The members of a Masonic lodge, an unincorporated body, appointed a committee to erect a building for the use of the lodge, authorizing them to borrow money for this purpose. The committee accordingly borrowed various sums, giving to the lenders certificates of indebtedness in the name of the lodge, signed by the officers thereof, and sealed with a seal, usually employed by the secretary for authenticating communications to other lodges, and which had never before been appended to a pecuniary obligation. In a suit brought upon one of said certificates, wherein all the members of the lodge were joined as defendants and alleged to be partners, verdict and judgment in the trial court were for the plaintiff. Defendants bring writ of error.

TRUNKEY, J. One of the defendants, called by plaintiffs, testified: "* * * The purposes of our lodge are charitable, benevolent and social." This is the evidence as to the objects for which the association was formed, and without proof of its constitution or rules respecting admission of members and the management of its affairs it was held to be a common partnership. A partnership has been defined to be a "combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit." It may be formed, not only for every kind of commercial business, but for manufacturing, hunting, and the like, as well as for carrying on the business of professional men, mechanics, laborers, and almost all other employments. It would seem that there must be a community of interest for business purposes. Hence, voluntary associations or clubs, for social and charitable purposes, and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. * * *

A benevolent and social society has rarely, if ever, been considered a partnership. * * * In Flemyng v. Hector, 2 M. & W. 172, Lord Abinger stated the difference between a body of gentlemen forming a club and meeting together for one common object, and a partnership where persons engage in a community of profit and loss, and each partner has the right of property for the whole, and in any ordinary transactions may bind the partnership by a credit. He held that a club and its committee must stand on the ground of principal and agent, and that the authority of the committee depends on the constitution of the club, which is to be found in its own rules. After noting the rules of the club, in the case before him, he says: "It therefore appears that the members in general intended to provide a fund for the committee to call upon. I cannot infer that they intended the committee to deal upon credit, and unless you infer that that was the intention, how are the defendants bound?" A mutual benefit society partakes more the character of a club than of a trading association. Every partner is agent for the partnership, and as concerns himself he is a principal, and he may bind the others by contract, though it be against an agreement between himself and his partners. * * *

Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner, so

that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of the members, had a right to contract debts for the building of a temple which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking, or subsequently ratified it. Those who participated in the erection of the building, by voting for and advising it, are bound the same as the committee who had it in charge. And so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade. * * *

Judgment reversed. * * *

PHILLIPS v. PHILLIPS.

(Supreme Court of Illinois, 1863. 49 Ill. 437.)

John Phillips owned a business. His sons were not expressly given any interest in the business, but they worked with him in making a success of the enterprise, and received no salaries. The father paid them, from time to time, out of the profits of the business, such sums as they needed. One of the sons withdrew his services from the business, and filed a bill for an accounting as a partner.

CATON, C. J. The only question in this case is one of fact. Was there a copartnership between John Phillips and his four sons, or was he the sole proprietor of the business about which the controversy has arisen? It must be remembered in the outset that this is a controversy inter sese, and is not between third parties and the alleged members of the firm. Parties may so conduct themselves as to be liable to third persons as partners, when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain truth is positively known to the alleged parties of a firm. A partnership can only exist in pursuance of an express or implied agreement to which the minds of the parties have assented. The intention or even belief of one party alone cannot create a partnership without the assent of the others. If John S. Phillips designed and really believed that there was a partnership, but to which his father and brothers never assented, and in the existence of which they did not believe, then there was no partnership, unless, indeed, a copartnership could be formed and conducted without their knowledge or consent. This would be simply absurd. We cannot in this way surprise them into a partnership of which they never dreamed.

Over 20 years ago John Phillips emigrated from Scotland and settled in Chicago with his family, consisting of a wife and four sons and two daughters. He was then very poor. He was a wood turner by trade, and commenced that business in a very small way with a foot lathe. He was frugal, industrious, and honest, and prospered as

but few men, even in this country, prosper. He labored hard with his own hands, and as his sons grew up they joined their work to his, all except John S., who at a proper age was put as an apprentice to learn the chair maker's trade; but, his health proving delicate, his father made an arrangement with his master by which his time was released when he had but partially learned his trade, when John S. returned home and took a more or less active part in the business of his father. His health was, however, for many years very delicate, and he was enabled to do but little physical labor. He, however, mostly took charge of the office and books, for which the testimony shows he was very well qualified, and where he rendered efficient service. In the meantime the business had grown from the smallest beginning, with a single foot lathe, to a large manufactory, with extensive machinery propelled by steam; and chair making, which was introduced at an early day, had become the principal or largest branch of the business. Thus this business was begun and continued and prospered till 1860, when the complainant left his father and the business, and filed this bill for an account as among partners.

The business had always been conducted, as it was begun, in the name of John Phillips, the father, although in a few instances bills were made out to John Phillips & Sons by persons with but a superficial acquaintance with them, which were paid without eliciting remark or particular attention. The books were all kept in the name of John Phillips, with the exception of a few entries made by a bookkeeper in the name of John Phillips & Sons. Indeed, there is, and can be, no question that, if there was a copartnership embracing the father and sons, the firm name adopted was John Phillips.

The complainant, to show a copartnership, proves that the sons all devoted their time and attention to the business after they attained their majority, without regular salaries as laborers or servants; that funds which they drew from the concern for their support were charged to each one separately, while neither received a credit for labor or services; that the father, upon one or two occasions, stated to third persons that his sons were interested in the business; and he also relies upon the appearances to the outside public and the interest which all took in the success of the business.

For the defense it is claimed that, following the habits and customs of their forefathers in Scotland, the sons continued to serve the father in the same relation and with the same fidelity after attaining their majority as before, under the distinct and often declared understanding that all should belong to the father during his life, and at his death the business and property should be left by him to his children, as he should think proper. * * * If such was the understanding and purpose of the parties, then there was no partnership. Originally, undoubtedly, the entire concern belonged to the father, and it so continued, unless by the agreement of the father the sons were admitted into the concern as partners; for, as before intimated, we know of no means by which the sons could become partners with the father, and thus acquire a title to his property, without his knowledge or consent. Did the father ever consent that his sons, or either of them, should be admitted as partners with him? Did he ever agree that they should be part owners of this property? On repeated occasions the subject of a copartnership with his sons

was presented to him, both in the presence of the complainant and his brothers, and he ever repudiated the suggestion in the most emphatic terms. The very suggestion, even seemed to excite his indignation. Upon one occasion he expressed himself in this characteristic phrase: "Na, Na! I will ha' nae sons for partners as long as I live. Damn them! they would put me out of the door."

On none of these occasions do we find the complainant or any of his brothers, claiming the existence of a copartnership; but, on the contrary, they silently acquiesced in the assertions of the father. * * * Had there been ever any agreement, express or implied, that there should be a partnership, they, as parties to it, must have been aware of it. If not expressed in words, there must have been at least the mental intention and tacit understanding on the part of the father that they should be admitted as partners, and on their part to assume the benefits and liabilities of partners, and this could not be without their knowledge. Others might be deceived by appearances. Others, ignorant of the customs and traditions of their forefathers, which are so fondly cherished by emigrants from the old country, and particularly from Scotland, might draw erroneous conclusions as to the true relation existing between them as a family, by seeing men in middle life zealously bending their energies under the guidance of their father to the promotion of the success of the business. Whoever should apply customs prevalent among native Americans to this state of facts would unhesitatingly conclude that all were in partnership. And so, no doubt, many were deceived; nor was it deemed necessary by any of the parties, on all occasions, to undeceive them by a full explanation of this family arrangement.

But the question here is, what was the actual fact? and not what observers supposed was the fact from appearances. It is the internal truth we are seeking, and these external appearances are only important as they may enable us to arrive at this truth; and when we so find the truth by indubitable proof in a different direction than that indicated by these external appearances, then these must go for naught. Here we have the positive testimony of every living man who has the absolute knowledge of the facts, including the complainant himself, all testifying most unqualifiedly that there was no partnership.

Decree is reversed, and the bill dismissed.

MEEHAN v. VALENTINE.

(Supreme Court of the United States. 1892. 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835.)

Statement by Mr. Justice GRAY:

This was an action of assumpsit brought by Thomas J. Meehan, a citizen of Maryland, against John K. Valentine, executor of William G. Perry, both citizens of Pennsylvania, alleging Perry to have been a partner with Lawrence W. Counselman and Albert L. Scott, under the name of L. W. Counselman & Co., and counting on promissory notes of various dates from August 10, 1883, to November 25, 1884, signed by that firm, indorsed to the plaintiff, and amounting in all to about $10,000, with interest. The defendant denied that Perry was a partner in the firm.

At the trial, the plaintiff put in evidence the following agreement: "L. W. Counselman. Albert L. Scott, Office of L. W. Counselman & Co., Oyster and Fruit Packers, corner Philpot and Will streets. Baltimore, Md., March 15, 1880. For and in consideration of loans made and to be made to us by Wm. G. Perry, of Philadelphia, amounting in all to the sum of ten thousand dollars, for the term of one year from the date of said loans, we agree to pay to said Wm. G. Perry, in addition to the interest thereon, one tenth of the net profits over and above the sum of ten thousand dollars on our business for the year commencing May 1, 1880, and ending May 1, 1881—i. e., if our net profits for said year's business exceed the sum of ten thousand dollars, then we are to pay to said W. G. Perry one tenth of said excess of profits over and above the said sum of ten thousand dollars; and it is further agreed that if our net profits do not exceed the sum of ten thousand dollars, then he is not to be paid more than the interest on said loan, the same being added to notes at the time they are given, which are to date from the time of said loans, and payable one year from date. L. W. Counselman & Co." * * *

The plaintiff also called Scott as a witness, who testified that the firm was composed of L. W. Counselman and himself; that it was engaged in "the fruit and vegetable packing and oyster business" in Baltimore; that Perry was in the stationery business in Philadelphia; that the $10,000 mentioned in the agreement was paid by him to the firm, receiving their notes for it, and remained in the business throughout, no part of it having been repaid; that from time to time he lent other sums to the firm, which were repaid; that he was an intimate friend of the witness, and visited him every few weeks; that these visits were not specially connected with the business, though on such occasions Perry "usually went down to the place of business and talked business;" that he annually asked and received from the firm accounts of profit and loss; that the accounts showed an annual profit, which varied from year to year, amounting for the second year to $11,000 or $12,000; that, it being then found difficult to tell at the end of the year exactly what the profits would be, it was agreed with Perry that he should thenceforth receive $1,000 each year, leaving the final settlement until the whole business was settled up; and that he received under the agreement about $1,500 the first year, and $1,000 each subsequent year. On cross-examination, the witness stated that the firm made an assignment to the plaintiff for the benefit of creditors on April 30, 1885; that their liabilities were from $60,000 to $70,000, about half of which was with collateral security, and he did not know whether it had been paid out of such security; that the assets realized less than $2,000; that so far as he knew, no dividend had been paid; and, in regard to the $10,000 received from Perry, the witness testified as follows: "Question. Mr. Counselman and yourself did owe this $10,000 to the estate of Mr. Perry, did you? Answer. They had my notes for it. Q. Did you or did you not owe it? A. It was capital he had in the business the same as ours. We owed it to him. Of course, we owed it to him if we did not lose it."

At the close of the plaintiff's evidence, the defendant moved for a nonsuit, on the ground that there was no evidence to show that Perry was liable as a partner. The court so ruled, and ordered a nonsuit. * * * The plaintiff duly excepted to the ruling, and sued out this writ of error.

GRAY, J. * * * Some of the principles applicable to the question of the liability of a partner to third persons were stated by Chief Justice Marshall in a general way, as follows: "The power of an agent is limited by the authority given him; and, if he transcends that authority, the act cannot affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others." "A man who shares in the profit, although his name may not be in the firm, is responsible for all its debts." "Stipulations [restricting the powers of partners] may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law." Winship v. Bank, 5 Pet. 529, 561, 562, 8 L. Ed. 216. * * *

How far sharing in the profits of a partnership shall make one liable as a partner has been a subject of much judicial discussion, and the various definitions have been approximate rather than exhaustive.

The rule formerly laid down, and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his copartners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. Story, Partn. c. 4. * * * The test was often stated to be whether the person sought to be charged as a partner took part of the profits as a principal, or only as an agent. * * *

Accordingly, this court, at December term, 1860, decided that a person employed to sell goods under an agreement that he should receive half the profits, and that they should not be less than a certain sum, was not a partner with his employer. "Actual participation in the profits as principal," said Mr. Justice Clifford in delivering judgment, "creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits," or "may have expressly stipulated with his associates against all the usual incidents to that relation. That rule, however, has no application whatever to a case of service or special agency, where the employee has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services." Berthold v. Goldsmith, 24 How. 536, 542, 543, 16 L. Ed. 762. * * *

Mr. Justice Story, at the beginning of his Commentaries on Partnership, first published in 1841, said: "Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction between him and a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either. * * *"

Afterwards, in discussing the reasons and limits of the rule by which one may be charged as a partner by reason of having received part of the profits of the partnership, Mr. Justice Story observed that the rule was justified, and the cases in which it had been applied reconciled, by considering that "a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances," but that it is not "to be regarded as anything more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not as of itself overcoming or controlling them," and therefore that, "if the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled." And again: "The true rule, ex æquo et bono, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons; unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." Story, Partn. §§ 1, 38, 49.

Baron Parke (afterwards Lord Wensleydale) appears to have taken much the same view of the subject as Mr. Justice Story. Both in the Court of Exchequer and in the House of Lords he was wont to treat the liability of one sought to be charged as a dormant partner for the acts of the active partners as depending on the law of principal and agent. Beckham v. Drake (1841) 9 Mees. & W. 79, 98. * * *

In Cox v. Hickman, 8 H. L. Cas. 268, two merchants and copartners, becoming embarrassed in their circumstances, assigned all their property to trustees, empowering them to carry on the business, and to divide the net income ratably among their creditors (all of whom became parties to the deed) and to pay any residue to the debtors, the majority of the creditors being authorized to make rules for conducting the business or to put an end to it altogether. The House of Lords, differing from the majority of the judges who delivered opinions at various stages of the case, held that the creditors were not liable as partners for debts incurred by the trustees in carrying on the business under the assignment. The decision was put upon the ground that the liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent; that a right to participate in the profits, though cogent, is not conclusive, evidence that the business is carried on in part for the person receiving them: and that the test of his liability as a partner is whether he has authorized the managers of the business to carry it on in his behalf. * * *

This new form of stating the general rule did not at first prove easier of application than the old one; for in the first case which arose afterwards one judge of three dissented (Kilshaw v. Jukes, 3 Best. & S. 847), and in the next case the unanimous judgment of four judges in the common bench was reversed by four judges against two in the Exchequer Chamber, Bullen v. Sharp, 18 C. B. (N. S.) 614, and L. R. 1 C. P. 86. And, as has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than

partnership from agency. * * * Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent. * * *

In other respects, however, the rule laid down in Cox v. Hickman has been unhesitatingly accepted in England, as explaining and modifying the earlier rule. * * *

In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or services to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.

In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. * * * And it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect. * * *

In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the whole capital on which the business was carried on by another, or else contributed part of the capital and took an active part in the management of the business. * * * And in Mollwo v. Court of Wards, * * * after speaking of a contract of loan and security, in which no partnership was intended, it was justly observed: "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character." L. R. 4 P. C. 438. But in the case at bar no such element is found.

Throughout the original agreement, and the renewals thereof, the sum of $10,000 paid by Perry to the partnership, and for which they gave him their promissory notes, is spoken of as a loan, for which the partnership was to pay him legal interest at all events, and also pay

him one tenth of the net yearly profits of the partnership business, if those profits should exceed the sum of $10,000. The manifest intention of the parties, as apparent upon the face of the agreements, was to create the relation of debtor and creditor, and not that of partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he assumed any other relation. He never exercised any control over the business. The legal effect of the instrument could not be controlled by the testimony of one of the partners to his opinion that "it was capital he had in the business the same as ours; we owed it to him; of course, we owed it to him if we did not lose it."

Upon the whole evidence, a jury would not be justified in inferring, on the part of Perry, either "actual participation in the profits as principal," within the rule as laid down by this court in Berthold v. Goldsmith, or that he authorized the business to be carried on in part for him or on his behalf, within the rule as stated in Cox v. Hickman and the later English cases. There being no partnership, in any sense, and Perry never having held himself out as a partner to the plaintiff or to those under whom he claimed, the circuit court rightly ruled that the action could not be maintained. * * *

Judgment affirmed.

SECTION 2.—PARTNERSHIP BY ESTOPPEL

Uniform Partnership Act, Section 16. (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made. (a) When a partnership liability results he is liable as though he were an actual member of the partnership. (b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.[4]

[4] *Lewis' Note to Section 16 (1b).*—The section clears several doubts and confusions of our existing case law. It has been held that a person is liable, if he has been held out as a partner and knows that he is being held out, unless he prevents such holding out, even if to do so he has to take legal action. Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355 (1889); Tanner & De Laney Engine Co. v. Hall, 86 Ala. 305, 5 South. 584 (1888); Rittenhouse v. Leigh, 57 Miss. 697 (1880); Speer v. Bishop, 24 Ohio St. 598 (1874); Prof. Burdick, in 30 Cyc. 393. On the other hand, the weight of authority is to the effect that to be held as a partner he must consent to the holding and that consent is a matter of fact. The act as drafted follows this weight of authority and better reasoning. Morgan v. Farrel, 58 Conn.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

THOMPSON v. FIRST NAT. BANK OF TOLEDO.

(Supreme Court of the United States, 1884. 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507.)

GRAY, J. * * * The remaining and the principal question in the case is whether the liability of Thompson, by reason of having held himself out as a partner, was submitted to the jury under proper instructions.

The court was requested to instruct the jury that if Thompson was not in fact a member of the partnership, the plaintiff could not recover against him, unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transaction with the partnership. The court declined to give this instruction, and instead thereof instructed the jury, in substance, that if Thompson permitted himself to be held out to the world as a partner, by advertisements and otherwise, as shown by the evidence, and to be introduced to other persons as a partner, the plaintiff was entitled to the benefit of the fact that he was so held out, and he was estopped to deny his liability as a partner, although the plaintiff did not know that he was so held out, and did not rely on him for the payment of the plaintiff's debt, or give credit to him, in whole or in part. This court is of opinion that the circuit court erred in the instructions to the jury, and in the refusal to give the instruction requested.

A person who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is that, by his conduct in holding himself out as a partner, he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted, or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion

413, 20 Atl. 614, 18 Am. St. Rep. 282 (1890); Bishop v. Georgeson, 60 Ill. 484 (1871); Thompson v. First Nat. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507 (1884); Fisher v. A. Y. McDonald Co., 85 Ill. App. 653 (1899); Ihmsen v. Lathrop, 104 Pa. 365 (1883); Wood's Collyer, 75, note.

or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership. There may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel in pais, a question of fact for the jury, and not of law for the court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of law is always the same: that one who had no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact. * * *

The result is that both, upon principle and upon authority, the third and fourth assignments of error, as well as the first, must be sustained. the judgment of the circuit court reversed, and the case remanded to that court with directions to order a new trial.

SECTION 3.—PARTNERSHIP BY OPERATION OF LAW AS TO THIRD PERSONS

Uniform Partnership Act, Section 7. (1) Except as provided by section 16, persons who are not partners as to each other are not partners as to third persons.

As appears from the following case, the English courts once held that the fact of sharing in the profits of a business established a partnership liability upon such person as to third persons by operation of law. This rule was not based upon estoppel. This rule proceeds upon the theory that the fact of sharing in the profits was something more than evidence of intention to create a partnership. It was conclusive proof of a pertnership as to third parties. This rule was later overthrown by the English courts. Except in a few cases, the earlier English rule has never been adopted in the United States. The Uniform Partnership Act adopts the majority rule. Under section 7 (1) there can be no partnership as regards third persons except as the result of the application of the doctrine of estoppel. The sharing of profits is made but prima facie evidences of a true partnership. Section 7 (4) provides:

The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment: (a) As a debt by installments or otherwise; (b) as wages of an employee or rent to a landlord; (c) as an annuity to a widow or representative of a deceased partner; (d) as interest on a loan; though the amount of payment vary with the profits of the business; (e) as the consideration for the sale of the good will of a business or other property by installments or otherwise.

HARVEY v. CHILDS et al.

(Supreme Court of Ohio, 1876. 28 Ohio St. 319, 22 Am. Rep. 387.)

DAY, J. The original action was brought by Harvey against Childs and Potter, to recover $158.40, for seventeen hogs sold by Harvey to Potter.

Potter is in default. Childs denies his liability. His liability is claimed solely on the ground that he was a partner of Potter in the adventure for which the hogs were purchased.

The partnership claimed rests on the following state of facts: Potter went to Childs, and told him that he had contracted for about two car loads of hogs, to be delivered at Loudonville the next day, and had not the money to pay for them. He asked Childs to advance the money and take an interest in the hogs. Childs refused. Thereupon Potter proposed that if he would let him have the money to enable him to pay for the hogs he had bought, and others he might have to buy to make the two car loads, he (Childs) should take possession of the hogs when carried at Loudonville, as security for the money, take them to Pittsburgh, sell them, and take his pay from the proceeds of the sale; that he might have one half the net profits of the adventure and that in no event should Childs sustain any loss, but the money advanced by him should be fully paid by Potter in case the amount realized from the sale of the hogs was insufficient. Childs accepted the proposition, and, it being agreed that $2,500 would be enough to pay for the two car loads, he advanced that sum to Potter. Afterward, without the knowledge of Childs, Potter bought the hogs in question of Harvey, on his own credit, and they made part of the two car loads of hogs which were taken possession of by Childs, sold in Pittsburgh, and the avails of the sale were appropriated in payment of the money advanced by him. No profits were made. The avails of the sale were insufficient to pay the amount advanced by Childs, and Potter advanced him the deficiency, and for time and expenses in the transaction.

The question to be considered, then, is, Are the defendants, by construction of law, to be regarded partners as to the plaintiff, being a third person, in the debt incurred to him by Potter in his own name?

What shall be regarded, as to third persons, a test of partnership between parties who do not consider themselves to be partners, and who have done nothing to estop them from denying that they are such, has been much discussed by courts and elementary writers, and the problem seems to be one of difficult solution. It is needless to review here the numerous cases on the subject; a statement of results is sufficient.

No little difficulty has been experienced in determining the meaning and limits of phrases that have been recognized as tests of a partnership in such cases, and in their application to the various cases that arise.

The effort has been to draw a distinct line between cases where one has a community of interest in the profits of a business, as distinguished from those where one is entitled to receive a sum of money out of the profits as a creditor, or a sum proportionate to a quantum of profits, or a share of the profits as a compensation for services or labor.

Although a partnership may be said to rest upon the idea of a communion of profits, nevertheless the foundation of the liability of one partner for the acts of another is the relation they sustain to each other, as being each principal and agent. That relation, it would seem, then, constitutes the true test of a partnership liability, and rests upon the just foundation that the joint liability was incurred on the express or implied authority of the party sought to be charged.

But if the relation of principal and agent be regarded as the test of a partnership and consequent joint liability, the question still remains, what shall be deemed sufficient evidence of that relation, or to raise the implication of authority to incur the liability in question?

To this end numerous tests have been supposed to exist; but the best considered and least objectionable is that of a community of interest in the profits of a business or transaction as a principal or proprietor. * * *

But this test is valuable as a rule chiefly because it evinces a relation between the parties, where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits of a business, however, cannot be regarded as a rule so universal and unrelenting as to be unjustly applied in a case where a debt is incurred by one who cannot be said to be acting, in the particular transaction, as the agent or on behalf of the party sought to be charged. Therefore, on principle, the true test of a partnership, at last, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for when they sustained that relation, a joint liability may be said to have been incurred by the authority, or on behalf of each of the parties so related. The tendency of the more modern authorities, both English and American is to this conclusion.

The case of Cox v. Hickman, decided by the House of Lords in 1860, has become a leading case on that subject. 8 House of Lords, 268, 99 E. C. L. 47, 11 Eng. Repr. 431, 19 Eng. Rul. Cas. 323. It is summarized in the subsequent case of Bullen v. Sharp, 1 Law Reporter, 112, by Blackburn, J., as follows: "I think the ratio decidendi is that the proposition laid down in Waugh v. Carver, 2 H. Bl. 235, 126 Eng. Repr. 525, viz. that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England; but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining the question, but not being of itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation in the profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business." Addison on Contracts, 163.

These cases were decided before the passage of the act of parliament in relation to partnerships. But, so far as relates to this question in a subsequent case, Bramwell, J., declared, in effect, that the act was only declaratory of the common law, as held in Cox v. Hickman. Holme v. Hammond, 7 Law, 218–236.

The question was much considered in Eastman v. Clark, 53 N. H.

276, 16 Am. Rep. 192, where the authorities are fully collated and ably reviewed. The case was decided in 1872. The conclusion arrived at is stated by Smith, J., as follows: "The real ultimate question in all cases like the present is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of the question, 'except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business.' Whether such relation actually existed is a question of fact. Upon the trial of that question, proof of a right to participate in the profits would be a cogent and often practically conclusive piece of evidence to establish the existence of that relation; but there is no sound foundation for an arbitrary rule of law requiring courts or jurors to regard participation in the profits as a decisive test which will in all instances necessitate the conclusion that the participator is liable for the debts."

In the absence of any known stipulation to the contrary, every partner of a trading firm, within the scope of the joint business, in contemplation of law, is clothed with implied authority to enter into simple contracts on behalf of the firm in furtherance of the business of the partnership, and thereby bind each member of the firm. Where, therefore, as in the case of Wood v. Vallette, 7 Ohio St. 172, and in the later case of Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244, money is advanced, to be used in a trading business, and returned in a year with a share of the profits made during that time, it may be implied that the business was conducted on behalf and by the authority of the person advancing the money and sharing the profits, for it is to the continuing trade, in the ordinary way, that he looks for his profits.

But such cases are plainly distinguishable from one where money is advanced, to be embarked in a single transaction, where no credit is contemplated. In such cases there is no ground for the implied authority to incur debts, such as exists in regard to a general trading business.

In the case before us it is obvious that it was not contemplated in the arrangement between Childs and Potter that any indebtedness should be incurred in the purchase of hogs for the contemplated adventure, to which the whole business was to be confined. There is, then, no ground for the implication of authority from Childs to incur the debt in question. On the contrary, such implication is rebutted by the advancement of money to pay for all the hogs that were to come to his hands.

Moreover, Childs had no legal interest in any of the hogs until they were delivered to him at the cars, nor had he any equitable interest in hogs, before such delivery, that were bought by Potter and not paid for by money received from Childs. He had, then, no interest whatever in the hogs bought of Harvey on credit, when the debt to him was incurred; and Potter, before delivery to Childs, might have sold them without being liable to account to Childs. The fact is apparent that it was the understanding of the parties that Potter had bought for himself, and, if need be, was in like manner to buy enough more hogs to make two carloads; and it cannot be doubted that, until their delivery at least, all the hogs belonged to Potter alone, and

at most were only regarded as his contribution to the enterprise. If so regarded, the case is like that of Wilson v. Whitehead, 10 M. & W. 503, where it was agreed between three parties that one should edit, another print, and the other publish a paper, and share equally in the net profits. The printer was to furnish the paper and charge the firm at cost prices. It was held that the printer alone was liable to the person of whom he bought the paper. Parke, B., said: "The question is, Did the other defendants authorize Whitehead to purchase the paper on their account or on his own? It appears to me, on the true construction of the contract, that the latter was the case. When the paper was in his possession he was at liberty to have appropriated it to any other purpose."

But the truth is, Potter was the owner of the hogs until they were sold by Childs; for Childs declined to take any interest in the hogs other than as security for the money advanced by him to Potter. Looking to the whole matter, it is clear that the transaction was a loan of money by one party to the other, on the security afforded by the possession of the hogs. Childs, therefore, was the mere pledgee of the hogs, with a power of sale by agreement of the parties, and, as such, had only special property in the hogs. The general property in the hogs, from first to last, remained in Potter. He was the owner, and if they had died on the way to market without the fault of Childs, the loss would have fallen upon Potter, both by the positive agreement of the parties, and the legal effect of the transaction between them as bailor and bailee. There was, then, strictly speaking, no mutuality of community of interest between them in the hogs. Childs had no interest in them other than as security for a debt, and to find in half the profits of their sale the measure of his reward for the use of his money, to be paid out of Potter's property.

The relation of the parties was that of debtor and creditor, of bailor and bailee, and not that of partners. They had no mutual interest in the hogs in common as principals or proprietors, nor was either acting as principal for himself and agent for the other. If, however, that relation could be said to exist after the hogs were delivered to Childs, there is no ground for an inference that the debt to Harvey, previously contracted by Potter, was incurred upon the authority of Childs. On the contrary, the facts rebut any implication of such authority, and are consistent only with the supposition that the debt was incurred without authority from Childs, who was doubtless no less surprised to learn of the debt than Harvey was, after the failure of Potter, to find the existence of a rule of law under which he had unwittingly given credit to another and responsible party. We may, in conclusion, therefore, well adopt in this case the language of Judge Story (Partnership, § 36): "Now, it is incumbent upon those who insist that a partnership exists between the parties, as to third persons, by mere operation of law, in opposition to their own intention, to establish that in the given case, under all the circumstances, there is such a rule, and that it is strictly applicable."

This disposes of the material question made by the record. The court of common pleas gave judgment in favor of the plaintiff, against both Childs and Potter. The district Court, on error reversed the judgment as to Childs. It follows that the judgment of the district court must be affirmed.

Judgment accordingly.

SECTION 4.—PARTNERSHIPS DISTINGUISHED FROM TRUSTS FOR BUSINESS PURPOSES

SIMSON et al. v. KLIPSTEIN.

(United States District Court, D. New Jersey, 1920. 262 Fed. 823.)

Action by Leslie N. Simson and George W. Hunter, trustees, against Ernest C. Klipstein. On motion to dismiss for want of jurisdiction.

DAVIS, District Judge. Defendant in the above-stated cause moved to dismiss the same on the ground that this court is without jurisdiction because one of the necessary parties plaintiff and the defendant are both citizens of the state of New Jersey. The defendant further asks permission to take testimony to establish the citizenship of the said necessary party and for an order adding the name of said party plaintiff to the complaint.

On March 15, 1916, the plaintiffs, Simson and Hunter, by an instrument purporting to be a declaration of trust, called "Articles of Association of Midvale Chemical Works," established a proposed trust and constituted themselves trustees thereof. Their plan contemplated that, as trustees of the Midvale Chemical Works, the name of the proposed trust, persons would give to them money, in return for which they would issue certificates entitling the holders thereof to share in the profits resulting from their management of the enterprise upon which they were to embark with said money. The certificate holders were the beneficial owners of the money contributed by them, in that they were to share in the profits earned and in the final distribution of the assets of the association, in accordance with the terms of the articles of association. According to said terms, however, the legal and equitable title to the property is vested in the said trustees.

The trustees purchased at Elizabeth, N. J., some considerable real estate and established and operated a factory thereon, wherein aniline oil, etc., was manufactured. On May 31, 1917, the "Midvale Chemical Works, by George W. Hunter, Leslie N. Simson, trustees," entered into an agreement with the defendant for the sale to him of said real estate and factory for the sum of $150,000, and also for the personal property, including the raw materials on hand, an inventory of which, the plaintiffs allege, showed it to be worth about $45,000 in addition. The defendant entered into possession of the property, but it developed that the said trustees could not give a clear title to the real estate and the defendant refused to accept a deed for the same. During the time title to said real estate was being determined by litigation in the Court of Chancery of New Jersey, the defendant continued in possession of the property and operated the factory. For his alleged failure to pay for the personal property and raw materials, for his refusal to remove from the premises at the termination of the litigation in accordance with the terms of an agreement entered into while litigation was going on, and for damages alleged to have been done to the said property while in possession of defendant, plaintiffs brought this action against him to recover the sum of $141,870.78. The defendant is before this court on motions as aforesaid.

Whether or not an association is a trust or partnership depends upon the instrument creating it. Real estate trusts, such as this claims to

tributed by said certificate holders. That the present plaintiffs are the proper parties plaintiff in a suit in equity in New Jersey touching said property was decided in the case of Simson et al. v. Klipstein, 88 N. J. Eq. 229, 102 Atl. 242. The parties plaintiff and defendant were the same in that case as in the instant case and the same questions which are raised here as to proper parties were raised there, and decided against the defendant. In view of the powers conferred upon the so-called trustees or "managing agents" by the articles of the association, the recognition by the defendant of their full and unquestioned authority of the association, and the decision of the Court of Chancery of New Jersey holding that the plaintiffs are the proper parties plaintiff in a suit touching said property, I am of the opinion that Simson and Hunter are proper parties plaintiff, and have full power and authority to represent the certificate holders in this proceeding. * * *

The defendant may have 20 days, after the entry of order, within which to answer.

WILLIAMS et al. v. INHABITANTS OF MILTON.

(Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 1, 102 N. E. 355.)

LORING, J. These are four petitions for the abatement of taxes assessed upon the plaintiffs as trustees of the Boston Personal Property Trust. The Boston taxes were assessed on the theory that the property held by the plaintiffs under that trust was partnership property to be assessed under St. 1909, c. 490, pt. 1, § 27, in Boston where the partnership (if there was a partnership) had its place of business. The other taxes were assessed upon the theory that the property held by the plaintiffs under that trust was held by them as trust property the income of which was payable to another person and was to be assessed under St. 1909, c. 490, pt. 1, § 23, cl. 5.

It has been contended in effect if not in terms that whatever may be its true character the trust for the purposes of taxation was a partnership. Doubtless the Legislature might provide that a trust which was not a partnership should be treated as a partnership for the purposes of taxation. But it has not done so. What the Legislature has done is to provide (1) that "personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the commonwealth," and if he resides out of the commonwealth, in the place where the trustee resides (St. 1909, c. 490, pt. 1, § 23); and (2) that "partners, whether residing in the same or in different cities or towns, may be jointly taxed under their firm name, in which their business is carried on, for all the personal property employed in such business, except ships or vessels" (St. 1909, c. 490, pt. 1, § 27). That is to say, the Legislature has provided that the right to tax property as trust or as partnership property depends upon the real character of the property taxed. Under these enactments of the Legislature there is no room for holding that property which is in reality not partnership property can be taxed as partnership property. The right to tax property as trust or as partnership property depends upon what the character of the property taxed really is. * * *

This brings us to the question of the character of the Boston Personal Property Trust. It is plain that it is a trust and not a partnership. By the terms of the indenture of trust the property contributed by the certificate holders, or that bought with money contributed by them (the original trust property could be acquired in both ways by the terms of the indenture of trust), was to be held by the trustees in trust to pay the income to the holders of the certificates, and on the termination of the trust to divide the trust fund or the proceeds thereof among them. The certificate holders are throughout called "cestuis que trustent." The certificate holders, or "cestuis que trustent," are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which (under the trust indenture) they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders or "cestuis que trustent" can do is to give or withhold their consent to the trustees taking such action. And the giving or withholding of consent by the cestuis que trust is not to be had in a meeting, but is to be given by them individually. As we have said, no meeting of the cestuis que trust for that or any other purpose is provided for in the trust indenture. The trustees of the Boston Personal Property Trust have a right to sell the trust securities and reinvest the proceeds, and also a limited power to borrow on the security of the trust property. The certificate holders, or "cestuis que trustent," as they are called in the trust deed, have a common interest in precisely the same sense that the members of a class of life tenants (among whom the income of a trust fund is to be distributed) have a common interest, but they are not socii, and it is the trustees, not the certificate holders, who are the masters of the trust property. The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end.

It has been urged by the learned counsel for the city of Boston that these certificate holders or "cestuis que trustent" are in effect carrying on the business of buying and selling securities through the trustees as managing agents or directors, and he refers to two facts which (he argues) bear him out in that contention, namely: (1) That the trustees on April 1, 1911, had on hand undivided income to the amount of $51,516.93, and a "surplus capital" amounting to $488,566.35. By the terms of the trust the trustees are authorized to set aside from time to time such portion of the net income as shall not be required for dividends for a "surplus fund," which surplus fund may be subsequently used by them in their discretion in payment of dividends. It appears that the face value of the outstanding certificates is $2,090,500. The surplus fund of undivided income therefore amounts to about 2½ per cent. of the corpus of the fund. The surplus capital of $488,566.35 is about 23½ per cent. of the face value of the outstanding certificates. That is not an extraordinary increase in the value of the corpus of the trust fund during a period of 18 years. But this contention brings out a fact in addition to those already re-

ferred to, which shows that the Boston Personal Property Trust is not a partnership, but a trust, and nothing but a trust.

When persons engage as partners in buying and selling stocks, bonds and other securities for their mutual profit, the gains made by purchases and sales are profits of the partnership, divisible as such among those entitled to the profits of the partnership. In the case of a trust, on the other hand, any gain made by a change of investments is an accretion belonging to the corpus of the trust fund and belongs to those who own the corpus of the fund. Such gains become part of the corpus as much as the original money contribution to the trust fund. On them the certificate holders or "cestuis que trustent" are entitled to income while the trust lasts, and to their share of them (because they are included in the corpus of the trust fund) when the trust ends and there is a distribution of the corpus among the cestuis que trust. That is the way in which the trustees of the Boston Personal Property Trust have dealt with gains made by changes of investment of the securities of that trust. That is to say, the trustees have treated gains from sales of securities not as profits of a partnership organized to buy and sell stock for a profit, but as gains on a change made in the investments of a trust fund. * * *

There is nothing in the trust deed of the Boston Personal Property Trust which is in any way different from a trust under a will except that there are no limitations over and the interests of the cestuis que trust are represented by transferable and transmissible certificates.

Up to this time we have not alluded to the declaration in the indenture of trust here in question that it was the intention of the parties to it to create a trust and not a partnership. It is what the parties did that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did. * * *

In the Boston Personal Property Trust the property is the property of the trustees, to be managed for the benefit of the certificate holders, but to be managed by the trustees and not by the certificate holders. There is no association of or among the certificate holders. The rights of the certificate holders are limited to each receiving his share of the income of the trust investments during the continuance of the trust and his share of the corpus of the trust when the trust comes to an end. It is in every respect an investment trust and nothing more.

It follows (1) that the property held by the plaintiff as trustees of the Boston Personal Property Trust was not taxable as partnership property, and that in the petition brought by them against the city of Boston they are entitled to an abatement; and (2) that their property was taxable as property held in trust, the income of which was payable to another, and the taxes assessed by the assessors of the city of Waltham and by the assessors of the inhabitants of Milton and of Brookline were properly assessed, and that the petitions against those municipalities should be dismissed.

It is so ordered.

CHAPTER II

RELATIONS OF THE PARTNERS BETWEEN THEMSELVES

Section

1. Partner's Interest in Specific Partnership Property.
2. What Constitutes Partnership Property.
3. What Constitutes Partnership Capital.
4. Acquisition and Transfer of Partnership Realty.
5. Partnership Name and Good Will.
6. Partner's Interest in the Partnership.
7. Sharing of Profits and Losses.
8. Partner's Right to Repayment of Contributions.
9. Partner's Right of Indemnity.
10. Partner's Right to an Accounting.
11. Fiduciary Relation of Partners.
12. Partner's Right to Participate in Management.
13. Partner's Right to Information.
14. Partner's Right to Remuneration for Services.

SECTION 1.—PARTNER'S INTEREST IN SPECIFIC PARTNERSHIP PROPERTY

Uniform Partnership Act, Section 24. The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

Uniform Partnership Act, Section 25. (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.[1]

[1] *Lewis' Note to Section 25(1).*—One of the present principal difficulties in the administration of the law of partnerships arises out of the difficulty of determining the exact nature of the rights of a partner in specific partnership property. That the partners are co-owners of partnership property is clear; but the legal incidents attached to the right of each partner as co-owner are not clear. When the English courts in the seventeenth century first began to discuss the legal incidents of this co-ownership, they were already familiar with two other kinds of co-ownership joint tenancy and tenancy in common. In joint tenancy, on the death of one owner his right in the property passes to the other co-owners. This is known as the right of survivorship. The incident of survivorship fits in with the the necessities of partnership. On the death of a partner, the other partners, and not the executors of the deceased partner, should have a right to wind up partnership affairs. See clause (d), infra. The early courts, therefore, declared that partners were joint tenants of partnership property; the consequence being that all the other legal incidents of joint tenancy were applied to partnership co-ownership. Many of these incidents, however, do not apply to the necessities of the partnership relation and produce most inequitable results. This is not to be wondered at, because the legal incidents of joint tenancy grew out of a co-ownership of land not held for the purposes of business. The attempt of our courts to escape the inequitable results of applying the legal incidents of joint tenancy to partnership has produced very great confusion. Practically this confusion has had more unfortunate effect on substantive rights when the separate creditors of a partner attempt to attach and sell specific partnership property than when a partner attempts to assign specific partnership property not for a partnership purpose, but for his own purposes.

The Commissioners, however, believe that the proper way to end the con-

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property, for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.[2]

fusion, which has arisen out of the attempt to treat partners as joint tenants, is to recognize the fact that the rights of a partner as co-owner with his partners of specific partnership property should depend on the necessities of the partnership relation. In short, that the legal incidents of the tenancy in partnership are not necessarily those of any other co-ownership.

In the clauses of this section these incidents of tenancy in partnership are stated with several practical results of value. In the first place, the law is greatly simplified in expression. In the second place, the danger of the courts reaching an inequitable conclusion by refusing to modify the results of applying the legal incidents of joint tenancy to the partnership relation is done way with. Finally, ground is laid for the simplification of a procedure in those cases where the separate creditor desires to secure satisfaction out of his debtor's interest in the partnership. Compare clause (c) with section (1).

[2] *Lewis' Note to Section 25 (2b).*—Clause (b) asserts that the right of a partner as co-owner in specific partnership property is not separately assignable. This peculiarity of tenancy in partnership is a necessary consequence of the partnership relation. If A. and B. are partners, and A. attempts to assign all his right in partnership property, say, a particular chattel, to C., and the law recognizes the possibility of such a transfer, C. would pro tanto become a partner with B.; for the rights of A. in the chattel are to possess the chattel for a partnership purpose. But partnership is a voluntary relation. B. cannot have a partner thrust upon him by A., without his (B.'s) consent. A. cannot confer on C. his (A.'s) right to possess and deal with the chattel for a partnership purpose. Neither can he confer any other rights which he has in the property. A partner has a beneficial interest in partnership property considered as a whole. As profits accrue, he has a right to be paid his proportion, and on the winding up of the business, after the obligations due third persons have been met, he has a right to be paid in cash his share of what remains of the partnership property. These rights, considered as a whole, are his interest in the partnership; and this beneficial interest he may assign, in whole or fractional part, as is indicated in section 27, infra. In a sense, each partner, having thus a beneficial interest in the partnership property considered as a whole, has a beneficial interest in each part, and such beneficial interest might be regarded as assignable, if it were not impossible, except by purely arbitrary and artificial rules, to measure a partner's beneficial interest in a specific chattel belonging to the partnership, or any other specific portion of partnership property.

A single illustration will make clear the impossibility of determining a partner's beneficial interest in any single piece of partnership property. Let us suppose A. and B. are partners. The value of partnership property is $100,000; the liabilities amount to $50,000. A. has contributed $15,000, and has a three-fourths interest in the profits; B., $10,000, and has a one-fourth interest in the profits. A. attempts to assign his interest in certain definite chattels belonging to the partnership; the value of these chattels being $5,000. The chattels themselves must be still used for partnership purposes. On dissolution, if still part of the partnership property, they must be sold. If A. conveyed anything, it was not a right in these chattels, but in a fractional part of his interest in the partnership. But how is it to be determined what fractional part of his interest in the partnership A. intended to assign? Did he intend to give B. a lien for $5,000 on his interest, or a lien on his interest for three-fourths—his share of the profits—of $5,000? Or did he intend to give him a lien on his interest in the partnership, which in amount should bear the same proportion to the total value of the chattel, $5,000, as the amount which he would receive should the partnership be

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the

liquidated, bears to the total of the present partnership property? It is impossible to answer these questions. If the assigning partner did not intend to dissolve the partnership, it is even impossible to analyze the possible intentions. Of course, in practice, a partner who assigns his "interest in particular partnership chattels" has only the vaguest notion of what he intends.

Clause (b) not only states a principle theoretically sound, it expresses almost the unbroken current of authority, if we confine our investigation to cases relating to attempted voluntary assignments, as distinguished from involuntary assignments, the result of adverse proceedings by a separate creditor of a partner.

Thus in Cayton v. Hardy, 27 Mo. 536 (1858), two were partners in a farm. One, without the consent of the other, sold two yoke of oxen, the property of the partnership, used in the work of the farm. He delivered the oxen to the purchaser. The co-partner brought an action against the purchaser and recovered possession. In Drake v. Thyng, 37 Ark. 228 (1881), the co-partners, after an assignment by one of his interest in a partnership chattel, recovered possession by proceedings in equity, and in McNair v. Wilcox, 121 Pa. 437, 15 Atl. 575, 6 Am. St. Rep. 799 (1888), the co-partners recovered in an action of trover and conversion against a purchaser who refused to return the property. In Freeman v. Abramson, 30 Misc. Rep. 101, 61 N. Y. Supp. 839 (1899), the court held that a partner who had "assigned the partnership stock" was a necessary party in a suit for the replevin of the goods brought by the other partners, as the assignment did not deprive the assignee of any interest in the property. These cases are direct authority for the proposition that the attempted assignment of a partnership chattel by a partner, or of his interest in the chattel, does not make the purchaser and the other partners joint tenants or tenants in common of the chattel, for one joint tenant or one tenant in common cannot recover possession from his cotenant.

An assignment, by way of mortgage, of specific partnership property, the assignment not being an act within the power of the partner creating the mortgage, confers no rights of possession on the mortgagee. Wilcox v. Jackson, 7 Colo. 521, 4 Pac. 966 (1884). Nor can such mortgagee prevent the property from being applied to the payment of partnership debts, though thereby all the mortgagee's rights, if any, are destroyed. McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338 (1898); Osborne v. Barge, 29 Fed. 725 (C. C. N. D. Iowa, 1887). There are, indeed, at least two cases which have regarded the partner assigning by way of mortgage, his interest in specific partnership property as mortgaging something. Arnold v Steveson, 2 Nev. 234 (1866); Sutlive v. Jones, 61 Ga. 676 (1878). But in neither case did the court indicate how the value of the interest of the partner could be determined.

After an attempted assignment by a partner, invalid as against his co-partner, of all the partnership property, it has been held that both partners, as partners, have an insurable interest in the property. Kimball v. Hamilton Fire Ins. Co., 21 N. Y. Super. Ct. 495 (1861).

Of course, an attempted assignment of all the partnership property, void as an assignment of the rights of either of the partners in the property, or an attempted assignment by one partner of his rights in all the partnership property may be regarded as a valid assignment of the partner's interest in the partnership. For instance, in Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522 (1820), the entire property of the partnership was the brig Phœnix and her cargo. One partner assigned "all his estate real and personal," according to a schedule annexed to the deed of assignment, the schedule including the brig Phœnix and her cargo. Chancellor Kent regarded the deed as assigning the partner's interest in the partnership. Whatever the merits of this decision, it is not authority for the proposition that a partner's right in one or more of the chattels of the partnership may be separately assigned. It merely stands for the proposition that a particular act—the attempted assignment of the partnership property—was, under the circumstances of that case, an assignment, not of the chattels, the brig and her cargo, but of the interest of the assignor in the partnership. Compare Horton's Appeal, 13 Pa. 67 (1850). In Miller v. Brigham, 50 Cal. 615 (1875), A. and B. were partners. A. "sold and conveyed" to C. "all his (A.'s) one undivided one-half inter-

partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a

est in the property." The court was of the opinion, though the question was not directly before them, that A. had assigned to C. his interest in the partnership. The case does decide that C. had no right to possess any of the partnership property.

Against this uniform current of authority we know of only one case where the voluntary assignment by a partner of a chattel belonging to a partnership, not being valid as a collective assignment of the rights of all the partners in the property, nevertheless vested rights in the chattels in the assignee. The case is Blaker v. Sands, 29 Kan. 551 (1883). A. and B. were partners; the business being the improvement of a flock of sheep. In the temporary absence of B., A. sold and delivered all the sheep to C. As the partnership was for the improvement, not for the sale of the sheep, their sale was beyond the scope of A. as partner. A. died, and B. brought an action against C. for the possession of the sheep. The trial court refused to admit C.'s offer of the bill of sale of the sheep, and a verdict in favor of B. was given. On appeal a new trial was awarded on the theory that, while C.'s assignment did not transfer the rights of B. in the sheep, it made B. and C. tenants in common, and therefore the bill of sale was a defence to B.'s action, and should have been admitted in evidence. The practical result of the decision was to deny to the surviving partner the right to obtain possession of partnership property, though, of course, he was liable for all the partnership debts. The adoption of clause (b) as drafted would make such a decision impossible.

It will be noted that this clause deals with what may be called the quality of assignability. It asserts that the right in specific partnership property is assignable collectively with the rights of the other partners; or, to put the matter in another way, it is possible to assign the rights of all the partners—the rights of the partnership—in partnership property, but it is not possible to assign separately the right of an individual partner.

It is important to note that the clause does not deal with the person or persons who may make an assignment of partnership property, or with the acts necessary to a conveyance of title. Indeed, the act as a whole, except in the case of a conveyance of land belonging to a partnership (see section 11, paragraphs 2, 3, 4, 5, 6), does not attempt to deal with any question pertaining to the transfer of title. The act, however, does deal in section 9 (1) with the authority of a partner to bind the partnership. Clause (b) asserts that partnership property is assignable, while section 9 (1) indicates when a partner has authority to make an assignment of partnership property; but neither tells us what the partner, in view of what we may call the rules of conveyancing, must do in order to transfer the title to a stranger, or even whether, in view of those rules, it is possible for him, acting alone, to transfer title. For instance, A. and B. are partners in the retail dry goods business. In the course of the business A. sells and delivers to C. part of the stock in trade. Clause (b) indicates that the rights of A. and B. in the goods are collectively assignable; section 11 (1) that A. had the authority to make the sale and deliver the goods. But whether a good title has, by the sale and delivery, been vested in C., is a question pertaining to the transfer of title to chattels. Delivery passes the title of the owner, when the delivery is by the owner or with his consent. C., therefore, in the case put, obtains a good title. It is no part of the business of a Partnership Act however, to deal with such a question, unless, as in the case of land, it is considered desirable to introduce a new method of transfer of title, or to make clear confusions in the law which confusions exist only in cases connected with property held by a partnership. In all other cases, as in the illustration given, the requirements of a partnership act are satisfied if the co-ownership of partnership property is stated, the collective assignability of the rights of all the partners emphasized, and the extent of the agency of the partner to act for his co-partners indicated.

The importance of seeing clearly the exact scope of clause (b) warrants two additional illustrations: If A., in the case above put, instead of selling and delivering part of the stock, should attempt to sell and should deliver a counter or table on which the goods were sold, would the purchaser obtain a good title? Clause (b) does not answer this question. It merely states that, the table being partnership property, the rights of all the partners in it are

deceased partner, cannot claim any right under the homestead or exemption laws.[3]

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

subject to collective assignment. This is what A. has attempted to do. But the clause does not tell us whether A. had, under the circumstances, power to make the assignment, or whether, having the power he has done so. Neither does section 11 (1) answer either of these questions. Section 11 (1) tells us that A. has, under the circumstances, no authority to bind the partners, as the act is not an act for apparently carrying on in the usual way the business of the partnership. But whether A. has the power to make the conveyance depends on the law of transfer of title to chattels—a subject beyond the scope of the act. Under ordinary circumstances, C. would obtain no title to B.'s rights, as it is a fundamental rule pertaining to the transfer of titles to chattels that the right of the true owner is not transferred by the sale and delivery of an agent in possession, unless the owner has done something to clothe the agent with the apparent power of sale, the delivery of the chattel by the owner to the agent or bailee not being considered such an act.

Finally, suppose A. and B. are in partnership, the business of the partnership being the buying and selling of land. The title to a particular tract is in A. and B. A. sells X to C, giving C. a deed signed by A., but not by B. The land being partnership property, the rights of A. and B. are collectively assignable. A. has attempted to make such an assignment. The business of the partnership being "trading in land," the sale was an act which the partner had authority to do. But whether the deed signed by one partner only in his own name conveyed to B. title is again a question of conveyancing, and normally outside the province of a Partnership Act. In this case, however, section 11 (4) does deal with the transfer of the equitable title, declaring that it, under the circumstances, vested in C.

[3] *Lewis' Note to Section 25* (c).—Compare this clause with section 28(1).

The first sentence in this clause is similar to section 23 (1) of the English act. It is a logical consequence of clause (b). If a partner's right in specific partnership property is not assignable by voluntary assignment for a separate purpose of the assigning partner, his separate creditors should not be able to force an involuntary assignment. The beneficial rights of the separate creditors of a partner in partnership property should be no greater than the beneficial rights of their debtor. The confusion of the subject of this clause in the decisions is well known to all students of the law of partnership. For all practical purposes, while the reasoning of the courts is more or less conflicting, the net result of the remedial law, as worked out in law and at equity, is that a judgment creditor of a separate partner may attach and sell his debtor's interest in partnership property as that interest is defined in section 26 (see section 28); but he cannot sell, so as to affect in any way the rights of the partnership, specific partnership property. See Heydon v. Heydon, 1 Salk. 392 (1693); Eddie v. Davidson, 2 Douglas 650 (1781); Taylor v. Fields, 4 Ves. 396 (1799); Lord v. Baldwin, 23 Mass. (6 Pick.) 348 (1828); Doner v. Stauffer, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370 (1829) Tappan v. Blaisdell, 5 N. H. 190 (1830); Phillips v. Cook, 24 Wend. (N. Y.) 389 (1840); Washburn v. Bank of Bellows Falls, 19 Vt. 278 (1847); Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390 (1861); Cooper's Appeal, 26 Pa. 262 (1856); Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683 (1873); Case v. Beauregard, 99 U. S. 119, 25 L. Ed. 370 (1878).

The second sentence in the paragraph apparently expresses the weight of authority. See Burdick, 111-113, 299. A partner has a right to claim exemption, if his interest in the partnership is attached for his separate debts. See section 28(3), infra.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

R. A. MYLES & CO. v. A. D. DAVIS PACKING CO. et al.

(Court of Appeals of Alabama, 1919. 17 Ala. App. 85, 81 South. 863.)

Action by R. A. Myles & Co. against the A. D. Davis Packing Company and another. Judgment of nonsuit, and plaintiffs appeal. Reversed and remanded.

BRICKEN, J. The appellants, R. A. Myles, Mrs. R. A. Myles, and Erwin S. Myles, conducted a meat market under the style of "R. A. Myles & Co." A judgment was recovered in the law and equity court of Mobile county by the A. D. Davis Packing Company against R. A. Myles individually. An execution was issued upon this judgment and placed in the hands of the sheriff of Mobile county. The sheriff levied upon ten cows as the property of the defendant in execution, took possession of the same, and sold them in satisfaction of the execution. Prior to the sale of this property, the sheriff received an indemnifying bond, executed by the A. D. Davis Packing Company as principal and the Fidelity & Deposit Company of Maryland as surety.

The defendants in this suit were the principal and surety in the indemnifying bond. The complaint contained six counts. Each count is based upon the theory that the property levied upon was partnership property, and that the action of the sheriff in levying upon, taking possession of, and selling such property for the satisfaction of the individual debt of one of the partners was wrongful. Demurrers were interposed to the complaint, were sustained by the court, and appellants took a nonsuit.

The main and determining question raised by this record is whether the levy upon and sale of this property by the sheriff was wrongful. Each member of a copartnership is the owner of an undivided interest in the chattels and goods of such partnership. This interest under the decision in this state, is subject to seizure and sale under an execution in the hands of a sheriff upon a judgment rendered against one of the individual members of the partnership. * * *

The contention of appellants that this rule is to be applied only when all of the tangible property of a partnership has been levied upon to satisfy a judgment against one of the members of the firm is, in our opinion, without merit, and is opposed to the authorities above cited. Section 4106 of the Code of 1907 in no way changes this rule of law, and does nothing more than clothe the sheriff with the right of taking or not taking actual possession of the property levied upon, as he may see fit. * * *

The action of the court in sustaining appellee's demurrer was without error.

On Rehearing.

SAMFORD, J. The original opinion in this case expresses the view of BRICKEN, J., who still adheres to the principles there announced. The Presiding Judge and the writer, after a further consideration of the case, are of the opinion that the application for rehearing should be granted and the judgment reversed and the cause remanded for the following reasons:

It is undoubtedly the law of this state that under a fieri facias against the goods of one member of a partnership his interest in the tangible assets of the partnership may be levied on and sold, but only such interest as he has; the right acquired by such purchase is the right of the partner whose interest was sold and only his right, subject to all the liens, incumbrances, or infirmities affecting it as assets of the partnership. It is not a separate and exclusive right to any part or portion of it, or any right of any kind to any one part rather than to any other part, or any other right or interest than was held by the execution debtor as a member of the partnership. The ownership of each partner is subject to the ownership of all the other partners, and all the partners together hold the property subject to the right of the partnership to apply all of its funds to the payment of the partnership debts. The real ownership of all the chattels is vested in the firm, and the interest of each partner is merely a right to share in the profits of the business during its continuance, or in a division of the property upon dissolution after all the partnership obligations have been satisfied. No one partner has a separate ownership of or right to possess exclusively any part of the partnership assets, and a successor to his interest by purchase at an execution sale can acquire no greater interest than he has. * * *

And while the interest of a partner in the partnership may be levied upon and sold, if the sheriff, in total disregard and denial of the rights of the partnership, levies upon and sells the partnership property as the property of one of the individual partners under an execution against such member, the sheriff is a trespasser as to the partnership, and his act is a conversion of the partnership property. * * * And the partnership can maintain an action against him to recover damages resulting from such conversion. * * *

Such a sale being illegal and rendering the officer a trespasser ab initio, the action may properly be brought in the name of the partners, and they will be entitled to recover full value of the goods sold. * * * At common law the ownership of partnership property, as well as partnership obligations, were joint only, each partner holding his interest for the joint benefit of the other members and for the firm, the firm being all of the partners, and hence the process and pleadings in every action require the disclosure of the first name and surname of all the parties thereto for the purpose of rendering judicial proceedings, certain and conclusive as between the parties and to give full force and effect to the doctrine of res judicata. * * *

The rulings of the trial court were not in accord with the foregoing views. The application for rehearing is granted, the judgment of affirmance is set aside, the judgment of the trial court is reversed, and the cause is remanded. * * *

DARROW et al. v. CALKINS et al.

(Court of Appeals of New York, 1897. 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637.)

Calkins and Darrow, the plaintiffs' intestate, were partners, owning certain lands. Darrow executed a deed of his interest in the partnership real estate, conveying it to Calkins to hold, to control, and manage as part of the partnership property, and to pay over to the grantor what should be due him. Plaintiffs seek partition of the lands. The con-

tention of plaintiffs is that their property is realty; the defendant argues that the act of plaintiffs' intestate converted the land of Darrow into personalty, so that a suit for partition cannot be maintained. An interlocutory (temporary) judgment for plaintiffs in the trial court was vacated. Plaintiffs appealed.

ANDREWS, C. J. * * * The legal nature and incidents of land purchased by a co-partnership with co-partnership funds is a subject upon which great diversity of opinion exists in different jurisdictions. The English rule, after many fluctuations, has, as we understand the cases, come to be that lands so purchased, whether purchased for or used for partnership purposes or not, provided only that they were intended by the partners to constitute a part of the partnership property, become ipso facto, in the view of a court of equity, converted into personalty for all purposes, as well for the purpose of the adjustment of the partnership debts and the claims of the partners inter se as for the purpose of determining the succession as between the personal representatives of a deceased partner and the heir at law. * * * This doctrine had its origin in England, and is said to have grown out of the peculiar law of inheritance there, and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance, and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor. * * * Lindley, in his work on Partnership, bases the rule on the nature of the interest of each partner in the partnership property. He says (page 687): "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal, and not real, estate, unless, indeed, such conversion is inconsistent with the agreement between the parties." The concluding words of the paragraph quoted concede that the intention of the parties will prevent a conversion where that intention is manifested.

The general doctrine of "out and out" conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are assets for the payment of all debts, and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest, seems hardly sufficient to justify a fiction which should deprive real estate of a partnership of its descendible quality, when it is admitted on all hands that partnership real estate, if the necessity arises, is first subject to be appropriated in equity to the discharge of partnership obligations and the adjustment of the equities between the parties.

The clear current of the American decisions supports the rule that, in the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves, and also between a surviving partner and the real and personal representatives of a deceased partner, except that each

share is impressed with a trust implied by law in favor of the other partner that, so far as is necessary, it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes the character of the property is, in equity, deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion, and then only to the extent required.

The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation. It would be useless to review in detail the authorities which seem to us to maintain what has been called the "American rule." * * *

If, as sometimes happens, the title to partnership real estate is in the name of one of the partners only, on the death of the other partner his equitable title descends to his heirs or goes to his devisees, but subject to the primary claims growing out of the partnership relation. * * * But the general principles to which we have adverted are those applied by courts of equity in determining the character and incidents of partnership real estate, in the absence of any agreement, express or implied, between the partners on the subject. It is, however, generally conceded that the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted pro tanto for the purpose of partnership equities, may be controlled by the express or implied agreement of the partners themselves, and that where, by such agreement, it appears that it was the intention of the partners that the lands should be treated and administered as personalty for all purposes, effect will be given thereto. In respect to real estate purchased for partnership purposes with partnership funds, and used in the prosecution of the partnership business, the English rule of "out and out" conversion may be regarded as properly applied on the ground of intention, even in jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances, and where no specific intention appeared. The investment of partnership funds in lands and chattels for the purpose of a partnership business, the fact that the two species of property are in most cases of this kind so commingled that they cannot be separated without impairing the value of each, has been deemed to justify the inference that under such circumstances the lands as well as the chattels were intended by the partners to constitute a part of the partnership stock, and that both together should take the character of personalty for all purposes; and Judge Denio, in Collumb v. Read, 24 N. Y. 505, expressed the opinion that to this extent the English rule of conversion prevailed here. That paramount con-

sideration should be given to the intention of the partners when ascertained, is conceded by most of the cases. * * *

The legal title to the real estate which the heirs of Edwin J. Darrow asked to have partitioned in this action was vested in Daniel O. Calkins at the time of the death of Darrow, in November, 1864. The plaintiffs, on the death of their father, took no legal estate in the lands. The legal estate which, prior to the 25th day of September, 1861, Darrow held in the undivided one-half of the premises, was by the deed executed by him on that day conveyed to Calkins. That this was the effect of the deed, we have no doubt. The deed is in terms full and ample to convey in fee the interest of Darrow to his grantee. It was coupled, however, with the declaration on the face of the deed that it was to be held by Calkins as partnership property, and the deed contained a power of management and sale, and this was followed by the significant clause, "And to pay over to the said Darrow, his heirs and assigns, or other legal representatives, such portion thereof as shall, at the closing of the partnership business of said Calkins and Darrow, belong to or be due or coming to said Darrow, his heirs, executors, assigns, or other legal representatives."

The suggestion that the deed attempted to create an expresss trust in lands, not within the enumerated trusts permitted by section 55 of our statute of "Uses and Trusts" (1 Rev. St. 728), and was, therefore, void as a conveyance, is not well founded. It recognized a pre-existing trust imposed upon the lands, implied by law, and arising out of the partnership relation, and that the trust was to continue notwithstanding the conveyance of the legal title. This was not, we think, in contravention of the statute which contemplated the creation of original trusts, and not the abrogation of existing trusts resulting from or implied by operation of law; nor did it render inoperative the subsequent recognition of such an existing trust in connection with a conveyance of the legal title. We think the legal title to the one-half part of the land passed by Darrow's deed, subject to the performance by Calkins of the trust therein declared. The important question is whether it operated to convert the partnership lands into personalty, and to change the interest of Darrow, or his representatives, from an interest in the land as realty into an interest in the proceeds of the lands, after a sale thereof by Calkins under the power contained in the deed.

We are of opinion that it was the intention of the partners, disclosed on the face of the deed and by the surrounding circumstances, to substitute in place of Darrow's prior interest in the lands, as such, an interest in him and his representatives in any surplus which should remain after a sale by Calkins, and the adjustment of the partnership affairs. It is not necessary to decide whether the surplus, when ascertained, would go to the real or personal representatives of Darrow. As between Darrow and his representatives and Calkins and his representatives, the deed operated as a conversion of the lands into personalty. The personal representatives of Darrow were entitled to enforce, in an action for an accounting and an adjustment of the partnership affairs, the claims of Darrow's estate. This was the purpose of the action which resulted in the decree of October 31, 1867, and we think that decree was binding upon the plaintiffs, not on the ground that they were parties, but for the reason that, no controversy existing as to the original character of the property as partnership property, or as to the subsequent dealing between the partners in respect to it, the heirs

of Darrow were not necessary parties to a final adjustment of the partnership affairs, including the interest of the Darrow estate growing out of his relation to the lands under the deed of September 25, 1861. It was open to the plaintiffs, on an accounting by the administratrix of the Darrow estate, to claim that the $14,000 received by her under the decree in the action for an accounting should be regarded as real, and not personal, assets, and that they were entitled to it in their character as heirs, and not as distributees.

We think the order of the court below reversing the judgment at special term was correct, and it should, therefore, be affirmed, and judgment absolute entered for the defendants on the stipulation, with costs. All concur. Order affirmed.

MENAGH v. WHITWELL

(Court of Appeals of New York. 1873. 52 N. Y. 146, 11 Am. Rep. 683.)

Appeal from a judgment in favor of the plaintiff entered upon the report of a referee. This was an action for converting machinery, utensils, lumber, and other chattels formerly belonging to the firm of J. C. Smith & Co. and appertaining to a yeast factory operated by that firm.

From the 17th of August to the 22d day of December, 1866, the firm consisted of John C. Smith, Hollister E. Goodwin, John Wride, Marietta Huntington, and William B. Rubert, each being interested to the extent of one-fifth. The firm as thus constituted contracted debts to the Geneva National Bank upon which judgments were afterward recovered against the above-named parties, viz., one judgment for $1,403.83, and one for $237.53, both recovered May 24, 1867. The larger judgment embraced claims to the amount of $330 which accrued after the withdrawal of John Wride from the firm. Executions were issued on these judgments on the 25th day of May, 1867, and placed in the hands of the defendant Ringer, who was deputy sheriff of Ontario county, and by virtue of those executions he levied upon the property on the 19th day of July, 1867, and sold it on the 29th of July, 1867. The defendant Whitwell was sheriff, and this action was brought against him and his deputy for that levy and sale. The plaintiff recovered four-fifths of the value of the property.

The plaintiff makes title to this four-fifths as follows: On the 22d of December, 1866, John Wride assigned all his interest in the property and business of the firm to John C. Smith, who agreed to pay the firm debts, and on the 4th of February, 1867, Marietta Huntington assigned all her interest in the property of the firm to said John C. Smith, who assumed her place in the firm. After these transfers the same business was carried on by the remaining partners under the same firm name. The referee finds that both of these transfers were made with the consent of all the other members of the firm, and in good faith, without intent to defraud the creditors of the firm.

On the 28th of February, 1867, the firm then consisting of John C. Smith, William B. Rubert, and Hollister E. Goodwin, and Smith's interest being then three-fifths, he gave to the plaintiff a chattel mortgage upon his undivided three-fifths interest in the yeast factory, property, accounts, and other choses in action of the firm to secure his individual debt to the plaintiff of $2,400, payable in installments in two, five, and seven months, with power to take posses-

sion and sell in case of default, or whenever she should deem herself unsafe before default. The referee finds that this amount was justly due the plaintiff for money loaned by her to Smith, which he had used for the firm and for which it was indebted to him, and that the mortgage was given in good faith, with the consent of all the persons composing the firm, and without intent to defraud creditors. There is no express finding in respect to the solvency of the firm at the time of the giving of this mortgage.

On the 2d of February, 1867, William B. Rubert had given a like chattel mortgage on his one-fifth interest to Samuel E. Rubert to secure an individual debt of $500, payable in five days. The referee finds that this was a just debt for money loaned, and that the mortgage was executed in good faith to secure the debt, and without any fraudulent intent. It does not appear that any of the other partners consented to this mortgage.

On the 10th day of May, 1867, the plaintiff and Samuel E. Rubert took possession of the property mentioned in their respective mortgages, and after advertisement it was sold on the 18th day of May, 1867; the three-fifths interest of John C. Smith being purchased by the plaintiff for $1,000, and the one-fifth interest of William B. Rubert being bought in by Samuel E. Rubert for an amount less than his mortgage. On the same day John C. Smith sold and delivered to the plaintiff all his interest in a quantity of lumber, boxes and other material then on the premises, and belonging to the firm, for $200, which was applied in part payment of the plaintiff's mortgage. The referee finds that this sale was in good faith and without any fraudulent intent. This lumber, etc., was levied upon and sold by the defendants and is embraced in the plaintiff's recovery. On the same day on which the plaintiff and Samuel E. Rubert took possession under their mortgages, viz., the 10th of May, 1867, Hollister E. Goodwin, the only remaining member of the firm, transferred his undivided one-fifth interest in the property and business of the firm to Mary B. Goodwin, who still owns the same, but never became a member of the firm. The referee has not found that there was any consideration for this transfer, or what was its object, or that it was made in good faith.

The only findings in respect to the solvency of the firm at the times of these several transactions are that, on the 22d of December, 1866, when John Wride withdrew from the firm, transferring his interest to John C. Smith, the firm was somewhat embarrassed, but was not known or believed to be insolvent by either Wride or Smith, and that on the 4th of February, 1867, when Marietta Huntington transferred her interest, the financial affairs of the firm were about the same as they were on the 22d of December, 1866; that the firm was largely indebted and somewhat embarrassed; that the value of its property and assets depended in part upon the continuance of its business, and, in case such business was continued and properly managed, the property and assets of the firm were more than sufficient to pay its debts. The referee further finds that at the time of the seizure and levy by the defendants the property was in the possession of the plaintiff and Samuel E. Rubert, and was of the value of $2,150; that the plaintiff was the owner of an undivided three-fifths, and Samuel E. Rubert of one undivided fifth part thereof; that Mary B. Goodwin was the owner of the other undivided

fifth part thereof; and that, on the 15th of August, 1867, and before the commencement of this action, the said Samuel duly assigned to the plaintiff all his right to the property and cause of action against the defendants for taking possession thereof.

As conclusion of law he finds that at the time of the levy neither of the defendants in the execution had any leviable interest in the property, but that it belonged, four-fifths to the plaintiff, and one-fifth to Mary B. Goodwin; that the bank had no lien thereon; and that the plaintiff was entitled to recover four-fifths of the value, amounting to $1,720, with interest from the time of the conversion.

RAPALLO, J. The mortgages executed by John C. Smith and William P. Rubert appear to have been regarded by the learned referee as transferring an undivided four-fifths of the corpus of the partnership property therein described. He has found, as to the mortgage from Smith, that it was executed and delivered with the assent of the other members of the firm. This mortgage, if such be its true construction, having been given to secure the individual debt of the partner, even if effectual as to the firm, by reason of the concurrence of all the partners giving it, would be a fraudulent misapplication of the partnership property, and void as to the creditors of the firm, under the principle of the cases of Ransom v. Vandeventer, 41 Barb, 307, and Wilson v. Robertson, 21 N. Y. 587, unless the firm were solvent at the time the mortgage was given, and sufficient property would remain, over and above that devoted by that instrument to the payment of the individual debt, to pay the debts of the firm. The Supreme Court have considered that the findings of the referee fail to disclose any insolvency, but, on the contrary, establish solvency of the firm at the time the mortgages were given. We cannot concur in this view of the effect of the findings, but think that the facts found show that the firm was insolvent when the mortgages were given, and, if there were any doubt upon that point, they clearly establish that the diversion of four-fifths of its properties to the individual debts of two of the partners would make it insolvent.

According to these findings the firm was, in February, 1867, and had been from December, 1866, largely indebted and embarrassed and the value of its property, and its consequent ability to pay its debts, depended in part upon the continuance and proper management of its business. The mortgages were given on the 2d and 28th of February, 1867. If they were intended to be liens upon the corpus of the property, as they have been treated by the referee, and not merely liens upon the surplus which should belong to the partners, respectively, after the payment of the firm debts, it is evident, from the facts stated as existing at the time, as well as from the result, that their enforcement would prevent the firm creditors from collecting their demands out of the firm property, and that, under the principle of the cases cited, they were fraudulent and void as to such creditors. If so, the mortgagees, by purchasing at the sale under the mortgages, acquired no valid title as against such creditors, and the plaintiff was, consequently, not entitled to recover.

Assuming, however, that the mortgages were intended to pass merely the individual interests of the mortgaging partners in the common stock, and for that reason were not fraudulent as to the firm creditors, then it becomes necessary to consider their legal effect upon the rights of creditors of the firm. It is clear that the re-

maining partner was entitled to the control of the firm property so long as he retained his interest, and to apply it to the firm debts, and that the mortgagees acquired only a right to the surplus, if any, which would be found to belong to the mortgagors on the settlement of the accounts. And so long as any of the partners had this dominion over the firm property it can hardly be questioned that it was subject to levy on execution at the suit of a firm creditor. * * *

But the point upon which the judgment was sustained in the Supreme Court, at General Term, was that after the execution of the mortgages H. E. Goodwin, the only remaining partner, made a separate transfer to a third party of his individual interest in the partnership properties, and on this ground it was held that when the execution was levied none of the defendants in the execution had any leviable interest in the property levied upon, and it was further held that the plaintiff, who had purchased the interest of S. E. Rubert under his mortgage, was entitled, by virtue of the two mortgages and of the purchase at the sale under them, to recover the value of four-fifths of the corpus of the partnership property levied upon by the defendants, without regard to the partnership debts.

This position is not without authority in its support. It is founded upon the theory that the separate transfers of the individual interests of all the partners divested the title of the firm; that firm creditors have no lien upon the partnership effects, and no direct right to compel their application to firm debts in preference to individual debts; that the right to compel this application is an equity vested in the partners themselves, and exists only as between each other; that so long as this equity exists in any of the partners the creditors have an equity to compel its enforcement between the partners, and may by this means obtain the application of the partnership properties to their demands, in preference to the individual debts or separate dispositions of any of the partners—in other words, "that the equities of the creditors can only be worked out through the equities of the partners." From these premises the conclusions have been drawn that, if such equities are waived or released by the partners themselves, the creditors lose them, and that a transfer of the individual interest of a partner in the firm property to a third person extinguishes the equity of the partner, and consequently that of the creditors, which is dependent upon it. This doctrine has been carried to the extent of holding that, if the individual interests of each of the members of a firm are successively sold under executions against such members, respectively, for their individual debts, the purchasers acquire the corpus of the property free from the copartnership debts, and the equities of the partners and partnership creditors are extinguished. Coover's Appeal, 29 Pa. 9, 70 Am. Dec. 149.

The injustice, and it may be said, the absurdities which result from such a view lead to an inquiry into its correctness. A firm may be perfectly solvent, though the members are individually insolvent, and yet in such a case the doctrine that the property of the firm is divested, and the equities of the partners and partnership creditors are extinguished, by separate transfers of the individual interests of all the partners, might result, not only in an appropriation of all the properties of the firm to the payment of the individual debts, to the

entire exclusion of the firm creditors, but to a most unjustifiable sacrifice and waste of such properties. For instance, suppose a firm to consist of three members, each having an equal interest, and to be possessed of assets to the amount of $300,000, and to owe debts to half of that amount, the interest of each partner, supposing their accounts between themselves to be even, is $50,000. The members of the firm are individually indebted. One of them sells his share, and receives for it $50,000, which is its actual value. The share of another of the partners is sold under execution, and brings its full value, $5,000. Thus far one partner remains, and he has an equity to have the firm debts paid, and those who have sold out are protected against those debts. The purchasers of the separate interests are entitled to the surplus only. The joint creditors still have their recourse against the partnership property, and the right to levy on such of it as is subject to sale on execution; but before any levy the remaining partner sells out his individual interest, or it is sold on execution. According to the doctrine applied in the present case, and maintained in the case of Coover's Appeal, supra, the firm property is by this last sale relieved from the partnership debts, the two shares first sold are at once changed from interests in the surplus to shares in the corpus of the property free from the debts, their value is doubled, and the fund which should have gone to pay the joint debts, is, without any consideration, appropriated by the transferees of the individual interests of the partners.

Such is, in substance, the operation performed in the present case. Assuming that the mortgages are intended to convey only separate interests of the mortgagors (which, as has been shown, is the only theory upon which they can escape being regarded as fraudulent), the mortgaged property was, at the time the mortgages were given, liable to be taken for the partnership debts. The mortgages were but a slender security, and their value dependent upon the firm debts being paid. This state of affirs continued so long as Hollister E. Goodwin retained his one-fifth interest in the firm. The firm property was legally under his dominion for the payment of firm debts; and the firm creditors, if they then had their execution, could have rightfully levied upon it, or availed themselves of Goodwin's equity as to any property which must be reached in that form. But on the 10th of May, 1867, Hollister E. Goodwin made a transfer of his interest in the property of the firm to one Mary B. Goodwin; and on the same day the plaintiff and Samuel E. Rubert took possession under their mortgages. The referee has not found what was the consideration or purpose of this assignment from Hollister E. to Mary B. Goodwin, nor has he expressly found that it was made in good faith. But the effect claimed for it is that, Hollister E. Goodwin being the only remaining partner, the transfer of his interest divested him of his dominion over the partnership property and of his equity to require the application of the partnership property to the payment of its debts, and that, as the partnership creditors could only reach the property through him, he, by this transfer or surrender of his rights, had cut off their access to it, and thrown it into the hands of the transferees of the individual partners, unincumbered by firm debts.

Waiving any question as to the bona fides of this transaction, the referee not having found it fraudulent, and treating the sale of Goodwin's interest as if it had been made under an execution against him,

we come back to the question whether the consequences claimed do legally follow from separate sales of the individual interests of the several partners. It would be a superfluous labor to trace the history of the changes which have, from time to time, taken place in the views of the courts respecting the nature of the interests of individual partners in the common stock of a firm, and the respective rights of separate and joint creditors; but it is sufficient to observe that they have resulted in a general recognition of the doctrine that as between a firm and its creditors the property is vested in the firm, and that no individual partner has an exclusive right to any part of the joint stock until the firm debts are paid and a balance of account is struck between him and his copartners, and the amount of his interest accurately ascertained.

The corpus of the effects is joint property, and neither partner separately has anything in that corpus; but the interest of each is only his share of what remains after the partnership debts are paid and accounts are taken. * * *

Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts. 3 Kent, Com. (11th Ed.) 76.

Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership effects, is sold, and it consists merely of the share of the surplus which shall remain after the payment of the debts and settlement of the accounts of the firm. 3 Kent, Com. (11th Ed.) 78, note "b."

No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken. * * *

No person deriving under a partner can be in a better condition than the partner himself. * * *

A partner has no right, by an assignment of his interest, to take from the creditors or other partners the right to have their claims against the partnership satisfied out of its property. A mortgage made by one partner of his undivided interest cannot avail against the creditors of the partnership who attach partnership property. * * *

These principles have been enunciated in a great number of cases, where some one at least of the partners retained his equity to have the firm debts paid, and the rights of the creditors to assets or proceeds, which have come under the control of a court of equity, have been worked out through the equity of that partner. But I find no case in which the consequences of transfers of the separate interests of all the partners to outside parties has been considered, except the case of Doner v. Stauffer, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370, and Coover's Appeal, supra. In neither of these cases is the point adjudicated, for in both cases the joint creditors intervened before the sale of the interest of the last remaining partner, and their right to priority was sustained, though the opinion of the court was expressed as to what the result would have been if all the individual interests had been first sold.

There is another class of cases in which the partnership effects have been held to be liberated from liability to be applied to partnership debts in preference to the separate debts of one partner; that is, where

a bona fide sale has been made by a retiring partner, in a solvent firm of two members, to his copartner, the latter assuming the debts. In such a case it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner, and that the partnership creditors are not entitled to any preference as against his individual creditors in case of his subsequent insolvency. Ex parte Ruffin, 6 Ves. 119; Dimon v. Hazard, 32 N. Y. 65. But in those cases the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the corpus of the joint property, and the exercise of that power, when free from fraud, divested the title of the firm as effectually as if they had united in a sale to a stranger. It remained subject to execution for firm debts so long as it continued in the hands of the purchasing partner. It is conceded that the creditors have no lien which would affect the title of a purchaser from the firm. But the question now is: What is the effect upon the title of the firm, as between it and its creditors, of transfers by the partners severally of their respective interests to third persons? Where the property remains in specie, and no act has been done by the firm to divest its title, but the partners have made separate transfers of their respective individual interests to different persons, is it still to be regarded, as to the firm creditors, as firm property, or has it become the absolute property of the several transferees of the interests of the individual partners?

It has been shown that no share in the corpus of the property passed by either of these transfers separately, but merely an interest in the surplus, and which should be ascertained on an accounting after payment of the firm debts. But it is claimed that, when all the partners have assigned, their interest in the property is divested, and their equity is destroyed, and therefore the property is released from the debts, and what was at the time of the assignment a share of a contingent surplus has been converted into a share of the corpus of the property. Is this position sound? When a partner sells his interest in a firm to a person other than his copartner, or it is sold on execution against him, does he thereby lose all equity to have the firm debts paid out of the assets?

When he sells to his copartner he relies upon his assumption of the partnership debts, and unless he stipulates for an application of the assets to that purpose he parts with all lien upon them. But when he sells to a stranger not liable for the debts, or his interest is sold on execution, is not the right to have the debts paid out of the property a right of indemnity personal to himself, and which does not pass by the sale? Could it be tolerated that the interest of a partner should be sold under execution against him, on which sale only the value of his interest in the surplus could be realized, and that the purchaser should be allowed to take the corpus of the property and leave him liable for the debts? If the legal effect of the transfer were set forth in the instrument, it would be seen that all the purchaser acquired was a right to an account and to the partner's share in the surplus after payment of debts, when ascertained, and that he had no right to that part of the property which was required for the payment of debts; that the sale was subject to the debts. 3 Kent, Com. 76–78. The partner whose share was sold would manifestly have an interest in the protection and appropriation of that part of the property in discharge of his own liability to the firm creditors.

I do not see how this right can be affected by the question whether

the separate interests of all or only one of the partners is thus sold. Each of the purchasers would acquire an interest merely in the surplus, and each partner whose interest was sold would have the right to indemnity against the firm debts by the application to such debts of so much of the property as might be necessary for the purpose. These debts must have been taken into consideration in fixing the price of the interest sold, and consequently allowed to the purchaser, and the partnership assets are the primary fund for their payment. The case differs materially from a sale by a retiring copartner to his copartner, who is personally liable for the debts directly to the creditors; but even such a sale is valid only when there is no insolvency at the time. To sell to an insolvent partner would be a clear fraud. How much more clearly apparent would be the injury to creditors by a sale to a person not liable for the debts, if such sale had the effect to relieve the property from them.

It can hardly be necessary, when the firm property remains in specie, and is tangible and capable of being levied upon, to resort to the equities of the partners in case there has been no transfer by the firm and the only adverse claimants are assignees of the individual interests of the several partners for their separate debts. The right of the firm creditor to levy on property thus situated can be sustained on two grounds. If the effect of any of the transfers is to divest the title of the firm, then, if effected by the acts of the partner, they are clearly fraudulent and void as to firm creditors, as is shown in the cases of Ransom v. Vandeventer, 41 Barb. 307, and Wilson v. Robertson, 21 N. Y. 587. An appropriation to the individual debt of one partner of any part of the firm property, even with the assent of his copartners, is illegal and void, provided the firm is not left with sufficient to pay its debts. How absurd it would be to hold that all of the partners, by making separate assignments of their respective shares in the firm property to their individual creditors, could effectually divest the firm of all its property and apply it to their individual debts, leaving nothing for the partnership creditors. But the simple solution of the question is to hold that the title of the firm, as between it and its creditors, to the corpus of its property, or at least to so much of it as is necessary for the debts, is not divested by these separate transfers to strangers.

As is stated by Prof. Parsons, in his work on Partnership (pages 356 to 362 [2d Ed.] c. 10, 1), a partnership, though neither a tenancy in common nor a corporation, has some of the attributes of both. The well-established rule which excludes creditors of the several partners from the partnership property until that has paid the debts of the partnership is derived from the acknowledgment that a partnership is a body by itself. In its relation to its creditors it is placed upon the basis of having its own creditors and possessing its own property, which it applies to the payment of its debts, and after this work is done there is a resolution of the body into its elements.

Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceedings against them individually with reference to their individual interests, should be held to affect the title of the firm, so as to preclude a creditor of the firm, having a judgment and execution, from levying upon the joint property. To hold that separate transfers of their individual shares by the several partners can convey a good title to the whole property

free from joint debts would be to return to the doctrine, long since exploded, that partners hold by moieties as tenants in common. In the present advanced stage of the law upon this subject, no established rule is violated by holding that the title of the firm, as between it and its creditors, cannot be divested by the acts of the partners severally, not in the business of the firm, nor by the separate creditors of members of the firm (further than such temporary interruption of the possession as may be necessary to enable the officers of the law to make an effectual sale of the interest of the debtor partner). This view does not recognize any lien of partnership creditors upon the firm property. The firm have power to dispose of it without regard to the creditors, provided the disposition be not fraudulent. But the individual members or their creditors ought not to have any such power, and all transfers made by them for individual purposes should be held inoperative upon the corpus of the property, so long as there are firm debts unpaid for which the property is required. As against firm creditors, no greater effect should be given to such transfers when made by all the partners separately than when made by a portion of them, but the property should be deemed to continue in the firm until its title has been divested by some act of the firm.

My conclusion is that, as between the firm of J. C. Smith & Co. and its creditors, the property levied upon by the defendants remained the property of the firm, and subject to levy on execution against it, notwithstanding the transfers by the several partners of their respective individual interests. * * *

SECTION 2.—WHAT CONSTITUTES PARTNERSHIP PROPERTY

Uniform Partnership Act, Section 8. (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property. (2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

ROBINSON BANK v. MILLER et al.

(Supreme Court of Illinois, 1894. 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883.)

MAGRUDER, J. * * * Whether real estate upon which a partnership transacts its business is firm property or the property of the individual members of the firm is oftentimes a difficult question to determine, and one upon which the authorities are not altogether uniform. The mere fact of the use of land by a firm does not make it partnership property. * * * Nor is real estate necessarily the individual property of the members of a firm because the title is held by one member, or by the several members in individual interests. * * * Whether real estate is partnership or individual property depends largely upon the intention of the partners. That intention may be expressed in the deed conveying the land, or in the articles of partnership; but when it is not so expressed the circumstances usually relied upon to determine the question are the ownership of the funds

paid for the land, the uses to which it is put, and the manner in which it is entered in the accounts upon the books of the firm. * * * Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and in such case it makes no difference, in a court of equity, whether the title is vested in all the partners, as tenants in common, or in one of them, or in a stranger. * * * If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary, and the statute of frauds has no application. * * *

In the case at bar the land was not purchased with partnership funds. * * * The evidence, however, does show that the property was bought for the purpose of being used in the milling business, and that after its purchase it was used for firm purposes, and that the firm gave its notes to pay for repairs, and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual property of the partners, holding as tenants in common? It cannot be said that the land is firm property, upon the theory of a resulting trust, because the money of the firm was not used to buy the property. Such a trust might exist in favor of the firm, regarding it as a person, if the partners had taken the legal title, and the firm had advanced the purchase money. The trust must arise at the time of the execution of the conveyance, and when the title vests in the grantee. Such could not have been the case here, under the facts stated. * * * In view of the fact that the land was bought with individual, and not partnership, funds, and was conveyed in undivided interests to the several partners, and in the absence of any agreement that it should be regarded as firm property, does the conduct of the parties in afterwards forming a partnership, and using the property for partnership purposes and repairing and improving the mill at the expense of the firm, make the land firm property, in a court of equity? A negative answer to this question is found in many of the authorities, as will be seen by reference to the following: Alexander v. Kimbro, 49 Miss. 529; Theriot v. Michel, 28 La. Ann. 107; Reynolds v. Ruckman, 35 Mich. 80; Parker v. Bowles, 57 N. H. 491; Thompson v. Bowman, 6 Wall. 316, 18 L. Ed. 736; Frink v. Branch, 16 Conn. 260. * * *

The general doctrine of all these cases is that a purchase of the land with partnership funds is necessary to make it firm property. T. Parsons, in his work on Partnership (4th Ed.), says: "Although it [real estate] be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint tenants or tenants in common. * * * So, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it." * * * There are cases which hold that, even though the land was originally bought by the several partners with their individual funds, and deeded to them as tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes, and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are

essential to the firm. In some instances the land is held to be the property of the partners, and the improvements to be the property of the firm. * * * The use of the property is not conclusive of its character as real estate or personalty, but is only evidence of the intention of the parties. When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation. * * * And, where it is sought to show a conversion of the land into personalty by agreement of the partners, such agreement must be clear and explicit. * * *

The weight of authority seems to us to support the position that where persons who afterwards become partners buy land in their individual names and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think that an application of this rule to the facts of the present case shows the real estate here in controversy to be firm property. The testimony proves affirmatively that there was no agreement, written or verbal, to put the land into the firm as a firm asset, and that it was treated by the parties as individual property. * * *

The judgment of the appellate court and the decree of the circuit court are affirmed. * * *

SECTION 3.—WHAT CONSTITUTES PARTNERSHIP CAPITAL

DEAN et al. v. DEAN et al.

(Supreme Court of Wisconsin, 1882. 54 Wis. 28, 11 N. W. 239.)

COLE, C. J. This action is brought by the plaintiffs, as executors, to obtain a construction of the codicil to the will of N. W. Dean, who died February 28, 1880. The will was dated February 29, 1876, and makes a full disposition of the testator's estate, both real and personal. After the payment of certain legacies named, the testator directed his executors to divide the rest and residue of his estate into six equal parts, which were to be paid to the persons named in the proportions specified. * * * There is no controversy as to the proper construction of the will, and we need not further give its provisions. The codicil bears date February 23, 1880. On May 1, 1871, the decedent and his brother, Thaddeus Dean, entered into partnership in the business of dealing in lumber in the city of Chicago, which partnership was continued to the death of N. W. Dean.

The will makes no express reference to this partnership business. But the codicil, after reciting that this partnership business had hitherto been profitable to the testator, which was largely due to the business capacity and integrity of his brother Thaddeus, contains this language: "And being desirous of showing my appreciation thereof, and that the business so commenced should be maintained and carried on, I hereby direct my said executors to allow my present cap-

ital in said business to remain for the period of two years after my decease, collecting and receiving annually, from my said brother Thaddeus, the net profits arising from said business, under my agreement with him, belonging to me, for the benefit of my estate. At the expiration of two years it is my will and I direct that my said executors have a full settlement and accounting with my said brother Thaddeus in relation to said business, and that thereupon they collect and receive from him one-half of the net value of my interest therein, and upon the payment by him of the one-half value so ascertained I instruct and direct my said executors to execute and deliver to him all proper and necessary assignments and conveyances so as to vest in him absolutely all my right, title, and interest in the business aforesaid; it being my intention, in addition to the bequest heretofore made to him in my said will, to bequeath and devise to him one-half of my entire interest in said business, subject to the limitations and restrictions aforesaid."

The articles of copartnership, to which reference is made in the codicil, are quite full and specific. They provide, among other things, that each partner should contribute $15,000 to the capital of the firm, which was to be used in carrying on the copartnership business; that Thaddeus Dean was to have the management of the business; that he should be entitled to receive two-thirds of the profits, and N. W. Dean one-third thereof. The losses were to be borne in the same proportion. Books of account were to be kept, wherein all of the transactions of the firm should be entered, and which books should be open to the inspection of each partner at all times. By the ninth clause it was provided that N. W. Dean was to take out of the cash of the company's funds $125 per month for his own use, and Thaddeus Dean $250 per month, providing these sums could be so drawn out by the respective parties without impairing the capital of the firm, but neither partner was to take a greater sum for his own use during any month without the written consent of the other. The tenth clause provided that Thaddeus Dean, at the end of each year, and oftener, if need be, on request, should make and render to N. W. Dean a just and true account of all the gains and profits, as well as losses, of the business, and of all things done on behalf of the partnership, and this account being so made he was to pay N. W. Dean his proportionate share of the profits, and take to himself his own share. In the eleventh clause it was provided that during the continuance of the copartnership none of the capital of the firm, nor any of the accrued but undivided gains and profits thereof, should be used or employed by the parties thereto for any other purpose than carrying on said business. In the twelfth, that at the end of the copartnership a final accounting should be had, and all the debts of the firm should be first paid, then each should draw out the amount of capital originally contributed by him, diminished by his proportionate share of losses, if any; the balance, if any, to be divided as provided for dividing profits. These are the material provisions of the copartnership agreement.

From three letters which were introduced on the hearing—one written by Thaddeus Dean; the other two by N. W. Dean—it appears that each party agreed, in July, 1872, to increase its capital to $20,000, and did so. And it further appears, from the annual statement made of the partnership business, that at the end of each partner-

ship year each partner was credited on the books of the concern with his share of the profits, and was charged with the amount which he had drawn out during the year. The accumulated but undivided profits of the business consisted almost wholly of real estate, lumber, notes, book accounts, and other personal property belonging to the firm. The amount standing to the credit of N. W. Dean at the time of his death, including his capital of $20,000, was $43,478.16. Or, to speak more accurately, that sum embraced the profits standing to the credit of N. W. Dean on the books of the firm at the time of his death, and also the unascertained profits which had accrued since the last annual statement of May 1, 1879, down to that time.

The question arising upon the codicil, which the executors request the aid of the court in determining, is what amount they must leave in the partnership business for two years, and which, at the end of that period, they are directed to assign and convey to Thaddeus Dean upon his paying one-half of its ascertained net value; the annual profits having been collected by them in the meantime. On the part of the residuary legatee Thaddeus Dean it is claimed that it was the intention of the testator that his entire interest in the partnership business should remain in the business, including both his capital of $20,000 and all accumulated but undivided profits belonging to him under the partnership agreement; while, on the part of other residuary legatees, it is insisted that it was his capital only which was to be left in the business. * * *

On looking at the language of the codicil itself, the first thing which will be noticed is that the testator, in the introductory part, speaks of his "interest" in the business, which has been profitable to him. Being desirous that the business so commenced should be maintained and carried on, he directs his "executors to allow my present capital in said business to remain for the period of two years after my decease, collecting and receiving annually from my said brother, Thaddeus Dean, the net profits arising from said business under my agreement with him, belonging to me, for the benefit of my estate." It will be seen that the mind of the testator was fixed at the outset upon his entire interest in that business as distinguishable from his capital therein. If he intended that his entire interest should remain, it is singular that he changed his language, using words which convey a different meaning. The terms "interest" and "present capital" are not equivalent expressions, and do not convey the same idea in the connection in which they are used. If the testator intended that his entire interest in the business should remain, it is remarkable that he changed his phraseology. But this is not all. The executors are directed to collect annually from his brother Thaddeus the net profits arising from the business under the partnership agreement which belonged to him for the benefit of his estate. If the codicil is construed, as it must be, in connection with the partnership agreement, there is no difficulty in getting at the intention of the testator, for the agreement makes a plain and broad distinction between capital and profits. The former is devoted to the use of the partnership business, but provision is made for withdrawing the latter from time to time. Therefore we think that the word "capital," as used in the codicil, must be understood as meaning the same thing as when used in the agreement; it means the capital as opposed to profits, and the word "profits" means the gains upon the capital invested in the business. * * * If he

had intended to direct that his whole interest in the business should remain two years, or if he regarded his entire assets therein as capital, his intention or understanding would have been made manifest by the use of different language than that employed.

But, as observed by counsel who argue in favor of the view we have taken of the meaning of the codicil, the testator, in the very sentence in which the words "my present capital" occur, directs what shall be done with the "net profits" of the business, and pointedly makes a distinction between capital and profits, thus showing that the two things were separate in his mind. The intention of the testator must prevail if it is possible to gather it from the language of the entire codicil. That intention was to allow his capital to remain in the business for two years, but nothing more. This construction of the codicil is vigorously combated by the learned counsel for Thaddeus Dean, because, as he says, if the accumulated profits of the parties were withdrawn it would so cripple the business that it could not be carried on with the success and profit which had theretofore attended it. But this argument, under the circumstances, is entitled to but little weight; for if there had been no provision for continuing the business it would have to be closed up on the death of N. W. Dean. Its continuance, therefore, was a favor, and could not have been claimed as a right by the surviving partner. * * *

It results, from the views expressed, that the judgment of the circuit court, placing a construction upon the codicil, and giving directions to the executors in regard to the proper execution of their trust, is erroneous. The judgment must, therefore, be reversed, and the cause be remanded, with directions to enter a judgment in accordance with this opinion.

SECTION 4.—ACQUISITION AND TRANSFER OF PARTNERSHIP REALTY

While title to personal property may be taken, held, and transferred in the partnership name, it is generally held that title to realty cannot be taken in the partnership name, because of the uncertainty as to the grantee. There is authority, however, for the proposition that title taken in the firm name vests in all of the members of the firm, parol evidence being admissible to identify the grantees. The Uniform Partnership Act adopts the latter rule.

Section 8. (3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name. (4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.[4]

Section 10. (1) Where title to real property is in the partner-

[4] *Lewis' Note to Section 8 (3, 4).*—Paragraphs (3), (4), in connection with section 10, infra, do away with existing confusions where there has been a conveyance to a partnership in the partnership name, or a conveyance by a partner in the partnership name. At present such conveyance may convey an equitable, but does not convey a legal title. To this extent paragraph (3) of this section and section 10 (1), infra, change existing law.

ship name, any partner may convey title to such property by a conveyance executed in the partnership's name. * * *

Of these sections Professor Lewis has said: "In permitting a partnership to acquire real property by a conveyance executed in the partnership name, the intent of the Conference was to avoid those complications now arising when an attempt is made to make such a conveyance. Of course it is not probable that the practice of holding title to partnership real estate in the partnership name will become universal. * * * Still we may expect that a controlling consideration which will move many to place title to real property in the partnership name will be the convenience of being able to convey good title in case of the death of a partner without having to secure the signature of persons not members of the parnership." [5]

WINTER v. STOCK.

(Supreme Court of California, 1866. 29 Cal. 407, 89 Am. Dec. 57.)

CURREY, C. J. This action was brought to recover the sum of $800, paid by the plaintiff to the defendant on a contract for the purchase of a lot of land in the city of San Francisco. The contract between the parties was in writing, the concluding clause of which, on the part of the defendant, the bargainor, is in these words: "I warrant an indisputable and satisfactory title, or no sale, and I have to pay the expenses for the examination of the title." The defendant's title was submitted to a lawyer for examination, who pronounced against it. * * *

The objection made to the title, and which the court below held well founded, was that the conveyance by the Racouillats was to Louis Blanchard & Co. and John Antoine Couttolene & Co., and that the conveyance of the 8th of August, 1857, was by John Antoine Couttolene and Ernest Paris to Louis Blanchard & Co., and that the conveyance of February, 1861, was by Louis Blanchard and Francois Porta to Edme Ludovic Racouillat.

The fact that these several conveyances were made to certain persons whose names were mentioned with the words "and Company" annexed thereto seemed to have been regarded as passing the title, not alone to the grantees named, but also to persons not named, but represented by the word "Company," and that the deeds of the persons thus represented were necessary to transfer the entire title of the property to a subsequent grantee, and that, as "Company" was a word of indefinite and uncertain import, it could not be known to the purchaser that Paris and Porta were respectively members, and the only members, of the firms of Blanchard & Co. and Couttolene & Co.

The doctrine on this subject is well expounded in Arthur v. Weston and Strode, 22 Mo. 378. * * * The court observed that the question "is not merely whether the grantor intended to convey to the persons composing the firm, but whether the partnership style is, as a matter of law, a good name of purchase in a conveyance of real property sufficient to pass the legal title to all the individuals of the

[5] The Uniform Partnership Act, 24 Yale Law Journal, 624.

firm. * * * A conveyance of real property being required by the statute to be put in writing, the party who is to take as grantee must be sufficiently ascertained by the written instrument, or it is a nullity, so far as it purports to effect a transfer of the legal title." The court, in the case here referred to, admit, upon authorities cited, that parties to a deed may be described by other modes than by their proper names —as a grant to the wife of a person named, or to the first son or second son, or to all the children of a particular person who is specified, or to a person who can answer the description. * * *

The defendant's title to the lot being good and valid, it was, in the sense of the defendant's warranty, an indisputable title, and the plaintiff was in duty bound to be satisfied with it. * * *

The judgment must be and is hereby reversed.

SECTION 5.—PARTNERSHIP NAME AND GOOD WILL

WILLIAMS et al. v. FARRAND et al.

(Supreme Court of Michigan, 1891. 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161.)

Bill in equity by William C. Williams et al. against Jacob S. Farrand et al. Respondents retired from a partnership composed of themselves and complainants, and sold the latter "all their right, title, and interest in the firm." Complainants alleged that they had bought the good will of the firm, and were entitled to the exclusive use of its name, and prayed that respondents be restrained from so using their own names as to attract the firm's old customers, etc., and from using its trade-marks, etc. From a decree for respondents, complainants appeal.

McGRATH, J. Complainants and defendants had been for some years engaged as wholesale druggists on Larned street east, in the city of Detroit, as copartners, under the name and style of Farrand, Williams & Co. There were no articles of copartnership, and no term fixed for which the partnership was to continue. Prior to the taking of the annual inventory in January, 1890, defendant Jacob S. Farrand expressed to complainant Sheley a desire to dissolve the copartnership. * * * On the 25th of January, 1890, after the completion of the inventory, defendants made a proposition in writing to "pay Messrs. Sheley & Brooks, for their interest in the firm of Farrand, Williams & Co., for the amount of their interest, being fifty thousand dollars, ($50,000), the sum of sixty thousand dollars, ($60,000), or they will take for their interest, the amount being one hundred thousand dollars, ($100,000), the sum of one hundred and twenty thousand dollars, ($120,000), the sum to be paid in cash, or in notes acceptable to the parties who sell, one week from to-day, Saturday, the first day of February next. The store to be leased to the party purchasing for a term of five years, at a rent of eight thousand dollars ($8,000) a year, and the warehouse to be rented to the party purchasing, at a net rental of 6% a year on the cost of their interest therein."

On the following Monday Mr. Sheley accepted defendants' offer to sell, and on the 1st day of February following a bill of sale was pre-

pared, reciting, among other things, that defendants, in consideration of the sum of $120,000, paid to them by Alanson Sheley, party of the second part, "have bargained and sold unto the said party of the second part all our right, title, and interest to the within-mentioned resources of said firm, including the good will attendant upon the business." This bill of sale was not executed, objection being made to the clause, "including the good will attendant upon the business," and a new instrument was prepared, reciting that defendants, parties of the first part, "for and in consideration of the sum of one hundred and twenty thousand dollars, to them paid by Alanson Sheley, of the second part, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all our right, title, and interest in the firm of Farrand, Williams & Company." This instrument was executed, the insurance policies were assigned by Farrand, Williams & Co. to Williams, Sheley & Brooks, and an agreement to assume and pay all the debts of the old firm was executed by Williams, Sheley & Brooks, and delivered to defendants. Defendants afterwards formed a copartnership under the firm name of Farrand, Williams & Clark, and opened a wholesale drug establishment at No. 32 Woodward avenue.

Complainants adopted the name and style of Williams, Sheley & Brooks, posted their firm name, as successor to Farrand, Williams & Co., over their place of business, had the words "Williams, Sheley & Brooks, Successors to" printed in red ink over the words "Farrand, Williams & Co." wherever the latter appeared upon letter heads, bill heads, labels, and on other stationery, advertised themselves in the newspapers and trade journals as Williams, Sheley & Brooks, successors to Farrand, Williams & Co., and sent out circulars to the trade containing not only their firm name, but the names of the individual members of the new firm. Defendants also extensively advertised the new enterprise through the same mediums, calling special attention to the names of the members of the new firm, their long connection with the drug business, and the dissolution of the old firm, and soliciting trade.

The complainants contend that the assignment by defendants of all interest in the business carried with it the good will of the business, and, having purchased the good will of that business, they are entitled to the exclusive use of the old firm name; that, while defendants have the right to engage in the same line of business, they have not the right to such a collocation of their own names as will produce confusion, attract customers, and secure orders, letters, and goods intended for the old firm; that defendants have no right to simulate their labels, to solicit their customers, or entice away their employés. "Good will" has been defined by this court to be "the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage." Chittenden v. Whitbeck, 50 Mich. 401, 15 N. W. 526. Lord Eldon, in Cruttwell v. Lye, 17 Ves. 335, defined it as simply the probability that old customers will resort to the old place.

The following propositions must be regarded as established by the clear weight of authority:

1. Though a retiring partner may have assigned his interest in the partnership business, including the good will thereof, to his copartner, he may, in the absence of an express agreement to the contrary,

engage in the same line of business in the same locality, and in his own name.

2. He may, by newspaper advertisements, cards, and general circulars, invite the general public to trade with him, and through the same mediums advertise his long connection with the old business, and his retirement therefrom.

3. He will not be allowed, however, to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence, will not be allowed to advertise himself as its successor.

4. The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

5. That no man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure such other person. * * *

6. That when an express contract has been made to remain out of business, or for the use by a purchaser of a fictitious name, or a trade-name, or a trade-mark, the courts will enjoin the continued violation of such agreement. * * *

7. That an assignment of all the stock, property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business. These incidents attach to the business or right of manufacture, and pass with it. Courts have uniformly held that a trade-mark has no separate existence; that there is no property in words, as detached from the thing to which they are applied; and that a conveyance of the thing to which it is attached carries with it the name. * * *

8. A corporate name is regarded as in the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation. Statutes providing for the organization of corporations usually prohibit the adoption of the same name by two companies. * * *

These propositions are sustained by a long line of authorities, but in none of the cases cited does the question hinge upon a grant of good will. Complainants insist, however, that a grant of good will may be implied, and, when express or implied, it imposes certain restraints upon the vendors, viz.: (1) That they cannot afterwards personally solicit customers of the old firm; and (2) that they are restricted in the use that may be made of their own names.

I. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good will be included or not, cannot personally solicit the customers of the old firm, has no support in principle. A retiring partner conveys, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business, and produces its accustomed profits on the day after the transfer. It is capital already invested, and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time at least it is capital awaiting in-

vestment, or invested, but earning nothing. The retiring partner takes these chances or disadvantages. He does not agree that the benefit derived from his connection with that business shall continue. He does not agree that the old business shall continue to have the benefit of his name, reputation, or service; nor does he guaranty the continuance of that patronage which may have been attracted by his name or reputation. He does not pledge a continuance of conditions. He takes out of the business an element that has contributed to the success of that business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor. * * * He sells only so much of the custom as will continue in spite of his retirement and activity. He sells probabilities, not assurances.

It is urged that by the solicitation of the customers of the old firm he is endeavoring to impair the value of that which he has sold, but every act of his in the direction of the establishment of the new business tends to divert the customers of the old firm. The right to enter into the same line of business in the same locality—next door, if you please—to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. The exercise of these rights necessarily involves the diversion of custom to the new firm. Does not the right to again engage in the same line of business include all of the incidents of that right? Upon what principle is the line arbitrarily drawn at the personal solicitation of the customers of the old firm? The right to engage in business in his own name attaches to the retiring partner, and, unless expressly so agreed, there is no restraint upon that right.

In the present case, Jacob S. Farrand had been at the head of the old house for half a century. His name could not be subsequently used in the same line of business without attracting the attention of the entire trade, nor without affecting the probabilities of a continuance of the patronage of the old house. He gave no hint that he did not intend to again engage in business. All of the circumstances pointed in the direction of a new business. The retirement was not of Jacob S. Farrand alone, but of his son-in-law and Mr. Clark also. The proposition made to complainants was not only to sell, but to buy. In Ginesi v. Cooper, 14 Ch. Div. 596, the court went so far as to insist that a retiring partner had no right to deal with the customers of the old firm; but that rule would operate as a restriction upon the public, and the case is without support in that respect. In Labouchere v. Dawson, L. R. 13 Eq. 322, the court say that a retiring partner who sells the good will of a business is entitled to engage in a similar business, may publish any advertisement he pleases in the papers, stating that he is carrying on such a business; he may publish circulars to all the world, and say that he is carrying on such a business; but he is not entitled, by private letter, or by visit by himself or agent, to solicit the customers of the old firm.

But in Pearson v. Pearson, 27 Ch. Div. 145, Labouchere v. Dawson is expressly overruled. The court say: "The case of the plaintiff is founded on contract, and the question is, what are his rights under the contract? There is no express covenant not to solicit the customers of the old business, but it is said that such a covenant is to be implied. I have a great objection to straining words so as to

make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation. It is said that there was a sale of the good will. I think that there was, taking good will as defined by Lord Eldon in Cruttwell v. Lye, 17 Ves. 335. The purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the good will, as defined by Lord Eldon. But the term 'good will' is not used; and when a contract is sought to be implied we must not substitute one word for another. But suppose the word did occur, what is the effect of the sale of 'good will.' It does not, per se, prevent the vendor from carrying on the same class of business."

Vernon v. Hallam, 34 Ch. Div. 752, held that a covenant by a vendor of a business, including the good will thereof, that he would not for a term of years carry on the business of a manufacturer, either by himself or jointly with any other person, under the name or style of J. H. or H. Bros. (the name of the business which he had sold), is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and the injunction was granted to restrain a breach of that covenant. The court say: "When a vendor sells his business, and commences a similar business in the same locality, and solicits customers of the old house to deal with him, the court, following the decision in Pearson v. Pearson, and being of opinion that the case of Labouchere v. Dawson had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation." Leggott v. Barrett, 15 Ch. Div. 306, Ginesi v. Cooper, 14 Ch. Div. 596, and a number of other cases cited, follow Labouchere v. Dawson.

The correct rule is, we think, laid down in Cottrell v. Manufacturing Co., 54 Conn. 138, 6 Atl. 791. The court say: "Cottrell did not require Babcock to agree, and the latter did not agree to abstain from the manufacturing of printing presses. By purchasing the good will merely Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that old customers would continue to go there. If he desired more, he should have secured it by positive agreement. The matter of good will was in his mind. Presumptively he obtained all that he desired. At any rate, the express contract is the measure of his right; and since that conveys a good will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always when addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a good will to establish a like business at the next

door, and, by the potential instrumentalities of the newspapers and general circulars ask old customers to buy at the old place, and withhold from him only the instrumentality of highest power, viz., personal solicitation. To deny him the use of the newspapers and general circulars is to make successful business impossible, and therefore is to impose an absolute restraint upon the right to trade. This the courts could not do, except upon express agreement. But possibly the old customers might not see these; and in some cases, the courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade, either totally or partially; and that all restraint of that nature must come from his positive agreement. And such, we think, is the present tendency of the law."

Good will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed. Where it consists of the advantages of location, it follows an assignment of the lease of location. Again, it may not depend at all upon location, as in the case of a newspaper, and it would follow an assignment of all interest in the plant, property, effects, and business. A partnership name may become impersonal after the death of the partners, and it is then treated like a fictitious or corporate name. A surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may in consequence follow a grant of the right to manufacture that article, or a sale of the business of manufacturing such article; and where the right to manufacture is exclusive, the right to the use of the name as applied to that article becomes likewise exclusive. It appears, however, that in the first bill of sale which was prepared the words, "including the good will attendant upon said business," were inserted, but were objected to, stricken out, and a new bill of sale prepared, omitting any reference to good will. But it is said that this clause was objected to because, in the opinion of the objector, it might preclude him from engaging in the same business, whereas, under the law, he would have such a right had the clause remained. The only use, however, which complainants now propose to make of the clause, treated as a part of the instrument, is to restrict that right to engage in business by taking away one of its incidents. Adopting the language used in Churton v. Douglas, Johns. Eng. Ch. 174, with reference to the right of plaintiff to continue the use of the old firm name, "I think the defendant is fully entitled to the benefit of the observation that it was proposed to him to insert such a provision, and that he refused it. I think, therefore, that this case goes a step higher than the authorities, and the defendant is entitled to put his case in the highest possible form with regard to his right" to engage in the same line of business.

II. The next question relates to the use by defendants of the firm name of Farrand, Williams & Clark. It is clear that complainants have no right to continue their business under the old firm name. The rule that upon a dissolution of a firm neither partner has the right to

use the firm name, as well as the other rule that a retiring partner has no right to use the old firm name, are both subject to the exception that a person has the right to use his own name unless he has expressly covenanted otherwise. In case A. B. should sell out his business to C. D., in the absence of a grant to C. D. of the right to use the name of A. B., or an agreement to the contrary, is there any doubt but that A. B. would have the right to engage in the same line of business in his own name? In that case, such a probability would naturally suggest itself to C. D., and, if he desired to get the advantage of A. B.'s abstinence from business, he would insist upon an agreement to that effect.

In the present case, Mr. Farrand's name had been at the head of the firm name for nearly half a century, and the name of another of the retiring members corresponded with the only other surname used in the old firm name. It must have been evident to complainants that in any event the name of the new firm would be similar to that of the old firm. If complainants desired any protection against such a use of the names of the retiring members, they should have inserted a provision to that effect in the bill of sale. The right to continue the use of a firm name, as well as a restriction upon the use by a retiring partner of his own name, are proper subjects of bargain, sale, and agreement. Here neither have been purchased. Complainants have purchased the business of the old firm. They have the right to advertise themselves as succeeding to and continuing that business. The exercise of such a right does not conflict with any right reserved by defendants. Complainants, by such a holding out, commit no fraud, misrepresentation, or deception. They publish the truth only. Defendants have the right to use their own names, or any collocation of their own names. They have not adopted the old firm name, although it would have been appropriate. They have adopted no fictitious name. There is no deception in the use of the name adopted by them. The business of the old firm is a separate and distinct business. Defendants have no right to advertise their business as a continuation of the old firm business. They are subject to the rule already laid down, that no man has the right to sell or advertise his own goods or business as that of another, and so mislead the public and injure such other person. * * *

The same principle obtains with reference to trade-marks. One may have a right in his own name as a trade-mark, but he cannot have such a right as against another person of the same name, unless the defendant use a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. * * * The tests applied by all the authorities in this class of cases are: Is a corporate or trade or fictitious name simulated? Is the name assumed or adopted false in fact? Is it used in connection with locality or other representations, so as to convey the impression that the business is a continuation of the old business? Defendants are not responsible for the blunders made by clerks, postal clerks, mail carriers, telephone employés, or newspaper reporters. * * *

Any collocation of the names of Farrand and Williams would create some confusion. Defendant Clark had been connected with the old business for 30 years, and Williams, the son-in-law of Mr. Farrand, for 21 years. Defendants are using their own names only. They went

into business on Woodward avenue, several blocks from the old stand. In every letter head, bill head, card, or advertisement in which their firm name appears they give the individual names of the members of the firm, the new place of business, and in no case have they represented that they are successors to the old firm. The bill heads used by the old firm had a cut of the old stand on the left-hand upper corner, about three inches square. Those of the new firm contain no cut, and less than half of the amount of matter. It would be exceedingly difficult to prepare two bill heads more unlike. The letter heads of the old firm contained two cuts—one of the old stand, at the left hand, and one of the Peninsular White Lead & Color Works, on the right. The dissimilarity is marked. The envelopes used by the old firm contain eight printed lines on the upper left-hand corner, occupying an inch and three-quarters of space. Those used by the new firm contain five lines, occupying about three-quarters of an inch in space. There has been no attempt at imitation in words or type. On March 15th they announced, through circulars distributed generally, that they had engaged in business at 32 and 34 Woodward avenue; that they expected to have their new store ready for occupancy in a few days; and that the work of getting a new stock of goods would be pushed as fast as possible. On April 7th they issued another circular announcing that they were now prepared to fill orders, and hoping that the friendly acquaintance of many years would be continued. An advertisement is produced, wherein defendants say: "Though it may seem paradoxical, it is nevertheless true, that the wholesale drughouse of Farrand, Williams & Clark is both the oldest and the newest representative of this important commercial industry in Detroit." But in the same advertisement they announce the dissolution of the old firm, their retirement from said firm, and the formation and business location of the new firm.

It is difficult to imagine how such an advertisement would mislead the public. It contains no false colors. Both parties advertised extensively in the city and state papers and in the trade journals; complainants giving the names of their individual members, and their new firm name, and advertising themselves as the successors to Farrand, Williams & Co.; and defendants giving the names of their individual members, and the name and business location of the new firm. Complainants sent out circulars to the trade generally, informing it of the dissolution of the old firm, the fact that they were the successors, and giving their firm name; and defendants sent out circulars announcing their withdrawal and the formation of a new firm. There is no doubt but that the dissolution of this firm, the fact that complainants had bought out the interests of defendants, the name adopted by complainants, the formation of the new firm, the names of its members, and the defendants' firm name, have been most extensively advertised by both parties, not only in the city, but throughout the state and Union. Nearly 50 letters have been received by the old firm, since the dissolution, addressed to Farrand & Williams; Farrand & Williams Paint Co.; Farrand & Williams Drug Co.; Farrand, Sheley & Brooks; Farrand, Williams & Sheley; Farrand, Williams, Sheley & Co.; Farrand, Williams & Brooks; Farrand & Co.; Williams, Farrand & Co.; Farrand, Sheley & Brooks; Williams & Farrand; Williams, Farrand & Co.; and Williams & Co. It cannot be said that any act of defendants is responsible for these blunders. Confusion is in-

separable from the dissolution of an old firm and the composition of two firms from its membership, especially when the name of but one of these who remain has appeared in the firm name, and the new firm is composed of one whose name for nearly half a century has stood at the head of the firm name, and the surname of another retiring member is the same as the only other name used in the old firm name. * * * These proofs do not tend to show any appropriation by defendants of the old firm name, or any attempt to secure the correspondence addressed to the old firm, or that the customers have been deceived or misled, or that defendants have practiced any fraud, concealment, or deception. * * *

Complainants have, under the authorities cited, an undoubted right to protection in the proprietary rights acquired by the old firm, and in the use of such trade-marks as were in use by the old firm, and defendants have no right to so imitate the labels in use by the old firm as to convey the belief that the goods labeled are from the old house. The use, however, of the words, "Sold by Farrand, Williams & Co." or "Prepared by Farrand, Williams & Co.," upon a label, will not be protected as a trade-mark or trade-name and the right to use that name in that connection did not pass under the bill of sale.

The decree of the court below must be affirmed as of February 27, 1891, and the bill dismissed, with costs to defendants.

Morse and Grant, JJ., concurred with McGrath, J. Long, J., did not sit. Champlin, C. J., dissented.

SECTION 6.—PARTNER'S INTEREST IN THE PARTNERSHIP

Uniform Partnership Act, Section 26. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

Section 27. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

Section 28. (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other

money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by ony one or more of the partners, or

(b) With partnership property, by any one or more of the partners, with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

SECTION 7.—SHARING OF PROFITS AND LOSSES

Uniform Partnership Act, Section 18. (a) Subject to any agreement between them, each partner shall * * * share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

WHITCOMB v. CONVERSE et al.

(Supreme Judicial Court of Massachusetts, 1875. 119 Mass. 38, 20 Am. Rep. 311.)

Bill in equity by a partner in the late firm of Converse, Whitcomb & Co., against the other partners, James C. Converse, Walter Stanton, and Edward Blagden, to compel contribution to the losses incurred by the partnership. The partnership agreement provided for carrying on of a dry goods commission business on the following terms: Whitcomb was to contribute $50,000 to the capital, receive 7 per cent. on the same and 25 per cent. of the net profits. Converse was to contribute $25,000. receive 7 per cent. interest on the same, and 25 per cent. of the net profits. Blagden and Stanton were each to contribute all their time to the business and each to receive 25 per cent. of the net profits. Whitcomb put in $25,000 of the $50,000 which he was to contribute. The partnership having been dissolved by mutual consent, a settlement of its affairs showed a loss of about $25,000. Blagden, at the time of the dissolution, was, ever since has been, and now is, insolvent and unable to pay any part of said loss. Stanton contended that he was not liable to make good any of the losses, and, if liable, he was not liable to make good any part of the share which Blagden ought to have contributed. The cause was reserved for the opinion of the court.

GRAY, C. J. In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but

his labor or services. 3 Kent, Com. 28, 29. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. Story, Part. §§ 27, 29. * * *

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter. A corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it. Such payment cannot, indeed, be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. * * * Only two cases were cited in the learned argument for the defendant Stanton in which opinions inconsistent with this view have been expressed. The one is Everly v. Durborow, 1 Leg. Gaz. R. (Pa.) 127, a nisi prius decision, with no reference to authorities, except an early edition of Lindley on Partnership, which has been corrected by the learned author, * * * conformably to the adjudged cases. The other is Cameron v. Watson, 10 Rich. Eq. (S. C.) 64. That was a bill in equity to settle the affairs of a partnership, to which Cameron had contributed labor and Watson capital. The master, to whom the case was referred, allowed the claim of Watson for so much of the capital as he had not withdrawn during the continuance of the partnership, but disallowed his claim for interest thereon. * * * Cameron excepted to the allowance of Watson's claim for capital, and Watson excepted to the disallowance of interest. The chancellor, before whom the exceptions were heard in the first instance, overruled the exceptions of Cameron, and also that of Watson as regarded interest before the dissolution of the partnership, but sustained it so far as to allow him interest after the dissolution. * * * The Court of Appeals, although in one part of its opinion appearing to discountenance Watson's claim for capital, ended by confirming the master's report in every particular. * * * So that the final judgment, while it disallowed Watson's claim for interest, established his claim for capital, and was in exact accordance with our conclusion.

In the case at bar the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital, in unequal proportions. Converse was to contribute "such time as he may be able to give," and Whitcomb and the other two partners, Blagden and Stanton, were each "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by express agreement to receive interest thereon at rates specified in the articles of copartnership. The partners were by agreement to receive each one-fourth

of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse, respectively, for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions. * * *

Decree for the plaintiff accordingly.

SECTION 8.—PARTNER'S RIGHT TO REPAYMENT OF CONTRIBUTIONS

Uniform Partnership Act, Section 18 (a) Subject to any agreement between them each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property. * * * (c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute shall be paid interest from the date of the payment or advance. (d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

FOLSOM v. MARLETTE.

(Supreme Court of Nevada, 1897. 23 Nev. 459, 49 Pac. 39.)

Suit by G. N. Folsom against S. H. Marlette. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals.

BELKNAP, C. J. This is a suit for an accounting between partners, in which each demands a balance due from the other. The partnership was formed on the 29th day of September, 1880, and continued until the 27th day of May, 1890, when it was dissolved. Its business was that of contracting for the cutting of cord wood and logs, and the sawing of timber, to which the business of merchandising was subsequently added. They were equal partners. The district court ordered judgment in favor of respondent for the sum of $6,540.49. From the judgment and an order refusing a new trial, defendant has appealed. * * *

Respondent paid to the creditors of the firm, after it had discontinued business, a short time prior to its dissolution, the sum of $16,747.72. The district court allowed interest upon this sum amounting to the sum of $7,224.06. The money thus paid is properly treated as an advancement for the benefit of the firm. Lindley, in his work upon Partnership, says: "An advance by a partner to a firm is not treated as an increase of his capital, but rather as a loan, on which interest ought to be paid; and, by usage, interest is payable on money bona fide advanced by one partner for partnership purposes, at least when the advance is made with the knowledge of the other partners." Volume 1, p. 390. The propriety of this charge admits of no question. The firm had no capital. It had been in the habit of paying

interest at its banker's upon overdrafts for a long time. Appellant has not suggested in his testimony that this money was not advanced with his knowledge and acquiescence. Under these circumstances, the charge of interest is equitable. * * *

The case will be remanded to the district court, with instructions to modify its judgment, * * * and to allow him simple interest at the rate of 7 per cent. per annum, instead of 10 per cent. per annum, upon the advances made by him after they had ceased to do business together. * * *

SECTION 9.—PARTNER'S RIGHT OF INDEMNITY

Uniform Partnership Act, Section 18. (b) Subject to any agreement between them, the partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

SECTION 10.—PARTNER'S RIGHT TO AN ACCOUNTING

Uniform Partnership Act, Section 22. Any partner shall have the right to a formal account as to partnership affairs: (a) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners; (b) if the right exists under the terms of any agreement; (c) as provided by section 21; (d) whenever other circumstances render it just and reasonable.[6]

LORD et al. v. HULL.

(Court of Appeals of New York, 1904. 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484.)

Action by Lord and others against their copartner, Hull, for an accounting without dissolution. Murchison was made a co-defendant with Hull, because of a disagreement between plaintiffs and Hull as to payments on a contract with Murchison. Judgment below for

[6] *Lewis' Note to Section 22.*—Ordinarily a partner is not entitled to a formal account, except on dissolution. He has equal access with his partners to the partnership books, and there is no reason why they should constantly render to him accounts in the formal sense of that word, which is the sense in which it is here used. When, however, he is excluded from the business or the possession of partnership property, without any express agreement authorizing such exclusion, he should have the right to demand a formal account from his partners, without necessarily requiring him to dissolve the partnership.

The reason for clause (d) is that there frequently arises circumstances which impose on one or more of the partners the duty of rendering a formal account to the co-partner, as where one partner is traveling for a long period of time on partnership business, and the other partners are in possession of the partnership books. These various circumstances cannot be detailed in any act. In view of the wording of clause (d), the total effect of this section is to emphasize the fact, that a partner, the partnership not being dissolved, has not, necessarily, the right to demand formal accounts, except at particular times and under particular circumstances.

plaintiffs against defendant Hull, and for defendant Murchison against the plaintiffs and the defendant Hull.

VANN, J. This action was brought by two copartners against the third for an accounting, without a dissolution, and it is not surprising that a challenge is interposed to the jurisdiction of the court. The contract of copartnership has existed as long as the common law, and a vast amount of business has been transacted by persons working together under this relation. The law upon the subject is founded on the custom of merchants, who have thus, in effect, made their own law, yet we find no well-considered case which approves of such an action as the one now before us. While the novelty of an action is by no means conclusive against it, still it is suggestive, when the history of the law relating to the subject shows many occasions and few efforts.

The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, or except with a view to dissolve the partnership, and by a final decree to adjust all its affairs. Story on Partnership, § 229. * * * It is not its office "to enter into a consideration of mere partnership squabbles" * * * or "on every occasion to take the management of every playhouse and brewhouse." * * * If the members of a firm cannot agree as to the method of conducting their business, the courts will not attempt to conduct it for them. Aside from the inconvenience of constant interference, as litigation is apt to breed hard feelings, easy appeals to the courts to settle the differences of a going concern would tend to do away with mutual forbearance, foment discord, and lead to dissolution. It is to the interest of the law of partnership that frequent resort to the courts by copartners should not be encouraged, and they should realize that, as a rule they must settle their own differences, or go out of business. As a learned writer has said: "A partner who is driven to a court of equity, as the only means by which he can get an accounting from his copartners, may be supposed to be in a position which will be benefited by a dissolution; in order words, such a partnership as that ought to be dissolved." Parsons on Partnership (4th Ed.) § 206. "If a continuance of the partnership is contemplated," as another commentator has said, "or if an accounting of only part of the partnership concerns is allowed, no complete justice can be done between the partners, and the fluctuations of a continuing business will render the accounting which is correct to-day incorrect to-morrow; and to entertain such bills on behalf of a partner would involve the court in incessant litigation, foment disputes, and needlessly drag partners not in fault before the public tribunals." 2 Bates on Partnership, § 910. * * *

While a forced accounting without a dissolution is not impossible, it is by no means a matter of course, for facts must be alleged and proved showing that it is essential to the continuance of the business, or that some special and unusual reason exists to make it necessary. Thus, Mr. Lindley, upon whom reliance was placed by the courts below, mentions three classes of cases as exceptions to the general rule: "(1) Where one partner has sought to withhold from his copartner the profits arising from some secret transaction; (2) where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner, or drive him to a dis-

solution; (3) where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all." The plaintiffs claim that this case belongs to the second class, and the courts below have so held; but, as we think, it does not come under any head of Mr. Lindley's classification, which is correct as far as it goes, and it goes as far in the direction of the plaintiffs' theory as any just classification that can be made.

There is neither allegation nor evidence that Hull tried to exclude or expel the plaintiffs, or to drive them to a dissolution, or that he did anything in bad faith or with an ulterior purpose. The controversy was confined to one point of difference—the Murchison contract—which was a matter of internal regulation. There was no dispute about anything else. The plaintiffs claimed that the contract bound the firm, and that it included all work done or to be done for Mr. Clark, while Hull claimed that it did not bind the firm, and that, if it did, it embraced only a part of that work. There was no difference in the computation of balances, or claim that the articles had been violated by either side, except with reference to that contract. The plaintiffs insisted that Hull had drawn out more than his share of the profits, because he drew one-third of the income without leaving one-third of the part going to Murchison, and that thus there was a balance against him. Hull claimed that the plaintiffs, in paying anything to Murchison, wasted the assets of the firm, and thus there was a balance against them. When the interlocutory judgment was made, the parties at once stipulated the respective balances on the basis of that decree, and thus obviated a reference, so that final judgment was entered without delay. Neither party desired an accounting, except as an excuse to sustain or defeat the Murchison contract.

Exclusion from a small portion of the profits, paid or withheld in good faith on account of that contract, was not exclusion from the affairs of the firm, yet an accounting was sought only as a means of settling the dispute over that particular subject, which related simply to a detail in the management of the business. No discovery was asked for. There was no claim that Hull was insolvent, or that he had suppressed any fact, or had made secret profits, or had been guilty of bad conduct, or that the books had not been properly kept, or that the plaintiffs had been denied access to the books. There was no evidence that any partner had refused to give an account of all moneys received by him, or that there was error or omission of any kind in the accounts of the firm, except as limited to the Murchison agreement. It was easy to test the validity of that contract by simply withholding payment, forcing Murchison to sue, and raising the question by answer. That was not an equitable, but a legal, question. Murchison's claim did not differ from that of any firm creditor, except that the partners were at odds over its validity. "No action can be maintained by one partner against the other in respect to particular items of account pertaining to the partnership business." Thompson v. Lowe, 111 Ind. 274, 12 N. E. 477.

An accounting without a dissolution has never been allowed, under the circumstances of this case, by any court in this country or in England, so far as we can learn from the authorities cited by counsel or discovered by ourselves. A brief review of the leading cases will show that the principle upon which they rest has no application to the

facts of the case before us. In Fairthorne v. Weston, 3 Hare's Ch. R. 387, the plaintiff bought into the business of an attorney, paying £700 down, and agreeing to pay 700 more at the end of five years, when the defendant was to retire, and the business was to belong to the plaintiff. During the five years the parties were to be copartners, sharing the profits and expenses equally. After a while the defendant, for the fraudulent purpose of getting rid of his contract, received money, and refused to account for it, excluded the plaintiff from all knowledge and control over the business, used insulting language toward him, and violated the copartnership agreement in other ways, and all in order to bring about a dissolution. A bill filed for an accounting, without a dissolution, was sustained upon the ground that the defendant was violating the contract in order to compel the plaintiff to submit to a dissolution upon very injurious terms, and that the court had power to support as well as dissolve a partnership. In Richards v. Davis, 2 Russell & M. 347, a copartnership for a long term had not expired, and the acting partner excluded the others "from the means of ascertaining the state of the partnership affairs." A bill for an accounting, and to permit the plaintiffs "to have access to all the books of the partnership," was sustained; but the court refused to make an order "for carrying on the partnership concerns, unless with a view to dissolution." * * *

With respect to occasional breaches of agreement between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the court stands neuter; but when it finds that the acts complained of are of such a character as to show that the partners cannot continue partners, and that relief cannot be given but by a dissolution, the court will decree it, although it is not specifically asked. * * *

A court of equity will not take cognizance of an action for an accounting as a mere incident to the settlement of a solitary matter in dispute between partners, when it is not vital to either party or to the business, and dissolution is not sought. Actions to establish a partnership, the existence of which was denied by the partner in control to give a partner access to the books after persistent refusal, or to permit him to take part in the business from which he had been excluded, are founded on intentional and continuous wrongdoing, which, unless arrested, might subvert the partnership. When one party seizes or absorbs the entire business, or usurps rights of his copartner which are essential to his safety or the safety of the firm, or persists in misconduct so gross as to threaten destruction to the interests of all, the court may intervene to restore the rights of the innocent party, or to rescue a paying business from ruin. Extreme necessity only, however, will justify interference without a dissolution.

There was no sufficient reason for an appeal to a court of equity in the case under consideration. There was no equity in the bill as filed by the plaintiffs, and none in the case made for them by the evidence. The defendant Murchison had an adequate remedy at law, and he can take nothing from his intrusion into the litigation, under the circumstances, for the questionable order admitting him as a defendant did not create a cause of action, nor add to the jurisdiction of the court. All the parties should be put back where they were before the action

was commenced, and hence it is our duty to reverse the judgments below and dismiss the complaint, with costs to the defendant Hull against the plaintiffs and the defendant Murchison.

Judgments reversed.

CENTRAL TRUST & SAFE DEPOSIT CO. v. RESPASS.

(Court of Appeals of Kentucky, 1902. 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317.)

Action by Jerome B. Respass against the executors of Solomon L. Sharp for a settlement of partnership accounts. Judgment granting relief sought, and defendants appeal.

DU RELLE, J. Jerome B. Respass and Solomon L. Sharp appear to have formed a copartnership, extending over several years, in the business of managing a racing stable, and, in connection with that business, were engaged in "bookmaking," or making wagers upon race horses. They seem, also, to have had an interest in a pool room at Newport. For the book business a separate account was kept by a cashier employed for the purpose. They had no regular time for making settlements with each other, but at various times, when requested the cashier made out statements of the booking business of the firm. It appears from the testimony of Bernard, the cashier, that Sharp in November, 1897, handed him $4,724, and told him to deposit it to his (Sharp's) credit in the Merchants' National Bank of Cincinnati, Ohio, which was done. Sharp appears to have stated at the time that one-half of this fund belonged to Respass. It appears further that this was the "bank roll" of the bookmaking concern, in which each partner had an equal interest. At the same time he remarked that Respass had paid out $1,500 for the firm, and that he would see him in a few days and settle with him. Sharp died suddenly, before any such settlement was made. The money in the bank roll was on deposit to Sharp's credit. The racing business of the firm seems to have been almost entirely in the hands of Respass, who attended to the horses, trained them, entered them in races, and at times wagered on them for the benefit of the firm, which divided the profits or shared the losses, as the case might be. Respass brought suit against Sharp's executors for a settlement of the partnership accounts. The horses in the racing stable were sold under order of court, and various claims against the fund in court were made by Respass for expenses incurred in keeping, shoeing, clipping, training, and caring for the various horses, as well as for entering certain of the horses in stakes, and for wagers paid upon the horses "Fair Deceiver" and "Shannon." The business of breeding, training, and racing horses for purses is legal. The partnership for that purpose can undoubtedly be settled by the chancellor. The only question presented as to this matter is upon the correctness of the settlement made. * * *

Another item to which exception is taken consists of $700; being the amount of two bets made, lost, and paid by Respass on the horses "Fair Deceiver" and "Shannon." In view of the statutory law of Kentucky, * * * we are unable to see how any legal consideration can exist for a promise to reimburse to a partner any portion of any sum lost upon a bet on a horse race. * * * We think it is well settled that a man who lends money to another, to be then bet on a

horse race, cannot recover it back. And so it would seem that if A. agrees with B. that B. shall advance the money, and himself bet upon a horse race for their joint account, no action will lie by B. to compel A. to respond for his share of a bet which is lost. The statement of this proposition seems to decide it. It is a contract for an illegal venture. The whole contract is illegal. No right of action can arise out of that contract. This is exactly the position of Respass as to the two bets. He advanced the money to make them for himself and Sharp, relying upon Sharp's express or implied agreement to pay half the losses if loss should be incurred. Such a contract cannot be enforced in this state.

A closer question is presented by the claim for a division of the "bank roll." This $4,724 was, as found by the chancellor, earned by the firm composed of Respass and Sharp in carrying on an illegal business—that of "bookmaking"—in the state of Illinois. But though this amount had been won upon horse races in Chicago, it is claimed that, though secured illegally, "the transaction has been closed, and the appellee is only seeking his share from the realized profits from the illegal contracts, if they are illegal." On the other hand, it is claimed for appellants that, as to the bank roll, this proceeding is a bill for an accounting of profits from the business of gambling.

It does not seem to be seriously contended that the business of "bookmaking," whether carried on in Chicago or in this commonwealth, was legal, for by the common law of this country all wagers are illegal. Irwin v. Williar, 110 U. S. 510, 4 Sup. Ct. 160, 28 L. Ed. 225. One of the most interesting cases upon this subject is that of Everet v. Williams, the celebrated Highwaymen's Case, an account of which is given in 9 Law Quart. Rev. 197. That was a bill for an accounting of a partnership in the business of highwaymen, though the true nature of the partnership was veiled in ambiguous language. The bill set up the partnership between defendant and plaintiff, who was "skilled in dealing in several sorts of commodities"; that they "proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch"; that defendant had informed plaintiff that Finchley "was a good and convenient place to deal in," such commodities being "very plenty" there, and if they were to deal there "it would be almost all gain to them"; that they accordingly "dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things, to the value of £200 and upwards"; that a gentleman at Blackheath had several articles which defendant thought "might be had for a little or no money, in case they could prevail on the said gentleman to part with the said things"; and that, "after some small discourse with the said gentleman," the said things were dealt for "at a very cheap rate." The dealings were alleged to have amounted to £2,000 and upwards. This case, while interesting from the views it gives of the audacity of the parties and their solicitors, sheds little light upon the legal questions involved, for the bill was condemned for scandal and impertinence; the solicitors were taken into custody, and "fyned" £50 each for "reflecting upon the honor and dignity of this court"; the counsel whose name was signed to the bill was required to pay the costs; and both the litigants were subsequently hanged, at Tyburn and Maidstone, respectively, while one of the solicitors was transported. This case is found referred to in the cases of Sykes v. Beadon, 11

Ch. Div. 170, 195, and McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. * * *

In the case at bar there was no division of the unlawful gains made by Sharp at Chicago. There was no new transaction with reference to them, such as the investment of the fund, or any part of it, in horses, for their joint account. There was not even an accounting of the gains, accompanied by a promise to pay to Respass the amount ascertained to be due him under the terms of the illegal partnership agreement. There was simply a termination by death of an illegal partnership, with unlawful gains in the hands of one of the partners, an accounting for which is here sued for. * * *

We conclude that in this country, in the case of a partnership in a business confessedly illegal, whatever may be the doctrine where there has been a new contract in relation to, or a new investment of, the profits of such illegal business, and whatever may be the doctrine as to the rights or liabilities of a third person who assumes obligations with respect to such profits, or by law becomes responsible therefor, the decided weight of authority is that a court of equity will not entertain a bill for an accounting.

The judgment of the chancellor is therefore reversed, and the cause remanded, with directions to enter a judgment in accordance with this opinion.

SECTION 11.—FIDUCIARY RELATION OF PARTNERS

Uniform Partnership Act, Section 21. (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.[7]

MITCHELL v. REED.

(Commission of Appeals of New York, 1874. 61 N. Y. 123, 19 Am. Rep. 252.)

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, affirming a judgment in favor of defendant, entered upon decision of the court at Special Term.

This action was brought to have certain leases, obtained by the defendant during the existence of a copartnership between him and plaintiff, for terms to commence at its termination, of premises leased

[7] *Lewis' Note to Section 21 (1)*—This paragraph removes a doubt in the existing law. At present it is not clear whether the obligation to account, where the partner has money or other property in his hands, is or is not an obligation in the nature of a trust. For instance: A., B., and C. are partners. A., as a result of a transaction connected with the conduct of the partnership, has in his hands, so that it may be traced, a specific sum of money or other property. A. is insolvent. Is the claim of the partnership against A. a claim against him as an ordinary creditor, or is it a claim to the specific property or money in his hands. The words "and hold as trustee for the partnership any profits" indicate clearly that the partnership can claim as their own any property or money that can be traced.

and occupied by the firm, declared to have been taken for the partnership, and to have it adjudged that the defendant held them as trustee for the partnership. * * *

The court found, as conclusions of law, that the defendant, Reed, was the sole owner of the leases executed to him as aforesaid, and that the plaintiff had no right, title, or interest in or to them, or either of them, and that the defendant have judgment accordingly, to which plaintiff duly excepted. Judgment was rendered accordingly.

EARL, C. The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights, and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself. He can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested. * * * It has been frequently held that when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease. It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation, and whether this contention is well founded is one of the grave questions to be determined upon this appeal.

It is not necessary, in maintaining the right of the plaintiff in this case, to hold that in all cases a lease thus taken shall inure to the benefit of the firm, but whether, upon the facts of this case, these leases ought to inure to the benefit of this firm. I will briefly allude to some of the prominent features of this case. These parties had been partners for some years. They were equal in dignity, although their interests differed. The plaintiff was not a mere subordinate in the firm, but, so far as appears, just as important and efficient in its affairs as the defendant. They procured the exclusive control of the leases of the property, to terminate May 1, 1871, and their partnership was to terminate on the same day. They expended many thousand dollars in fitting up the premises, a portion thereof after the new leases were obtained, and they expended a very large sum in furnishing them. By their joint skill and influence they built up a very large and profitable business, which largely enhanced the rental value of the premises. More than two years before the expiration of their leases and of their partnership the defendant secretly procured, at an increased rent, in his own name, the new leases, which are of great value. Although the plaintiff was in daily intercourse with the defendant, he knew nothing of these leases for about a year after they had been obtained. There is no proof that the lessors would not have leased to the firm as readily as to the defendant alone. The permanent fixtures, by the terms of the leases, at their expiration belonged to the lessors. But the movable fixtures and the furniture were worth vastly more to be kept and used in the hotel than to be removed elsewhere.

Upon these facts I can entertain no doubt, both upon principle and

authority, that these leases should be held to inure to the benefit of the firm. If the defendant can hold these leases, he could have held them if he had secretly obtained them immediately after the partnership commenced, and had concealed the fact from the plaintiff during the whole term. There would thus have been, during the whole term, in making permanent improvements and in furnishing the hotel, a conflict between his duty to the firm and his self-interest. Large investments and extensive furnishings would add to the value of his lease, and defendant would be under constant temptation to make them. While he might not yield to the temptation, and while proof might show that he had not yielded, the law will not allow a trustee thus situated to be thus tempted, and therefore disables him from making a contract for his own benefit. * * * It matters not that the court at Special Term found upon the evidence that the improvements were judicious and prudent for the purposes of the old term. The plaintiff was entitled to the unbiased judgment as to such improvements, uninfluenced by his private and separate interest. But, further, the parties owned together a large amount of hotel property in the form of furniture and supplies, considerably exceeding, as I infer, $100,000 in value. Assuming that the partnership was not to be continued after the 1st day of May, 1871, this property was to be sold, or in some way disposed of for the benefit of the firm, and each partner owed a duty to the firm to dispose of it to the best advantage. Neither could, without the violation of his duty to the firm place the property in such a situation that it would be sacrificed, or that he could purchase it for his separate benefit, at a great profit. Much of this property, such as mirrors, carpets, etc., was fitted for use in this hotel, and it is quite manifest that all of it would sell better with a lease of the hotel than it would to be removed therefrom. It is clear that one or both of these parties could obtain advantageous leases of the hotel for a term of years, and hence, if the parties had determined to dissolve their partnership, it would have been a measure of ordinary prudence to have obtained the leases and transferred property with the leases as the only mode of realizing its value. This was defeated by the act of the defendant, if he is allowed to hold these leases, and thus place himself in a position where the property must be largely sacrificed or purchased by himself at a great advantage.

This the law will not tolerate. The language of Lord Eldon, in Featherstonhaugh v. Fenspoint, 17 Ves. 311, a case in many respects resembling this, is quite in point. He says: "If they [the defendants] can hold this lease, and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away and seek some place in which to put it, as to the defendants, who were to continue it in the place where the trade was already established; and if the stock was sold the same construction would give them an advantage over the bidders. In effect they would have secured the good will of the trade to themselves in exclusion of their partner." For these reasons, independently of the consideration that the leases themselves had a value to which the firm was entitled, upon other grounds and upon authorities, to be hereafter cited, the plaintiff, who commenced his suit about one year before the term of the partnership expired, was, upon undisputed principles and authorities applicable to all trustees and persons

holding a fiduciary relation to others, entitled to the relief he prayed for. * * *

I am therefore of opinion that the judgment should be reversed, and new trial granted; costs to abide the event.

LATTA v. KILBOURN.

(Supreme Court of the United States, 1893. 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169.)

Bill by appellees, Kilbourn and Olmstead, as members of a dissolved partnership, against appellant, Latta, another member thereof, for an account of profits made by the latter in certain transactions alleged to have been within the scope of the partnership business, and which, as claimed, it was his duty to have conducted for the benefit of the firm, instead of for his individual advantage. Kilbourn and Latta had been partners in carrying on business as real estate brokers. Their business was one of agency, and consisted in negotiating and making sales and purchases of real property for others. Afterwards one Olmstead was admitted to the firm, the scope of the partnership business remaining unchanged. During the existence of both firms, each member thereof, with the knowledge of the others, had purchased real estate and other property on his individual account, and no question was ever made of the right to do so, nor did any partner ever claim that the profits realized from such purchases should be treated as belonging to the partnership or subject to division among its members. By special agreement and as a special venture they had several times bought real estate and property on joint speculation and had divided the profits. During the existence of the firm Latta entered into an agreement with one Stearns by which they undertook to engage in the buying and selling of real estate on joint speculation. These speculations resulted in large profits, and the present action is to compel Latta to account for his share of those profits and share them with his copartners, Olmstead and Kilbourn.

The court below entered a decree requiring Latta to account to his former partners for this share of these profits. From this decree Latta appealed.

JACKSON, J. * * * The court below based its opinion upon two grounds: First, that the scope of the copartnership business and agreement, as alleged in the third paragraph of the bill, (quoted above), was established, and that the appellant could not engage in purchases of real estate on his own account or in connection with others, except by the consent of his copartners, without violating the duty and obligation which he owed to his firm; and, secondly, that even if the copartnership did not include the business of buying and selling real estate on partnership account, still the appellant could not employ the knowledge and information acquired in the course of the partnership business in respect to the real estate market in making purchases or transactions for his own benefit.

The general principles on which the court proceeded admit of no question, it being well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the part-

nership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.

It therefore becomes necessary, in testing the liability of the appellant to account for the profits realized from the transactions with Stearns, to consider and ascertain what was the scope of the partnership agreement in reference to the purchase and sale of real estate. This is the underlying and essential fact on which rests the proper determination of the question whether the appellant, in engaging in the joint enterprises with Stearns, violated any duty or obligation which he owed to the firm of Kilbourn & Latta. In other words, the question on this branch of the case depends entirely upon this: Were or were not those transactions within the scope of the firm business, in respect to which Latta owed a duty to his firm, or in respect to which he could properly be said to be the agent of the firm? * * *

The proofs in the present case not only fail to break down his denial on this point, but, on the contrary, affirmatively establish that neither under the first nor the second firm of Kilbourn & Latta did the partnership agreement extend to the business of buying and selling real estate either for investment or for speculation on firm account. Neither of the appellees testified to the contrary. The appellee Kilbourn, when pressed upon the question, evaded a reply thereto; and Olmstead, in his sworn testimony, failed to support the allegation of the bill as made on that particular subject. On the other hand, the testimony of the appellant fully supported the denial of his answer, and he is corroborated by all the facts and circumstances in the case, such as the character of the business as advertised and as actually conducted. * * *

The court below was in error in finding as a matter of fact that the partnership extended to the buying and selling of real estate for the account of the firm. There is, therefore, no right on the part of the complainants to relief in this cause, based upon the consideration that the scope and character of the partnership business embraced the purchase and sale of real estate, either for the firm alone or jointly with others.

The further allegation of the bill "that all profits resulting from operations in real estate by any member of the firm of Kilbourn & Latta during the existence of said partnership should belong to said firm, and be entered upon the books of the firm, and be paid into the partnership account; and that no member of said firm should engage in the business of buying and selling real estate in the said District on his own account, or with any other person or persons, except in cases where the proposed transaction had been explained to the said firm, and the firm had declined to take any part therein,"—was also positively denied by the answer of the appellant under oath. There is no testimony in the cause to overcome that denial. On the contrary, the evidence establishes that there was no such restriction or limita-

tion imposed upon the individual members. So that the complainants were entitled to no relief on that ground.

But, aside from the foregoing questions of fact, how stands the case on the assumption that there was a new stipulation or agreement when Olmstead was taken into the firm (as claimed by Kilbourn and Olmstead, and as set out above) that knowledge and information obtained by any member of the firm as to bargains in real estate should be first communicated to the firm, with the view of giving the firm, or the members thereof, the first opportunity of purchasing, before any individual member thereof could act upon such knowledge or information for his own benefit? Can the agreement to furnish information as to bargains in real estate, and give copartners the option of taking benefit of such bargains, be considered as so enlarging the scope of the partnership business as to include therein the purchase and sale of real estate on joint account? It would be a perversion of language and a confusion of ideas to treat such a stipulation, if it were clearly established, as creating a partnership in future options to buy what did not already, by the terms of the copartnership, come within the scope and character of the partnership business. That alleged stipulation, instead of enlarging the partnership business, was manifestly a restriction and limitation upon the power and authority of the copartners to bind the firm, or the members thereof, in any real estate transaction, until each member had expressly consented or agreed to join in the particular purchase, specially submitted for consideration.

By the well-settled law of partnership each member of the firm is both a principal and an agent to represent and bind the firm and his associate partners in dealings and transactions within the scope of the copartnership. No express authority is necessary to confer this agency or fiduciary relation in respect to the business of the firm. If the buying and selling of real estate was a part of the business of Kilbourn & Latta, the alleged stipulation about giving an option to the firm and the members thereof to accept special bargains would have been an idle arrangement. But under the alleged stipulation each and every purchase of real estate was a special and individual transaction or enterprise, requiring the special assent and agreement of each partner thereto, before it became a subject of partnership, or was brought within the scope of the partnership business. Under the operation of the agreement, a partner who purchased real estate, either on joint or partnership account, did so not under or by virtue of the partnership articles, or under authority derived from the partnership business and his implied agency to represent the firm therein, but solely and exclusively from the special assent or agreement of his associates to engage in that particular purchase. So that each parcel of real estate to be acquired, as well as the agreement to purchase the same, was first made the subject of a special arrangement. It is difficult to understand how, under such circumstances and conditions, a copartnership could properly be said to include or extend to the business of purchasing and selling real estate.

The special subject of each purchase, as admitted by Kilbourn, like the purchase of bonds and other securities, did not and could not come within the operation of the copartnership, or become a part of the partnership agreement until each particular piece of property had been selected and agreed upon. It is undoubtedly true that, under this

alleged agreement, if a partner had submitted to the firm or his associates the question of buying a particular parcel of land, and they had agreed to make that purchase, he would thereafter have occupied an agency or fiduciary relation in respect to that particular piece of property. But the question here is whether his failure to give the firm, or his copartners, the opportunity of making an election to buy certain real estate, and his making the purchase thereof for his own account, or jointly with another, is such a violation of his fiduciary relations to the firm and his associates in respect to copartnership business as to entitle the latter to call him to account for profits realized in such transactions. In other words, will the violation of his undertaking to give to the firm, or his associates, the opportunity or option to engage in any particular transaction, not within the scope of the firm's business, entitle the copartners to convert him into a constructive trustee in respect to the profits realized therefrom? * * *

We are clearly of opinion that the alleged new stipulation that each copartner should furnish to the firm, or to the members thereof, information as to bargains in real estate, and give it or them the option to engage in the acquisition thereof before acting upon such information for his own benefit, neither enlarged the scope of the partnership so as to make it include the purchases and sales of real estate, nor precluded any member of the firm from making purchases on his own account or jointly with others; and that the act of the appellant in purchasing property with Stearns was no such a violation of his duty and obligation to the firm of Kilbourn & Latta, or to the members thereof, as to entitle the appellees to share in the profits which he realized therefrom.

In respect to the second ground, on which the court below rested its judgment, that the appellant could not take advantage of the skill, knowledge, and information as to the real-estate market acquired in the course of his connection with the partnership of Kilbourn & Latta, so as to gain any profit individually therefrom, but was bound to share with his copartners all the beneficial results which could be derived from his knowledge or information on that subject, we need not do more than to say that this proposition is wholly unsupported either by the authorities or by any legal principle applicable to partnership law.

It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, and without going into the authorities it is sufficient to cite the thoroughly considered case of Aas v. Benham, [1891] 2 Ch. 244, 255, in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection with the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice Lindley that if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and

not competing with it, the firm is not entitled to an account of such benefits.

It was further laid down in that case * * * that "it is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefits from information which he obtains as a partner would be manifestly absurd." And it was said by Lord Justice Bowen that the character of information acquired from the partnership transaction, or from connection with the firm, which the partner might not use for his private advantage, is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right.

Tested by these principles, it cannot be properly said that Latta used any information which was partnership property, so as to render him chargeable with the profits made therefrom. His knowledge of the real estate market, or in respect to profitable investments therein, was not used in competition with the business of the firm, nor in any manner so as to come within the scope of the firm's business. * * *

We are clearly of opinion, upon the whole case, that the decree should be reversed, and the cause remanded to the court below with directions to dismiss the bill at the costs of the appellees, and it is accordingly so ordered. * * *

BLOOM et al v. LOFGREN et al.

(Supreme Court of Minnesota, 1896. 64 Minn. 1, 65 N. W. 960)

Action by Louis Bloom and others against C. F. Lofgren and others. Verdict for plaintiffs, and from an order refusing a new trial, Lofgren appeals.

COLLINS, J. From the evidence adduced upon the trial of this action, it was well established that the writing designated as "Exhibit A" never became a contract between defendant Lofgren and the other persons who signed it, for there was nothing tending to show that the former ever accepted its terms and conditions. To the contrary, it appeared that he did not, and that it was wholly superseded by the oral agreement entered into April 15, 1891, after the writing was signed. And, even if it had been binding on the signers up to that time, it is clear that its terms and conditions were changed and modified at the meeting of Lofgren and his associates on that day. It was then agreed that Lofgren should purchase the horse in question of the supposed owner, Walker, for cash, for the association; that he should buy for $1,800 if he could not buy for a less sum; that he should advance the necessary money; and that he should take the notes of such persons as could not make immediate payment, payable at a future time, bearing 10 per cent. interest. This was the final contract, and, as before stated, modified or entirely superseded the writing. If Lofgren had previously purchased the horse at $1,200,—and it was admitted that he had,—he fraudulently imposed upon those with whom he was dealing, his actual or proposed copartners in the transaction. The law will not permit him to retain and enjoy the fruits of his fraudulent representations that Walker was still the owner, that the lowest cash price was $1,800, and his later representations of the same nature, that he had bought the animal as authorized, and had paid $1,800 for him. In

their dealings with each other, partners occupy positions of trust, and are required to exercise the most scrupulous good faith towards each other. Nor is this requirement confined to persons who are actually copartners, but it extends to those negotiating for a partnership not yet formed. All of the findings of fact were supported by the evidence.

Order affirmed.

EXCHANGE BANK OF LEON et al. v. GARDNER et al.

(Supreme Court of Iowa, 1897. 104 Iowa, 176, 73 N. W. 591.)

Suit in equity for an accounting, and to recover of defendant Gardner $15,000 on account of poor investments made by him as one of the partners and cashier of plaintiff banking partnership. Gardner was accused of negligently purchasing and renewing notes, to the loss of the partnership. Judgment for defendants. Plaintiffs appeal.

ROBINSON, J. * * * It must be admitted that Gardner did not exercise the highest degree of care and diligence which was possible in purchasing the notes in controversy; and the question we are required to determine is whether, in view of the facts disclosed by the record, his failure to exercise greater care and diligence than he did makes him liable for the loss which followed the investments. There is no evidence whatever that he acted in bad faith, nor do we think that he exceeded his authority in purchasing Kansas City paper. Money of the bank was invested in Chicago, and a little later investments were made in Sioux City and Minneapolis paper. It is not at all probable that all of those investments were made without the knowledge of the president of the bank; and, even if not known at the time they were made, they were certainly known within a short time thereafter, and we are satisfied that Gardner's authority to make them was not then questioned. That he was making an honest effort to invest properly a portion of the idle money of the bank is clearly shown, and that no question in regard to the Kansas City investments was made until after the Winner failure is, we think, also established. It was the duty of Gardner to act in good faith and with entire honesty in transacting all the business of the bank, and to exercise as high a degree of care and skill as is generally exercised by business men in the management of such business. * * * But he was not liable for honest errors in judgment, nor for the failure to take the utmost precaution possible in making investments for the bank. * * * Applying these rules, we conclude that he was not so negligent in the transactions in question as to be liable for the resulting losses.

This conclusion makes it unnecessary to determine questions in regard to ratification and waiver discussed in the arguments of counsel. The judgment of the district court appears to be sustained by the evidence, and is affirmed.

SECTION 12.—PARTNER'S RIGHT TO PARTICIPATE IN MANAGEMENT

Uniform Partnership Act, Section 18. (e) Subject to any agreement between them, all partners have equal rights in the management and conduct of the partnership business.

(h) Subject to any agreement between them any difference

arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

(g) Subject to any agreement between them no person can become a member of a partnership without the consent of all the partners.

JOHNSTON & CO. v. DUTTON'S ADM'R.

(Supreme Court of Alabama, 1855. 27 Ala. 245.)

GOLDTHWAITE, J. The evidence in this case tended to show that the appellants and one Vanderslice carried on in copartnership a steam sawmill, which by the articles of copartnership was to continue at least five years; that the note sued on was given with the concurrence of two of the partners, Fogg and Vanderslice, for supplies necessary for the hands engaged in carrying on the mill, which had been ordered by one of them. Upon these facts alone there can be no doubt that the firm would be bound. The furnishing of supplies to those engaged in the immediate direction of the business was essential to the conducting of it, and within the scope of the purpose for which the individuals had associated; and the authority of either of the partners to purchase such supplies, and give the note of the firm, cannot be questioned.

The principal ground of objection, however, is that the evidence proved that, before the goods were furnished and the note given, the appellant Johnston gave notice to the public that he would not be responsible for any future debt contracted on account of the copartnership, and that this notice was brought home to the party with whom the debt was contracted; and it is insisted that its effect was to revoke the authority of the other partners, so far as he was concerned, to bind the firm from that time.

It is to be observed that in the present case the contract was concurred in by two members of the firm; and the question, therefore, is as to the right of the majority to bind the other partners, against their dissent, as to matters appertaining to the common business, and in the absence of any stipulation conferring that power in the articles of copartnership. This question is a new one in this court, and, indeed, we have found no case in which it has been expressly decided. Both in England and the United States there are cases which assert the general proposition that a partner may protect himself against the consequences of a future contract, by giving notice of his dissent to the party with whom it is about to be made. * * * And where the firm consists of but two persons, and there is nothing in the articles to prevent each from having an equal voice in the direction and control of the common business, the correctness of the proposition cannot be questioned. In such case the duty of each partner would require him not to enter into any contract from which the other in good faith dissented; and, if he did, it would be a violation of the obligations which were imposed by the nature of the partnership. It would not, in fact, be the contract of the firm; and the party with whom it was made, having notice, could not enforce it as such. So, if the firm was composed of more than two persons, and one of them dis-

sented, the party with whom the contract is made acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the articles or from the nature of the partnership contract. All the cases can be sustained on this principle; and it is in strict analogy with the civil law, which holds, where the stipulations of the partnership expressly intrust the direction and control of the business to one of the partners, that the dissent of the other would not avail, if the contract were made in good faith. Pothier, Traite du Com. de Soc. Nos. 71, 90. And such, also, we think, is the rule of the common law. Const. v. Harris, Turn. & Russ. 496; Story on Part. § 121. Were it otherwise it would be denying to parties the right to make their own contracts. If our views as to the governing force of express stipulations are correct, the effect of such terms or conditions as result by clear implication from the articles, or arise out of the nature of the partnership, must be the same. It is as if they had been expressly provided.

Now, whenever a partnership is formed by more than two persons, we think that in the absence of any express provision to the contrary there is always an implied understanding that the acts of the majority are to prevail over those of the minority as to all matters within the scope of the common business; and such we understand to be the doctrine asserted by Lord Eldon in Const. v. Harris, supra, and such was the opinion of Judge Story. Story on Part. § 123; 3 Kent's Com. (5th Ed.) 45. The rule as thus laid down is certainly more reasonable and just than to allow the minority to stop the operations of the concern against the views of the majority. We do not say that it would be a bona fide transaction, so as to bind the firm, if the majority choose wantonly to act without information to or consultation with the minority. * * * But when, as in the present case, the one partner has given notice, and expressed his dissent in advance, there could be no reason or propriety in requiring him to be consulted by the other two.

We do not consider the cases to which we have been referred, holding that one partner has the right at pleasure to dissolve a partnership, although the articles provide that it is to continue for a specified term (Marquand v. Mfg. Co., 17 Johns. [N. Y.] 525; Skinner v. Dayton, 19 Johns. [N. Y.] 513, 10 Am. Dec. 286), as having any bearing on the case under consideration. Conceding they are law—which is doubtful (Story on Partn. & 275, note 3, and cases there cited)—the decision rests solely upon the ground that the limitation on the right of dissolution is incompatible with the nature of the copartnership contract; and this principle does not militate against the position we have asserted. The dissent, in the present case, cannot be regarded as a dissolution; for, if effectual, it would not necessarily produce that result, although it might operate to change the mode of conducting the business. In other words, it might be carried on without contracting debts.

Our conclusion is that the act, being concurred in by two of the partners, was, under the circumstances, the act of the firm, and that the charge, asserting the proposition that the dissent of one partner against the other two would necessarily exonerate him, was properly refused.

Judgment [for plaintiff] affirmed.

APPEAL OF JENNINGS et al.

(Supreme Court of Pennsylvania, 1888. 16 Atl. 19, 2 L. R. A. 43.)

Bill by Joseph G. Beale against Benjamin F. Jennings, John Davis, Robert Flenniken, and T. D. Jennings, all parties being of the firm of Jennings, Beale & Co., Limited, to enjoin the removal of the location of the steel-works of the firm. The opinion of the court was as follows: "The facts in this case present but a single question. It is whether the majority of the copartnership of Jennings, Beale & Co., Limited, have authority to change the location of their works, against the will of the minority. The partnership was formed for the manufacture and sale of steel, and the location of their works was stated in their certificate of association to be Leechburg, Armstrong county, Pa. It seems evident that the location of works for the manufacture of steel is not a matter of indifference. Any business, to be successful, must be properly surrounded. This is so much the case with the manufacture of steel that few places in our whole land are adapted for it, and therefore few are chosen for such works. This being a palpable truth, a court, in construing an instrument intended as the basis of such a copartnership, could not regard the place mentioned for the location of the works as a matter of indifference, or in any other light than a material element in the contract of the parties. If that be true, it could of course be changed only with the consent of all the members. If a majority were determined to abandon the works in Leechburg, and erect new works in some part of Allegheny county, it would plainly be a new enterprise; and yet no distinction in principle can, to our minds, be made between that and what is here proposed. The majority of Jennings, Beale & Co., Limited, are about to remove part of their works from Leechburg to some place in Allegheny county, with a view to the removal of the entire works thither in the future. Thus they would undertake a venture to which the plaintiff never committed himself, and would destroy the works they have agreed to operate. In our opinion, this is such a departure from the enterprise contemplated in the agreement of the parties, that constitutes such an irreparable injury to the property and right of the plaintiff, as entitles him to the injunction heretofore granted. The injunction is therefore continued until the further order of the court." Whereupon defendants appeal.

PER CURIAM. Decree affirmed, at costs of appellants.

SECTION 13.—PARTNER'S RIGHT TO INFORMATION

Uniform Partnership Act, Section 19. The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

Section 20. Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner under legal disability.

SECTION 14.—PARTNER'S RIGHT TO REMUNERATION FOR SERVICES

Uniform Partnership Act, Section 18. (f) Subject to any agreement between them, no partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

GAY v. HOUSEHOLDER.

(Supreme Court of Appeals of West Virginia, 1912. 71 W. Va. 277, 76 S. E. 450, Ann. Cas. 1914C, 297.)

Bill by Pat Gay against W. C. Householder. Decree for defendant, and plaintiff appeals.

MILLER, J. This suit is to settle a partnership. * * *

Now as to the salary item. There is substantial agreement between the parties as to what the original contract of co-partnership was, and that not a word was then said about salary. Householder makes some pretension that afterwards something was said by him to Gay about salary, but Gay denies this. He swears that Householder thought when they made the contract that as he was to finance the enterprise, and furnish the stock or capital to run it, an equal share of the profits would be fair compensation. It required considerable capital to furnish the live stock and keep the business stocked up with meat and other articles dealt in, besides the time required of Gay in doing so. The general rule is well established, that one partner is not entitled to compensation for his services in attending to partnership affairs, unless there be a contract therefor, express or implied. * * * No express agreement is proven, and we cannot say, on the facts proven, that one is implied. * * *

Another assignment of error is the allowance to John Wallace, expert accountant, $20.00, for work done on the firm's books, and in making up the account. We are not disposed to disturb this item. True Householder should have furnished the account without assistance of an expert accountant, but it was a proper expense incurred by the commissioner or receiver, and we think the item was a proper disbursement of the firm assets.

Affirmed in part, and reversed in part.

LINDSEY v. STRANAHAN.

(Supreme Court of Pennsylvania, 1889. 129 Pa. 685, 18 Atl. 524.)

Suit in account render by J. K. Lindsey against J. A. Stranahan, to settle the copartnership business existing under the name of J. K. Lindsey & Co. Decree for defendant, and plaintiff appeals.

PER CURIAM. There is but a single question in this case: Is J. R. Lindsey, the plaintiff, entitled to compensation for his services as a partner? It is conceded that there was no express contract that he should be paid for such services, and there is no principle better set-

tled than that the law will not imply a contract in such cases. The reason is that the partner is but attending to his own affairs. This rule is inexorable; as much so as that between parent and child. Were it otherwise, we might have a contract between the partners upon the settlement of every partnership account as to the value of their respective services. It is true this principle may work hardship in particular cases,—almost every general rule does; but that is a weak argument against the soundness of the rule. When the copartnership agreement contemplates that one partner shall manage the business, or do more than his share of the work, it is easy to provide for his compensation in the agreement itself; and if no such stipulation is then made, as before said, the law will not imply one. Even where a liquidating or surviving partner settles up the business, it has been repeatedly held that he is not entitled to compensation for doing so, although, in such case, he performs all the services. * * *

Judgment affirmed.

CHAPTER III

RELATIONS OF PARTNERS TO THIRD PERSONS

Section
1. Scope of a Partner's Power in General.
2. Particular Powers.
3. Powers with Respect to Partnership Realty.
4. Powers Arising by Estoppel.
5. Liability of Partners, When Joint, or Joint and Several.
6. Right of a Creditor of a Partner in the Partner's Individual Capacity with Respect to Partnership Property.

SECTION 1.—SCOPE OF A PARTNER'S POWER IN GENERAL

Uniform Partnership Act, Section 9. (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.[1]

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

WINSHIP et al. v. BANK OF THE UNITED STATES.

(Supreme Court of the United States, 1831. 5 Pet. 529, 8 L. Ed. 216.)

MARSHALL, C. J. * * * This was an action brought in the court for the first circuit and district for Massachusetts, against John Winship, Amos Binney and John Binney, merchants and partners, trading under the name and firm of John Winship, as indorser of several promissory notes, made by Samuel Jacques, Jun. * * * A verdict was found for the plaintiffs, and judgment entered thereon; which is brought before this court by writ of error. * * *

The third instruction asked in the Circuit Court, goes to the construction of the articles of co-partnership. The plaintiff in error contends that those articles gave Winship no authority to raise money on the credit of the firm, or to bind it by his signature, for the purpose of borrowing money.

The instruction given was, that if the particular terms of the ar-

[1] *Lewis' Note to Section 9 (1).*—The words "including the execution in the partnership name of any instrument" avoid any possible doubt as to whether a partner has the authority, in the ordinary course of business, to enter into formal contracts for his partnership, or to convey partnership property when the conveyance is the result of a sale in the ordinary course of partnership business.

ticles were unknown to the public, they had a right to deal with the firm in respect to the business thereof, upon the general principles and presumptions of limited partnerships of a like nature, and that any special restrictions did not affect them; that in such partnerships, it was within the general authority of the partners to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm, and if such was the general usage of trade, the authority must be presumed to exist, but that it did not extend to transactions beyond the scope and object of the co-partnership; that in the present articles, Winship was in effect constituted the active partner, and has general authority to transact the business of the firm, and a right to bind the firm in transacting its ordinary business with persons ignorant of any private restriction, to the same extent that partners in such limited partnerships usually possess.

The amount of the charge is, that if Winship and the two Binneys composed a joint company for carrying on the soap and candle business on the credit of the company, in the manner usually practiced in such partnerships, notwithstanding any secret restriction on his powers, in any agreement between the parties; provided such restriction was unknown to the lender.

The counsel for the plaintiff in error has objected to this instruction with great force of reasoning. He contends very truly, that in fact scarcely any unlimited partnerships exist. They are more or less extensive; they may extend to many or to few objects; but all are in some degree limited.

That the liability of a partner arises from pledging his name, if his name is introduced into the firm, or from receiving profits if he is a secret partner.

No man can be pledged but by himself. If he is to be bound by another, that other must derive authority from him. The power of an agent is limited by the authority given him; and if he transcends that authority, the act cannot affect his principal, he acts no longer as an agent. The same principle applies to partners. One binds the others, so far only as he is the agent of the others.

If the truth of these propositions be admitted, yet their influence on the case may be questioned. Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles, which are known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of these is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts. Another, more applicable to the subject under consideration, is, that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions, as entirely as himself. This is a general power, essential to the well conducting of business; which is implied in the existence of a partnership. When then a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business, has a right to consider him as the company, whoever may compose it.

It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of co-partnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business, in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners; but ought not to affect those to whom they are unknown, and who trust to the general and well established commercial law. * * *

The counsel for the plaintiff in error supposes, that though these principles may be applicable to an open avowed partnership, they are inapplicable to one that is secret.

Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner, and one whose name was to the articles. But their responsibility, in all partnership transactions, is admitted to be the same. Those who trade with a firm on the credit of individuals whom they believe to be members of it, take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners, who were not ostensible, are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea that, if partners are not openly named, the resort to them must be connected with some knowledge of the secret stipulations between the partners, which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles. * * *

We think there is no error in the opinions given by the judge to the jury. * * * The judgment is affirmed. * * *

GORDON v. AUMILLER.

(Supreme Court of Washington, 1920. 109 Wash. 496, 187 Pac. 354, 9 A. L. R. 369.)

Action by J. H. Gordon against W. C. Marburger and another, wherein W. J. Aumiller intervened. The plaintiff, Gordon, commenced this action against the defendant Marburger, seeking an accounting of their partnership affairs and the appointment of a receiver to take charge of their partnership property, pending the settlement of their differences. The partnership had been for the growing of potatoes. Marburger had borrowed money from Aumiller, giving his notes therefor, secured by a chattel mortgage on the potatoes of the firm. From a judgment for the plaintiff, Gordon, the intervener, Aumiller, appeals.

PARKER, J. * * * It is conceded that the business relation between them was that of a nontrading partnership, and that Marburger's power to contract debts and incumber the partnership property was limited accordingly. In Snively v. Matheson, 12 Wash. 88, 40 Pac. 628, 50 Am. St. Rep. 877, Judge Dunbar, reviewing the law touching the power of one partner of a nontrading partnership to bind the other partners, or the partnership property to the detriment of the other partners, speaking for the court, said: "The presumption is that one partner has no power to bind the other partners. Hence, before recovery can be obtained upon a contract entered into by one partner in a nontrading partnership against the other partners, it must be affirmatively shown by the party attempting to bind the noncontracting partners, either that the authority to bind was conferred by the articles of incorporation, or that authority had been specially conferred, or that it had been the custom of such partnership to recognize this right to such an extent as would give innocent dealers a right to rely upon the custom."

It was also recognized as the law in that decision that, in the doing of acts ordinarily necessary to be done by one partner in the performance of partnership duties assigned to such partner, he can bind the other partners and their interest in the partnership property. It is plain, however, that in this partnership Marburger had no duties to perform in the partnership business rendering it at all necessary for him to borrow money to further the partnership interests, nor was there any custom of dealing by either of the partners touching the partnership business in the least suggesting that Marburger was authorized to borrow money for the partnership or incumber its property. The contentions of counsel for Marburger are rested upon the theory that Gordon was a silent or dormant partner, and that Aumiller was warranted in dealing with Marburger upon the assumption that he was the sole owner of the potatoes. It is true that Aumiller testified in substance that he had no notice of Gordon's interest in the potatoes until after he had made all of the three loans to Marburger. It is hard to believe that Aumiller was wholly ignorant of Gordon's interest in the potatoes, in view of the fact that Aumiller prepared the rent receipt evidencing the leasing of the land to both Marburger and Gordon for the raising of these potatoes. The chattel mortgage given by Marburger to Aumiller to secure the first loan of $150 described the crop of potatoes as being then growing upon the same land, describing it, and referring to it as belonging to Henry Pagel, which mortgage was executed on June 12th, only 1 month and 12 days after Aumiller had prepared the rent receipt for Marburger. Surely this ought to be held to be sufficient to at least put Aumiller upon inquiry as to the probability of Gordon being interested in the potatoes. This significant fact; together with the fact that Gordon made no effort to conceal, and did no act tending to conceal, the existence of the partnership relation between him and Marburger and the fact that this was purely a nontrading partnership, we think, compels the conclusion that in no event can Aumiller at this time be heard to say, as against the rights of Gordon, that he was led to believe that Marburger was the sole owner of the potatoes, with absolute right to borrow money and secure the payment of the same by incumbering them. * * *

The judgment is affirmed.

SECTION 2.—PARTICULAR POWERS

Uniform Partnership Act, Section 9. (3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership;

(b) Dispose of the good will of the business;

(c) Do any other act which would make it impossible to carry on the ordinary business of the partnership;

(d) Confess a judgment;

(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

Section 11. An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.[2]

Section 12. Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.[3]

[2] *Lewis' Note to Section 11.*—Admissions before dissolution concerning a particular matter should bind the partnership only where the partner has authority to act in the particular matter, and after dissolution only if necessary to wind up the business. Where the partner has no authority to act and the person with whom he is dealing knows he has no authority, or where the admission is made after dissolution and is not for the winding up of partnership affairs, it should not affect the partnership. If it is not the act of the partnership then it should not affect the partnership. If it is not the act of the partnership then it should not be evidence against it. The words "within the scope of his authority, as conferred by this act" produce this result.

[3] *Lewis' Note to Section 12.*—At present, there is no confusion in the law when the "notice" is given to the partner while he is a partner. In such case the effect is the same as if notice was had by all the partners. Where the knowledge or notice has been received by the partner before he became a partner, and his partners are ignorant of this, and he is not the partner acting in the particular matter, there is no doubt that there has been neither knowledge of or notice to the partnership. Where, however, the partner acting in the particular matter acquired knowledge before he became a partner, and the knowledge is then present in his mind, the weight of authority, and, it is submitted, of reason, appears to be that the partnership should be charged with knowledge. Mechem on Agency, p. 721. The words "acquired while a partner or then present to his mind" effect the result desired.

It is not clear what the present law is when "knowledge," which is not the knowledge that may come from notice, has been obtained by a partner after the formation of the partnership, but the partner having such "knowledge" is not the one acting in the particular matter. It seems clear that in this

SECTION 3.—POWERS WITH RESPECT TO PARTNERSHIP REALTY

Uniform Partnership Act, Section 10.[4] (1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

SECTION 4.—POWERS ARISING BY ESTOPPEL

Uniform Partnership Act, Section 4. (2) The law of estoppel shall apply under this act.

(3) The law of agency shall apply under this act.

case the partnership should be charged only when the partner having "knowledge" had reason to believe that the fact related to a matter which had some possibility of being the subject of partnership business, and then only if he was so situated that he could communicate it to the partner acting in the particular matter before such partner gave binding effect to his act. The words "who reasonably could and should have communicated it to the acting partner" accomplish this result.

[4] *Lewis' Note to Section 10.*—The adoption of this section does away with the existing uncertainty surrounding the subject of the conveyance of real property belonging to a partnership.

BANK OF MONONGAHELA VALLEY v. WESTON et al.

(Court of Appeals of New York, 1902. 172 N. Y. 259, 64 N. E. 946.)

William W. Weston and his two brothers were partners under the firm name of Weston Bros. The other members remained silent during many years, while William made or indorsed in the firm's name many notes for his individual purposes; the notes aggregating more than $1,000,000. Finally the partnership was dissolved. After dissolution, but before any notice of dissolution was given, William indorsed, in the firm name, for his individual purposes, the two notes now sued upon by a bank which discounted them. One note was for $6,500, and the other for $5,000. From a judgment in favor of the defendants, William W. Weston's partners, the bank, plaintiff, appeals.

O'BRIEN, J. * * * It appears without any dispute, since the facts were testified to by Abijah Weston himself, that for 10 years prior to the indorsement of the notes in question he knew that his brother who made the indorsement on these notes was using the firm name for the accommodation of others by indorsing notes in the name of the firm outside the partnership business. He had warned him against this course of business several times, and forbid him to do it any more. * * * The brother and member of the firm who was thus engaged for years in using the firm name to give credit to the paper of parties outside the partnership business was all the time acting or assuming to act as the agent of the firm. When one partner, with the knowledge of the other partners, uses the firm name and indorsement to give credit to others in matters foreign to the partnership business, and this course of conduct is allowed by the other partners to continue during a long series of years, the question must always arise as to how far the habitual exercise of such an agency or authority, originally irregular or even void, is cured by acquiescence, or made binding upon the firm as such by the doctrines of negligence or estoppel; and this brings us to the exceptions taken to the charge of the learned trial judge in submitting the case to the jury.

The plaintiff's counsel requested the court to charge that, when the defendant became aware of the persistent and continued use of the firm name by his brother outside the business of the firm, it became his duty to take some public action for the protection of outside parties. The court refused to charge the request, and the plaintiff's counsel excepted. We think that the request embodied a correct and important principle applicable to the proofs in the case, and that affected the issue between the parties from various directions, and should have been charged. * * * The right of one partner to use the firm name rests upon those rules and principles applicable to the relations of principal and agent. The principal will be often bound by the act of his agent in excess or abuse of his actual authority as between the principal and third persons, who, believing and having the right to believe that the agent was acting within and not exceeding his authority, would sustain loss if the act was not considered that of the principal. The doctrine is established to prevent fraud, and proceeds also upon the ground that, when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury. * * * When a partnership firm, having knowledge of the continued and persistent conduct of one of its members in lend-

ing the credit of the firm to others by means of accommodation paper, neglects to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, that will be deemed an acquiescence in it, and, if innocent third persons have been led thereby to put themselves in a position from which they cannot be taken without loss, if the act were held invalid, the other partners will be estopped from questioning it. * * *

Judgment reversed.

SECTION 5.—LIABILITY OF PARTNERS, WHEN JOINT OR JOINT AND SEVERAL

Uniform Partnership Act, Section 15. All partners are liable: (b) Jointly for all debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.[5]

[5] *Lewis' Note to Section 15 (b).*—The actual condition of the American statute law affecting the nature of partnership liability is as follows:

In the following states, by specific declaration of statutes, all partnership liability is made both joint and several: Mississippi, Missouri, New Mexico, Alabama, Maryland, West Virginia, Iowa, Kansas, Minnesota, North Carolina, and Arkansas. In some of these states the liability is merely "deemed to be joint and several for the purposes of suit." In some of the states referred to the statutes are general—that is, they include all joint liability—while in others there is the general statement, followed by specific enumeration of partnership liability. But in all the states referred to the statutes taken as a whole, effect, not only partnership liability, but also all joint liability.

In Illinois the court refused to interpret a general statute making all liability joint and several so as to include partnership liability, Fleming v. Ross, 225 Ill. 149, 80 N. E. 92, 8 Ann. Cas. 314 (1907); also the courts of Colorado, Erskine v. Russell, 43 Colo. 453, 96 Pac. 249 (1908). In New York, though the statute apparently made partners liable jointly and severally, the court refused so to interpret the act. Seligman v. Friedlander, 138 App. Div. 784, 123 N. Y. Supp. 583 (1910).

In Texas, Oklahoma, Montana, Pennsylvania, New York, Colorado, Illinois, North Dakota, South Dakota, Ohio, Massachusetts, New Jersey, Georgia, Vermont, Virginia, Rhode Island, Kentucky, Michigan, Maine, Connecticut, Idaho, and Indiana, partnership liability is joint. In many of these states, however, the results of joint liability, as known to the common law, have been modified by statute and decision. The extent of the modification varies. In some each partner must be sued severally, or all jointly; an election being required. In some the partnership may be sued in the partnership name, and thereafter the partners separately until satisfaction is had. In all the estate of the deceased partner is subject to liability, but in some only after action first had against the survivors; in others, proof of no partnership property must first be made; in others, proceedings may be first had against the estate.

The purpose of the statutes in those states which have made the liability joint and several was to effect certain procedural results, rather than to affect the substantive law. Where, therefore, a state has already declared the liability to be joint and several, then the principle of uniformity would not be affected by that state so altering this paragraph as to make the liability joint and several, as this change would affect only the procedural law and this act is one to make uniform the substantive law of partnership.

MASON v. ELDRED et al.

(Supreme Court of the United States, 1867. 6 Wall. 231, 18 L. Ed. 783.)

On certificate of division between the judges of the Circuit Court of Wisconsin. The plaintiff, Mason, sued in the Circuit Court for Wisconsin Anson Eldred, Elisha Eldred, and one Balcom, trading as partners, upon a partnership note of theirs. Process was served on Anson Eldred alone, who alone appeared and pleaded non assumpsit. On the trial, the note being put in evidence by the plaintiff, Eldred offered the record of a judgment in one of the state courts of Michigan, showing that Mason had already brought suit in that court on the same note against the partnership, where, though Elisha Eldred was alone served and alone appeared, judgment in form had been passed against all the defendants for the full amount due upon the note. The evidence being objected to by the plaintiff, because not admissible under the pleadings, and because it appeared on the face of the record that there was no judgment against either of the defendants named, except Elisha Eldred, who alone, as appeared also, was served or appeared, and because it was insufficient to bar the plaintiff's action, the question whether it was evidence under the issue in bar of, and to defeat, recovery against Anson Eldred, was certified to this court for decision as one on which the judges of the Circuit Court were opposed.

FIELD, J. The counsel of the plaintiff suggests that the question presented by the certificate of the judges of the Circuit Court is divisible into two parts: (1) Whether the record of the judgment recovered in Michigan was admissible under the pleadings; and (2) whether, if admissible, the judgment constituted a bar to the present action. We think, however, that the admissibility of the record depends upon the operation of the judgment.

If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissible; for it has long been settled that under the pleas of the general issue in assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit. * * * On the other hand, if the note is not thus merged, it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question, then, for determination, relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the joint debtor act of Michigan.

It is true that each copartner is bound for the entire amount due on copartnership contracts, and that this obligation is so far several that, if he is sued alone and does not plead the nonjoinder of his copartners a recovery may be had against him for the whole amount due upon the contract and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor in-

dividually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements, or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exists. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and, if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises upon which the action is brought were made jointly with another, and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner.

The language of Lord Mansfield in giving the judgment of the King's Bench in Rice v. Shute, Burr. 2511, "that all contracts with partners are joint and several, and every partner is liable to pay the whole," must be read in connection with the facts of the case, and, when thus read, does not warrant the conclusion that the court intended to hold a copartnership contract the several contract of each copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several that in a suit against him judgment would pass for the whole demand, if the nonjoinder of his copartners was not pleaded in abatement.

The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same not against another copartner, the plaintiff relies upon the case of Sheehy v. Mandeville & Jamesson, decided by this court, and reported in 6 Cranch, 254, 3 L. Ed. 215. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different states. It was elaborately reviewed by the Supreme Court of New York in the case of Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227, where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the Supreme Court of Massachusetts a ruling similar to that of Robertson v. Smith was made. Ward v. Johnson, 13 Mass. 148. In Wann v. McNulty, 2 Gilman, 359, 43 Am. Dec. 58, the Supreme Court of Illinois commented upon the case of Sheehy v. Mandeville and declined to follow it as authority. The court observed that, notwithstanding the respect which it felt for the opinions of the Supreme

Court of the United States, it was well satisfied that the rule adopted by the several state courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law and was supported by better reasons.

In Smith v. Black, 9 Serg. & R. 142, 11 Am. Dec. 686, the Supreme Court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract and was not discovered until after the judgment. "No principle," said that court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless, indeed, where the cause of action is joint and several, which, certainly, actions against partners are not." In its opinion the court referred to Sheehy v. Mandeville, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the Supreme Court of the United States, was not of binding authority, and it was disregarded.

In King v. Hoare, 13 Mees. & W. 495, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other was presented to the Court of Exchequer and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that by the judgment recovered the original demand had passed in rem judicatam and could not be made the subject of another action. In the course of the argument the case of Sheehy v. Mandeville was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice Marshall, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice Story, in Trafton v. United States, 3 Story, 651, Fed. Cas. No. 14,135, refers to this case in the Exchequer, and to that of Sheehy v. Mandeville, and observes that in the first case the Court of Exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation. They cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common-law rule were to govern the decision of this case, we should feel obliged, notwithstanding Sheehy v. Mandeville, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action. But by a statute of that state (2 Comp. Laws Mich. 1857, p. 1219, c. 133), the rule of the common law is changed with

respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or, who appeared therein, but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them personally. The principal is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded. D'Arcy v. Ketchum, 1 How. 165, 13 L. Ed. 648. Nor is the demand against the parties not sued merged in the judgment against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them. It shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power of the state to limit the operation of the judgment thus recovered. The state can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand as it can modify the operation of the judgment in any other particular.

A similar statute exists in the state of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterward before the court, if found within the state, that such parties may be sued upon the original demand. * * *

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that state, we answer the question presented in the certificate that the exemplification of the record of the judgment recovered against the defendant Elisha Eldred, offered by the defendant Anson Eldred, is not admissible in evidence in bar of, and to defeat, a recovery against the latter.

STOUT v. BAKER, Sheriff.

(Supreme Court of Kansas, 1884. 32 Kan. 113, 4 Pac. 141.)

HURD, J. Devier & Blackburn recovered a judgment in the district court of Kingman county, on the twenty-third day of October, 1882, against Stout & Wingert, by their partnership name, for $90.74, and costs of suit. Execution was issued on this judgment to the defendant in error, as sheriff of Kingman county, under which he levied on and took into his possession the buggy in controversy in this suit. The plaintiff in error commenced suit in a justice's court, filed his affidavit and bond for a delivery of the buggy to him, and the justice

issued the proper process, and, by virtue thereof, the buggy was taken from the defendant and delivered to the plaintiff. The bill of particulars in this suit in the justice's court states that S. S. Baker, sheriff, "on the thirteenth day of March, 1883, did levy on a certain phaeton, buggy, or wagon, as the property of Stout & Wingert, according to an execution, * * * but is the individual and private property of the plaintiff herein, and that said buggy or wagon is exempt from levy on execution or writ of attachment, and that the plaintiff has been damaged in the premises to the amount of ten dollars, for which he prays judgment." On the trial the justice of the peace rendered judgment in favor of the plaintiff for the possession of the buggy and costs of suit. The defendant appealed from the judgment to the district court of Kingman county. At the April term of the said district court the cause was tried by the court without a jury, and the court made general findings in these words: "The court, after hearing the evidence and argument of counsel, does find that the right of property and of possession thereof, as set out in the plaintiff's petition, was in the defendant at the commencement of the action, and that the value thereof was one hundred dollars"—and then rendered judgment on these findings against the plaintiff for the return of the property in dispute to the defendant, and, if return cannot be had, then for its value in the sum of $100, and costs. The plaintiff filed his motion for a new trial, which was overruled, and he made his case for this court and brings the cause here by petition in error. He brings up a record of all the evidence and proceedings in the cause. * * *

The second objection is that, under the judgment and execution against Stout & Wingert as partners, the individual property of the plaintiff in error could not be legally seized. We doubt whether this question can properly arise under the evidence. * * * Assuming that the second point can be and is properly raised, we need only say, in answer to it, that the record shows that the summons in the suit was served on both defendants, and that the return of the service shows the full names of each, and the plaintiff by his full name was one of the defendants served. Both defendants appeared in the suit in the district court. By such service and appearance both of the defendants are individually as well as partners bound by the judgment. * * * These defendants were jointly and severally liable on this judgment, (section 4, c. 21, Comp. Laws, 1879,) and we think an execution on it might be legally levied upon the partnership property of both or the individual property of either. * * *

We find no error in the rulings of the court, and the judgment is affirmed.

Uniform Partnership Act, Section 15. (a) All partners are liable jointly and severally for everything chargeable to the partnership under sections 13 and 14.

Section 13. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor, to the same extent as the partner so acting or omitting to act.

Section 14. The partnership is bound to make good the loss: (a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and (b) where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any parties while it is in the custody of the partnership.

MURPHY v. COPPIETERS et al.

(Supreme Court of California, 1902. 136 Cal. 317, 68 Pac. 970.)

GRAY, C. This action was brought by plaintiff for the negligent killing of her son by defendants, while said son was at work as a plumber in the Call Building on the 30th day of September, 1897. The son was at work in a certain shaft at the rear of the elevator shaft on the second floor. In the same shaft, above, at about the seventeenth floor, an employé of appellants named Johnson was engaged in fastening an iron ladder in place by means of iron anchors, and the evidence indicates that it was by Johnson dropping one of these anchors down the open shaft that the son came to his death. The plaintiff, upon a trial and verdict in her favor for $2,250, had judgment for that amount. The appeal is from this judgment and from an order denying a new trial. * * *

Nor was it necessary to bring suit against appellants as copartners; for, when a cause of action for tort exists against a copartnership, the several partners may be sued individually, if so preferred. We quote from Lindley on Partnership, at page 283: "Supposing a tort to be imputable to a firm, an action in respect to it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants; and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself." * * *

The judgment and order appealed from should be affirmed.

Uniform Partnership Act, Section 13. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Section 14. The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

SECTION 6.—RIGHT OF A CREDITOR OF A PARTNER IN THE PARTNER'S INDIVIDUAL CAPACITY WITH RESPECT TO PARTNERSHIP PROPERTY

Uniform Partnership Act, Section 25. (2) (c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. * * *

Section 28. (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require. * * *[6]

Section 32. (2) On application by or for a partner the court shall decree a dissolution on the application of the purchaser of a partner's interest in sections 28 or 29: (a) After the termination of the specified term or particular undertaking; (b) at any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

JOHNSON v. WINGFIELD et al.

(Court of Chancery Appeals of Tennessee, 1897. 42 S. W. 203.)

BARTON, J. This cause is before us on bill and demurrer. The demurrer was sustained, and the bill dismissed. Complainant appealed, and assigns errors. The main question presented in the case is whether in this state specific property belonging to the firm is subject to levy for the individual debt of one of the members of the firm. The case made in the bill substantially is as follows: The complainant shows and avers that he had obtained before a justice of the peace in Hamilton county two judgments against the defendant Wingfield, on which executions had been issued and certified, in pursuance of section 3786 of the Code of Tennessee, to Hamblen county, where executions had been issued, which were placed in the hands of a constable, and by him, on the 2d day of January, 1896, levied on the interest of Nisbet Wingfield in a lot of iron pipe and other material, the property of the firm of J. N. Hazelhurst & Co., a firm composed of J. N. Hazelhurst and Nisbet Wingfield, in which firm, it is alleged, Hazelhurst and Wingfield were equal partners. * * * The defendants filed a demurrer

[6] *Lewis' Note to Section 28 (1).*—This provision is taken from section 23 (2) of the English Partnership Act. The operation of the provision has given great satisfaction. The judgment creditor does not acquire any greater rights than the debtor is entitled to for his own benefit. Sutton v. English & Colonial Produce Co., [1902] 2 Ch. 502; Howard v. Sadler, [1893] 1 Q. B. 1; Cooper v. Griffin, [1892] 1 Q. B. 740; Scott v. Lord Hastings, 4 K. & J. 633 (1858).

and answer, the demurrer being incorporated in the answer; the substance and point of demurrer being that a levy cannot be made on a certain, specific part of partnership property for the individual debt of one of the members of the firm, as the bill shows was done in this case, and that, to reach a partner's interest in partnership property, the levy must be made upon all the partnership property. The point is made that the partnership owned as an entirety the particular assets of the partnership, and had a right to use the same in the business of the partnership; that the purchaser would be required simply to take the interest of the debtor partner, and would have no right to maintain this bill for trover or conversion of the specific property levied on. * * * As stated, the demurrer was sustained, and the bill was dismissed. * * *

The main question presented has been before our Supreme Court in a number of cases, and the subject seems to be surrounded by many perplexities. One of the earlier and the leading case in this state on the subject is that of Haskins v. Everett, 4 Sneed, 531. This was an action of replevin brought by Haskins & Reynolds against James Everett, to recover certain personal property belonging to the firm of Haskins & Reynolds, which had been levied on by an execution in the hands of a constable, issued on a judgment recovered by one Browden against Haskins for his individual debt. Judge Caruthers, in his opinion, stated that the question was whether partnership property can be taken in execution and sold for the private debt of one of the members. The circuit judge held that it could, and gave judgment for the value of the property, and also for $43, damages for the detention of the property which had been taken in the action, against the complainants, Haskins & Reynolds; and this judgment was affirmed by the Supreme Court. Judge Caruthers, in his opinion, says: "Whatever doubts and difficulties may have existed on this subject, the law is now well settled that partnership property may be seized and the interest of one partner sold for his individual debt. The purchaser, however, only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts, and not his proportion of the property sold. What that interest is cannot generally be ascertained until a final adjustment and settlement of the partnership concerns. The effect of the sale and purchase is only to place the purchaser in the shoes of the partner whose interest he buys, and make him a tenant in common with the other partners. This is a necessary consequence of the rule that each partner has a lien upon the firm property, as well for the debts due by the firm as his own share and proportion thereof. The judgment creditor or the purchaser under him must take the interest sold subject to all such liens and claims. To ascertain the interest sold, the purchaser or any of the other partners may file a bill for the settlement of the partnership. The great uncertainty of the value of the interest purchased (for it may be nothing, or more or less than the amount bid) does not affect the principle." * * *

Referring to authorities outside of the state: The confusion and perplexity in which this question is involved is not confined to our own state, but is found in the annunciations of the text writers on this subject, and in the decisions of nearly all of the courts of last resort of the United States and in England. Mr. Freeman, in his work on Exe-

cutions (2d Ed. § 125), in treating of the matter, says: "It is universally conceded that, except where some statutory provision to the contrary has been enacted, the interest of the partner is liable to an execution for his individual debts. * * * Confessedly, a sale under an execution against one partner does not divest the title of the partnership in the property. It transfers only such interest as remains in the judgment debtor upon the settlement and adjustment of the affairs of the partnership. As the rights of the partnership are paramount, it would seem that they would preclude the officer serving the writ from taking the property into his exclusive possession, even for the purposes of levy and sale. And this view has been maintained with great force in several decisions pronounced in the supreme court of New Hampshire. The authorities elsewhere are almost unanimous in affirming that the officer may, in levying on the interest of a partner, assume exclusive possession of the chattels of the firm, and retain it until the sale. It is also undoubted that the interest subject to execution is, at least in equity, in no respect greater than that held by the defendant; that it is subject to the paramount claims against the partnership, and is in fact nothing beyond the right to demand an accounting, and to share in the surplus that may remain after all the partnership obligations have been discharged. Whether the levy can be upon any specific part of the goods of the firm, and whether, by the sale, the purchaser acquires any interest in the property sold, beyond the right to call for an accounting, are questions upon which the authorities are not agreed. The earlier cases were determined when partnerships were regarded as mere co-tenancies. Hence those cases, and such modern cases as have been controlled by them, place sales under execution for the separate debt of a co-partner very much on the same ground as a sale for a separate debt of a co-tenant. Therefore, according to this view, an officer can, under such an execution, levy upon a part as well as upon the whole of the chattels of the firm; and it can, by his sale, transfer a moiety of the legal title, together with the right to take and hold possession against the other partners, leaving them without any other means of enforcing the rights of the partnership than by proceedings in chancery. But the courts have gradually progressed towards a realization of the true nature of partnerships, and have therefore come to understand that they are materially different from co-tenancies. A co-partner has no right to any specific chattel belonging to the firm, nor has he any right as against the firm to take or hold exclusive possession of any such chattel. The real ownership of all the chattels is vested in the firm. The interest of each partner is merely a right to share in the proceeds of these chattels after all the partnership obligations have been satisfied. Upon what principle can the purchaser at an execution sale be sustained in the exercise of rights to which the defendant was never entitled? Clearly, upon no principle whatever. The precedents made at an early day, when the law of partnership was imperfectly understood, are losing their force as authorities. Their place is being supplied by a line of decisions destined to grow in favor and in number declaring that the creditor of an individual partner cannot sell any specific article, but only the partner's interest in the whole of the partnership assets and that the purchaser does not acquire the right to hold possession of the property purchased as against the other member of the firm, but only an interest in the proceeds, after the business of the firm shall have been settled.

Though the right of the officer to seize the property of the partnership under an execution against one of its members is conceded, it must be exercised, as far as possible, in harmony with the rights of the other partners, and not in hostility to them. His power to take and deliver possession of the corpus of the property is merely incidental of the right to reach the interest of the debtor, and is to be exercised only as a means to that end. Consequently, if he exceeds that limit, and undertakes to interfere with the rights of the other partners to a greater extent than is necessary to reach the interest of the debtor partner, he undertakes to sell the entire property, though his act is nugatory, such interference renders him liable as a trespasser ab initio."

In the same authority (section 254) it is said: "* * * The majority of the decisions on this subject are based on the false assumption that a co-partnership is a co-tenancy, and therefore sustains the officer in taking exclusive possession of the partnership property under a writ against one member alone. * * * The minority, based on more correct perceptions of the nature of a co-partnership and the rights of its respective members, will not permit a writ against one member to be used to seize all the assets and to suspend the business of the firm. The law with respect to the levy of a writ on a partner's interest in firm property involves many perplexities, the solution of which is worthy of legislative aid. To deny the right to make such a levy may very seriously embarrass creditors of a debtor amply able to discharge their debt; while to admit the right may involve the co-partners, and perhaps the creditors of the firm, in very serious inconvenience and substantial loss. Where the levy is permitted, its ultimate effect is to confer on the purchaser thereunder nothing beyond the right to an accounting. This is all the judgment debtor has, and therefore all he can transfer, whether the transfer be voluntary or involuntary. * * *"

These extracts will show into what confusion this subject has fallen by reason of the early decisions in all the states, evidently based, as stated by the text writers from whom we have quoted, on an erroneous conception, or, rather, a failure to recognize the true status of partnership property. It is well settled everywhere that, as to partnership property, partners are trustees of the partnership, as to each other, and the advantages derived from it inure to the benefit of the firm. And it is undoubtedly true that a firm or its members could, by injunction, or other appropriate remedy, prevent a partner from diverting partnership property to his individual use, to the damage of the firm, and could prevent him from exercising rights of possession and control which would be destructive of the purposes, or an injury to the business, of the firm. It is also well settled, as a general rule, that an execution cannot reach any higher interest in property than the debtor himself has; and yet all these decisions which justify an officer in taking exclusive possession of firm property would seem to ignore these just principles, which are so absolutely necessary to the successful operation of partnership business.

It would seem to be a contradiction of terms and principles to hold that the officer only takes and the purchaser only gets the interest which a partner may have in partnership property after a firm has been wound up and liquidated, and the partner's ultimate interest thus ascertained, and that an officer may seize partnership property, and retain exclusive possession of it until the sale, he thus being enabled

to do what the individual partner would have no right to do. And it also seems a violation of fundamental rights, and the taking of private property without compensation, to hold, * * * that where a partnership has endeavored to assert its rights of possession by a replevin suit as against an officer who had levied on the property for the individual debt of one of its members, it would be liable for damages for the use and detention of its own property. * * * It seems to be clear that, as long as property has not been converted by a partner, and is being used, or subject to be used, for the legitimate purposes of the partnership, no partner has any certain or exclusive or special interest in any specific partnership property, but it is the property of the entity, the firm. How, then, can a creditor or an officer take any specific interest in any particular piece of property belonging to the firm under such an execution, levy, and sale? * * * In other words, does the levy on specific property appropriate any specific property, or only the debtor's interest in the firm?

It would seem that by far the more sensible and enlightened method of reaching a partner's interest in the firm would be by garnishment, as provided by statute in Georgia; and, as said in Freem. Ex'ns, it would seem to be a subject deserving of legislative attention. * * * But, whatever trouble may arise from these holdings, we do not feel at liberty, in this court, to depart from what we understand to be well-settled principles in this state. Nor do we wish to be understood as criticising the holdings of our supreme court upon this subject, further than to call attention to the seeming inconsistencies that arise therefrom, and which are common to all the earlier cases in almost every state in the Union, as well as in England. But, for the purposes of this case, we may state that the decisions in this state from which we have above quoted settle the following points: (1) That partnership property may be levied on by the creditor for the individual debt of a member of the firm. (2) That specific property may be levied on, and it is not necessary that the execution be levied upon all the property of the firm. (3) That the officer may, and that in fact it is his duty to, take actual possession of the property levied on, and to retain it until the sale is made. (4) That the purchaser only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts. * * * (5) That, as stated by Judge Freeman in Bank v. Gray, 12 Lea, 459, a levy is necessary in order to fix a lien so as to authorize the filing of a bill.

These points being settled, it results, in our opinion, that the chancellor was in error in dismissing the complainant's bill. While we think that Hazelhurst had the right to use, and properly, whether by himself, or by the new firm of Hazelhurst & Co., used, the iron which had been levied on, in carrying out the contract and business of the old firm, still it is the logical effect of the decisions which we have quoted that the creditor, Johnson, having the right to have the property levied on, by the sale and purchase took whatever interest Wingfield had in this property at that time, which could only be ascertained by an accounting, and that this he has a right to do. If it shall turn out on an accounting that at the time of the levy the liabilities of the firm, as claimed in the answer filed with the demurrer, exceeded the assets, and that the firm was insolvent, then Johnson will, of course, take nothing by his purchase; and it is also clear that Johnson's interest could not exceed the value of Wingfield's share in all the partnership assets after

all partnership debts were paid, and all charges against him in favor of Hazelhurst were settled. The logical result of our cases on this subject seems to be that the taking by the officer has practically the same effect as the withdrawal and conversion of that amount of property by the debtor member of the firm, subject to being compelled to return. such an amount of the property after the exhaustion of other partnership property as might be necessary to pay all partnership debts, and to secure to the other partner his just share and division of the partnership assets.

For these reasons the decree of the chancellor will be reversed, and the cause remanded to be further proceeded with, with directions to refer the cause to the master to take an account, and to ascertain and report the condition of the old firm of Hazelhurst & Co. at the time of the levies made, as shown in the bill; and the complainant will be entitled to a decree for the value of Wingfield's interest in the property levied on, if any, on the lines indicated in this opinion. The decree of the chancellor is reversed, the demurrer overruled, and the cause remanded, as stated, and the defendants will pay the costs of the appeal.

CHAPTER IV

CAUSES OF DISSOLUTION

Section
1. Nature of Dissolution in General.
2. Causes of Dissolution Not Based on Breach of the Partnership Agreement.
3. Dissolution Caused by Breach of Partnership Agreement.
4. Dissolution Caused by Business Becoming Illegal.
5. Dissolution Effected by Court Decree.
6. Effect of Assignment of a Partner's Interest.

SECTION 1.—NATURE OF DISSOLUTION IN GENERAL

Uniform Partnership Act, Section 29. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.[1]

SECTION 2.—CAUSES OF DISSOLUTION NOT BASED ON BREACH OF THE PARTNERSHIP AGREEMENT

Uniform Partnership Act, Section 31. (1) Dissolution is caused without violation of the agreement between the partners:

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking.

(d) By the expulsion of any partner from the business bona fide in accordance with such power conferred by the agreement between the partners.

Section 31. (4) Dissolution is caused by the death of any partner.

(5) Dissolution is caused by the bankruptcy of any partner or the partnership.

[1] *Lewis' Note to Section 29.*—As used by the legal profession, the term "dissolution" designates, not only the single act of the termination of the actual conduct of the ordinary business, but also often the series of acts thereafter until the final settlement of all partnership affairs. It is also frequently said that dissolution, although the word is used to designate only the termination of ordinary business relations, terminates the partnership; it being at the same time explained that the partnership thereafter continues to exist for the purpose of suing and being sued in the process of winding up partnership affairs. Certainty demands that this confusion should be removed, if possible. In this act dissolution designates the point in time when the partners cease to carry on the business together; termination is the point in time when all the partnership affairs are wound up; winding up the process of settling partnership affairs after dissolution.

SECTION 3.—DISSOLUTION CAUSED BY BREACH OF PARTNERSHIP AGREEMENT

Uniform Partnership Act, Section 31. (2) Dissolution is caused in contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.[2]

SECTION 4.—DISSOLUTION CAUSED BY BUSINESS BECOMING ILLEGAL

Uniform Partnership Act, Section 31. (3) Dissolution is caused by any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

SECTION 5.—DISSOLUTION EFFECTED BY COURT DECREE

Uniform Partnership Act, Section 32. (1) On the application by or for a partner the court shall decree a dissolution whenever—

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind.

(b) A partner becomes in any other way incapable of performing his part of the partnership contract.

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.

[2] *Lewis' Note to Section 31.*—Paragraph (2) will settle a matter on which at present considerable confusion and uncertainty exists. The paragraph as drawn allows a partner to dissolve a partnership in contravention of the agreement between the partners. This is supported by the weight of authority. Civ. Code Cal. § 2417; Civ. Code S. D. 1903, § 1736; Gen. St. Okl. 1908, § 4850; Civ. Code N. D. 1905, § 5848; Civ. Code Mont. 1895, § 3262; Civ. Code, Ga. 1895, § 2633; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 537, 10 Am. Dec. 286 (1822); Mason v. Connell, 1 Whart. (Pa.) 381, 388 (1836); Monroe v. Conner, 15 Me. 178, 32 Am. Dec. 148 (1838); Cape Sable Co.'s Case, 3 Bland (Md.) 606, 674 (1840); Slemmer's Appeal, 58 Pa. 168, 176, 98 Am. Dec. 255 (1868); Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336 (1884); Carr v. Hertz, 54 N. J. Eq. 127, 33 Atl. 194 (1895); Moore v. Price, 116 Ala. 247, 22 South. 531 (1896); Karrick v. Hannaman, 168 U. S. 328, 334, 18 Sup. Ct. 135, 42 L. Ed. 484 (1897); Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315 (1899); Clements v. Norris, 8 Ch. Div. 129, 133 (1878). The English law is opposed to this view. Lindley, 601; Crawshay v. Maule, 1 Swanst. Ch. 509 (1818); Featherstonhaugh v. Fenwick, 17 Ves. 298 (1810); Peacock v. Peacock, 16 Ves. 49 (1809); Ferrero v. Buhlmeyer, 34 How. Prac. (N. Y.) 33 (1867); Story, § 275.

The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it, even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in doing so he breaks a contract, should, it is submitted, be recognized.

The rights of the parties upon a dissolution in contravention of the agreement are safeguarded by section 38 (2), infra.

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

(e) The business of the partnership can only be carried on at a loss.

(f) Other circumstances render a dissolution equitable.

Section 32. (2) The court shall decree a dissolution on the application of the purchaser of a partner's interest under sections 28 or 29: (a) After the termination of the specified term or particular undertaking. (b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

Section 28. (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require. (2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution: (a) with separate property, by any one or more of the partners, or (b) with partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold. (3) Nothing in this Act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

HAVNER v. STEPHENS.

(Court of Appeals of Kentucky, 1900. 58 S. W. 372, 22 Ky. Law Rep. 498.)

Action by Robert Havner against John Stephens for the dissolution of a partnership. Judgment for defendant, and plaintiff appeals.

BURNAM, J. This is an appeal from a judgment of the lower court sustaining a general demurrer to the plaintiff's petition, upon the ground that it does not state facts sufficient to support a cause of action. It is alleged, in substance, that plaintiff and defendant were conducting a sawmill business, as co-partners; that they were equally interested in the enterprise; that each member was to be consulted as to the management of the business, and to participate jointly in its management; that some time after the formation of the partnership, and while the business was being conducted satisfactorily, the defendant, without right, refused to allow the plaintiff to have anything to do with the management of the business, or to receive any portion of its profits or earnings; that he had taken entire control of the money, accounts, and property of the firm, and converted them to his own

use; that the defendant was insolvent—and asks a dissolution and settlement of the firm's business, and that the property be sold to apply to the payment of the debts, and for a division of the surplus in accordance with the rights of the parties.

In an action by one partner against another, seeking a dissolution of the partnership and a settlement of the accounts growing out of the partnership business, the essential allegations are the fact of the partnership, and the terms thereof, the rights and interests of the parties therein, and the grounds for seeking dissolution. It is not necessary to allege the specific indebtedness of the firm. These are matters of detail, to be determined from the testimony. If, as alleged, the defendant is insolvent, and has taken possession of the partnership's property and converted the same to his own use, and refused to consult or allow the plaintiff to participate in the management of the firm's business, it is a sufficient ground to dissolve the partnership, and to entitle the plaintiff to the settlement thereof. The averments of the petition are sufficient, and good on demurrer.

For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent herewith.

ROSENSTEIN v. BURNS.

(United States Circuit Court, D. Massachusetts. 1882. 41 Fed. 841, affirmed 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193.)

NELSON, J. This bill is brought to procure a dissolution and winding up of the affairs of a partnership entered into between the parties under a written agreement for the canning of fish and the manufacture of pomace and fish guano, and to continue for the term of five years from July 1, 1881. The copartnership agreement provides that the plaintiffs shall furnish the capital with which to carry on the business, and shall furnish, also, all materials at cost; that the defendants shall have charge of and superintend the manufacturing department at the factory in Gloucester, keep correct books, and submit weekly statements of the business to the plaintiffs, make good and marketable goods, at the lowest possible cost, in such quantities as the plaintiffs should deem advisable; and that all goods made, except in certain specified cases, should be shipped to the plaintiffs, and be sold by them in New York. The grounds upon which the dissolution is asked for are the willful and persistent neglect of the defendants to comply with the terms of the written agreement, that the business is being conducted at a great loss, and that the plaintiffs were induced to enter into the partnership, and contribute their capital to the concern, through certain false and fraudulent representations of the defendants as to the nature and extent of the business. The defendants demur to the bill * * * for want of equity. * * *

The bill states a plain case for equitable relief. A partner is under no obligation to continue a member of a partnership when his copartner persistently and willfully violates the essential conditions upon which the contract of the partnership rests. He is not under the necessity of remaining in the firm, and resorting to his action at law upon the partnership contract for redress. He is at liberty to withdraw himself and his capital from the concern whenever it becomes reasonably certain that the business can no longer be carried on at a profit, whether through the misconduct of his copartner or from a

failure of the business itself. So, if he has been induced to enter into the partnership contract through the deceit of his copartner, he may withdraw whenever the fraud practiced upon him becomes known. In neither case is he required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership. * * *

Demurrer overruled.

CHILDERS et al. v. NEELY.

(Supreme Court of Appeals of West Virginia, 1899. 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777.)

Bill by J. M. Childers and another against S. H. Neely. Judgment for plaintiffs, and defendant appeals.

BRANNON, J. Childers and Ramey filed a bill in equity in the circuit court of Tyler against Neely, praying that a partnership between them be dissolved, an account taken "of all its accounts, dealings, and transactions whatever," and that a manager be appointed to take charge of the property. The business was oil production. * * * The decrees made a partial account, decreed its balance against Neely, and denied him further participation in the partnership, and he appealed. * * *

The bill demanded a dissolution. It showed abundant cause, and the evidence shows abundant cause, of dissolution. The bill charges that the plaintiffs and Neely made a settlement to a certain date, but that they had been unable to get Neely to make a settlement since then; that he was violent and abusive, had threatened them with violence, and declared he would have nothing more to do with them; that he would not contribute to expenses; that bills remained unpaid; and that because of the unsatisfactory condition of the business, and the "disagreements, dissensions, and disaffections between the partners, the property and business were suffering." The evidence shows these disagreements and dissensions. Thus, it was plain that the business was hopeless of success and prosperity, and the interests of all parties demanded absolute dissolution at the hands of the law. Reconciliation, harmony, and success were utterly beyond hope. * * * Therefore the court should have decreed dissolution absolute, and directed an account of the partnership, and wound it up. But it decreed no dissolution, but, on the contrary, suffered the partnership still to subsist, and, indeed, go on in the sole hands and management of Ramey, excluding Neely therefrom, and decreed that the settlement by the commissioner should only apply to its date, leaving it open to future account. The decree perpetuated the injunction, forever prohibiting Neely from participation in the business, and provided that when he should pay $487.15 found due from him, and costs, the injunction should cease. * * *

If ever there were cases which, by bill and proof, called for dissolution and final account, not partial, this is one. And besides the showing of bill and proof, a petition for rehearing alleged that Ramey had sold the boilers. The evidence so shows. This would charge Ramey to credit of Neely. There was partnership property in Ramey's hands. There could only one adequate relief be given,—dissolution, sale of the property entire, and full account. But no provision was made for dis-

solution, sale, or full account,—only a partial settlement and decree against Neely for the sum found by it. The bill alleged that the property could not be divided in kind. If the injunction applied to property belonging to the firm, on which a lien rested for the other partners, it would be proper to continue it until final account and decree. * * * But Neely's share of the oil was his separate property. And I do not see why he should, without cause, be excluded from participation, letting Ramey have sole control. A receiver, impartial between them, was proper, under the circumstances. * * *

Therefore we dissolve the injunction, reverse the decree, overrule the demurrer to the bill, and remand for further proceedings as herein indicated, and further according to principles governing courts of equity in such cases.

SECTION 6.—EFFECT OF ASSIGNMENT OF A PARTNER'S INTEREST

Uniform Partnership Act, Section 27. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.[3]

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

HAWORTH v. JACKSON.

(Supreme Court of Oregon, 1916. 80 Or. 132, 156 Pac. 590.)

Action by J. Brooks Haworth and another against Frank A, Jackson and others. From an order dismissing the suit as to defendants Jackson and Burpee and decree dismissing it as to defendant Manning, the plaintiffs appeal.

In substance, the plaintiffs declare that they and the defendant Manning associated themselves together and purchased an auto truck con-

[3] *Lewis' Note to Section 27 (1).*—In re the subject of this paragraph, see George, 153; Beale's Parsons, §§ 106, 305, 306; Story, §§ 272, 277, 308; Bates, §§ 158–168, 931–933; Lindley, 397 et seq., 620; Jas. Parsons, § 175; Collyer, 151, 161; Kent. 59. These authorities on the whole state that the mere assignment dissolves the partnership. Many such assignments, however, are merely by way of collateral security for a loan, the assigning partner in no wise intending to end the partnership relation. If he neglects his personal relation the other partners may dissolve the partnership under section 31 of this act. But the mere fact of assignment, without more, should not be said in all cases to be an act of dissolution. The change in the existing law follows a similar change of the English law embodied in section 31 of the English Partnership Act.

tracting to pay $3,815 for the same. The sum of $1,975 was paid in cash. The remainder was to be paid in four equal installments of $460 each. With this as a commencement, they formed a partnership according to a certain written agreement, which recites that the title to the property remained in the original owner, the Packard Company, until the full purchase price should be paid. They say they carried out all the stipulations of this contract, but that the defendant Manning misappropriated moneys to himself belonging to the partnership, did not keep full or true accounts of the moneys received from the earnings of the machine, and has failed to divide the profits of the business; that, although he was permitted to handle the moneys of the concern and pay therefrom its liabilities, he allowed the last installment of $460 to remain unpaid, and the plaintiffs were compelled to assume the payment of the note therefor then in the hands of the defendant Jackson. They charge the latter with knowledge of their interest in the property, and that he, well knowing that they had both a legal and equitable interest therein, "without any notice to the plaintiffs or either of them, attempted to execute an alleged and pretended transfer of the said auto truck to the defendant Herman S. Burpee, in order to cheat and defraud the plaintiffs, without any right either in law or equity so to do, and without in any way giving the plaintiffs or either of them a right to pay or redeem the same, and without taking any action either in law or equity seeking to enforce the ownership of the said truck or the equitable lien upon said truck." They further aver that they are ready, willing, and able to pay $315, principal and interest thereon, which they say is the balance due on the last installment mentioned. They tender that amount into court for the benefit of Jackson or the owner and holder of the purchase price note. They pray for a decree dissolving the partnership between themselves and Manning; that they be adjudged to be the owners of the truck subject to any claim which Manning or his assignees may have in the same; that the $315 tendered be declared to be full payment of the purchase price of the truck which is to be thereby freed from any lien on account thereof; and that the defendants and each of them be enjoined from claiming any interest in the same.

BURNETT, J. As between the plaintiffs and Manning, this is a suit to dissolve the partnership and for an accounting concerning the affairs thereof. * * *

The sale of Manning's interest to Armstrong worked out a dissolution of the partnership, and it was not necessary that the consent of the plaintiffs be obtained; "for what a man hath that also can he sell." "In most jurisdictions, in this country, although not in England, a partner may work a dissolution of the firm by withdrawing or selling his share in the partnership or by selling the entire firm's property without the consent of his copartners." 30 Cyc. 653.

This rests upon the doctrine that, while a partner may thus withdraw from the firm, he cannot force upon his former associates a new one without their consent. All that remains is the obligation to account to the original partners concerning the transactions of the late firm. * * *

It is so ordered. * * *

CHAPTER V

EFFECT OF DISSOLUTION UPON THE RELATIONS OF THE PARTNERS BETWEEN THEMSELVES

Section
1. Effect, as Between the Partners, of a Dissolution Not Caused by the Act, Bankruptcy, or Death of a Partner.
2. Effect, as Between the Partners, of a Dissolution Caused by the Act, Bankruptcy, or Death of a Partner.
3. Liability of a Partner to His Co-Partners for Wrongfully Causing a Dissolution.
4. Power of the Partners to Wind up the Partnership Affairs.
5. Rights of Partners After Dissolution with Respect to the Disposition of Partnership Assets.
6. Relations of the Partners After Dissolution upon Their Election to Continue the Business.
7. Right of a Partner Who has Wrongfully Caused a Dissolution.
8. Right of a Partner Who has Rescinded a Partnership Contract for Fraud.

SECTION 1.—EFFECT, AS BETWEEN THE PARTNERS, OF A DISSOLUTION NOT CAUSED BY THE ACT, BANKRUPTCY, OR DEATH OF A PARTNER

Uniform Partnership Act, Section 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Section 33. (1) (a) Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership, with respect to the partners, when the dissolution is not by the act, bankruptcy or death of a partner.

SECTION 2.—EFFECT, AS BETWEEN THE PARTNERS, OF A DISSOLUTION CAUSED BY THE ACT, BANKRUPTCY, OR DEATH OF A PARTNER

Uniform Partnership Act, Section 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Section 33. (1) (b) Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership, with respect to the partners, when the dissolution is by such act, bankruptcy or death of a partner, in cases where section 34 so requires.

Section 34. Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless,

(a) the dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or (b) the dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.[1]

[1] *Lewis' Note to Section 34.*—This section relates only to a partner's liability to his co-partner, where a co-partner, after dissolution, caused by the act of one of the parties or by the death or bankruptcy of a partner, makes a contract in the course of partnership business.

As worded, where the dissolution has been caused by the act of one of the parties, if the partner acting is subject to a liability to third persons, he can call on his co-partners to contribute towards this liability to the same extent as if there had been no dissolution, provided he had no knowledge of the dissolution, at the time of the act. Mere notice, not producing knowledge, would not be sufficient. This provision makes certain that which is now uncertain. Thus A., B., and C. are partners. A., in accordance with his right, or in contravention of the agreement between the partners, declares a dissolution of the partnership. B., subsequently, makes a contract, for the partnership in ignorance of the dissolution. B. under this act would have the right to call upon A. and C. to assume their share of the burden. The Commissioners believe that to relieve A. and C. of this duty to B., B. ought to have more than "notice" as "notice" is defined in section 3, supra. "Notice" should be, it is submitted, sufficient in all cases where the fact to be notified is an ordinary business fact, as notice to third persons of the dissolution of a partnership. But it is not customary for partners to dissolve a partnership at a time not previously specified, without consultation with their co-partners. Such dissolution may or may not amount to a breach of partnership contract; but, in any event, if done without consultation, it is out of the ordinary course. This fact should not deprive the partner of a right to terminate a relationship which must necessarily depend on mutual good will and confidence; but if the partner so terminating wishes to show that he should not be required by his partners to be liable, for his share of the loss due to a partnership contract thereafter made by them, he should be able to prove that they had "knowledge" that he had dissolved the partnership at the time they made the contract.

Clause (b) makes a change in the law. Beale's Parsons, §§ 309, 310, 318, 342, 343, 351; Mechem, §§ 245, 258, 259, 260, 261, 266; Collyer, §§ 102, 103, 30 Cyc. 653, 670; Story, §§ 265 et seq., 319, 334, 336; Bates, 570 et seq.; Conyngton, §§ 53, 72; Burdick, 56; Shumaker, §§ 119, 120; 3 Kent. Com. 53. At present, where the partnership is terminated by operation of law—i. e., by death, bankruptcy, by being unlawful, or by decree of court—every person "must take" notice of such facts. This statement is made generally and includes the partners. As to the partners, to whom only this provision relates, the Commissioners agree that they must not expect relief if the partnership or the business is unlawful, or if they have actual knowledge or notice of dissolution by decree of court; but the Commissioners do not believe that the partners do have actual knowledge or should "take notice" of the death or of the bankruptcy of any one partner. In the case of the death, to hold that a partner acting for the partnership bona fide, in ignorance of the death of one of his co-partners, must assume the entire liability, even though all other partners are ignorant of the death of the partner, and even though such deceased partner was entirely inactive, and may have resided at any distance from the actual place of business, is entirely unjust to the acting partner or partners. The rule of the common law has been modified as to the law of agency. Story on Agency (1882) 598; Cassiday v. McKenzie, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76 (1842); Civ. Code Cal. § 2356; Rev. Code Dak. 1877, §§ 1150, 1151; Rev. Code Md. 1878, p. 388, art. 44, § 31; Saunders' Rev. Civ. Code La. 1909, § 3032; Gen. Stat. S. C. 1882, § 1302; Kent, Comm. 646; Mechem on Agency, § 245; Blackwood Wright (2d Eng. Ed.) on Principal and Agent, 332 et seq.; English Conveyancing Act (1881) § 47; English Bankruptcy Act (1883) § 38. See Lindley, 240 et seq. The Commissioners believe that the partnership law should follow this modification.

What has been said of the death of a partner applies also to the bankruptcy of a partner. If there are a number of partners, and one of them becomes

Section 3. (1) A person has "knowledge" of a fact within the meaning of this Act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith. (2) A person has "notice" of a fact within the meaning of this Act when the person who claims the benefit of the notice (a) states the fact to such person, or (b) delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

SECTION 3.—LIABILITY OF A PARTNER TO HIS CO-PARTNERS FOR WRONGFULLY CAUSING A DISSOLUTION

Uniform Partnership Act, Section 38. (2) (a) (II) When dissolution is caused in contravention of the partnership agreement each partner who has not caused dissolution wrongfully shall have the right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

FLETCHER v. REED.

(Supreme Judicial Court of Massachusetts, 1881. 131 Mass. 312.)

MORTON, J. This is a bill in equity brought to settle the affairs of a partnership. * * *

The master finds that the copartnership between the parties was formed by an oral agreement, for an indefinite time, to which no exception is taken. A partnership for an indefinite period is in law a partnership at the will of the partners, and either partner may withdraw when he pleases, and dissolve the partnership, if he acts without any fraudulent purpose. It follows that the master rightly ruled that the defendants were not entitled to be allowed for any damages which they contended were caused by the withdrawal of the plaintiff from the firm. * * *

Decree for the plaintiff.

SECTION 4.—POWER OF THE PARTNERS TO WIND UP THE PARTNERSHIP AFFAIRS

Uniform Partnership Act, Section 37. Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs: Provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

bankrupt, and another, having no knowledge or notice of this fact, makes a contract in the ordinary course of the business, there appears no reason why he should not be able to call on his other partners, not bankrupt or deceased, to contribute towards any loss which his separate estate may sustain on account of the contract.

STEWART et al. v. ROBINSON et al.

(Court of Appeals of New York, 1889. 115 N. Y. 328, 22 N. E. 160, 5 L. R. A. 410.)

DANFORTH, J. The defendants are brought before the court as trustees and executors of the estate of Joseph Colwell, deceased. It appears that Colwell, in his life-time, and one Samuel S. Hepworth, carried on business as copartners under the name of S. S. Hepworth & Co., for the manufacture and sale of centrifugal machines and some other machinery, under articles of agreement, one of which was entered into February 22, 1877, and provided for the continuance of the partnership for five years from January 1, 1877. * * * Before the expiration of the stipulated time, and on the 18th of October, 1881, a further agreement was made that the copartnership should continue until dissolved by mutual consent or terminated by six months' notice in writing by one party to the other, and that, "in the event of the death of either, the business shall be continued by the survivor until the expiration of five years from the 1st day of February next succeeding such death; the estate of the deceased partner to have the same share and interest in the profits, and to bear the same share of the losses of the business, as would have been received and borne by the deceased partner had he lived: Provided, however, that if the survivor shall think it necessary to employ an additional clerk in consequence of the death of the deceased partner, in such case the expense shall be charged to and shall be borne by the share in the profits of the deceased partner."

The firm business was thereafter continued under these instruments until the 1st day of June, 1882, when Colwell died, leaving children and a will. He appointed the above-named defendants executors and trustees, and gave them, in trust for his children, the greater part of his estate, and directed a distribution of the whole, making no reference to the business of the firm of S. S. Hepworth & Co., or to it in any way, or to the agreement above set out, and revoking all other wills theretofore made by him. It also appeared that from the death of Colwell to September, 1887, the business of S. S. Hepworth & Co. was continued and carried on by Samuel S. Hepworth, he assuming to do so under the agreements of February 23, 1877, and October 13, 1881. In the course of that business, in September or October, 1887, or five years after Colwell's death, he contracted debts with the plaintiff and with other persons or firms in the name of S. S. Hepworth & Co., for some of which he gave promissory notes in that name, and others of which rest in account. On the 4th of October, 1887, Hepworth individually and as surviving partner was insolvent to the extent of about $500,000, and on that day made an assignment in both capacities for the benefit of his creditors. The individual debts of Colwell have been paid, and property remains in the hands of his executors. The plaintiffs, either as original creditors or by assignment, are the owners of the debts contracted by Hepworth, and set out in the complaint, amounting in the aggregate to about $15,000, and they seek to recover the amount from the individual estate of Colwell, and in the mean time ask for the appointment of a receiver of his property, assets, and estate, and an account thereof from the defendants as his representatives.

Various defenses were interposed by them, but, so far as material upon this appeal, their effect depends upon the single question whether the general estate of Colwell was by virtue of the above agreements rendered liable for debts contracted by Hepworth in the firm name, after the death of Colwell. The trial court and the general term have held against the plaintiffs, and the defendants had judgment accordingly.

It is a general rule that a contract of partnership is dissolved by the death of one of the parties, whether entered into for a fixed time or not, and that after his death the former partner cannot bind the estate of the decedent by new contracts, and, although the partnership be expressly extended to executors, they could not be compelled to carry it on, and would be entitled to a dissolution and an account of the assets, subject to the liabilities of the firm incurred up to the time of dissolution. These are familiar and well-settled principles. Here the representatives of the deceased partner were not to be partners with the survivors, nor were they to have anything to do with the conduct of the business or its management; on the contrary, the business is "to be continued by the survivor." We have only to inquire, therefore, whether the partnership agreements take the case out of the general rule. The frame of the last articles shows that the parties contemplated and bargained for a continuance of the business for the term of five years from the 1st of February next preceding the death of either, but the residue of the clause containing this stipulation depends to some extent for its interpretation upon the preceding or original article. The second agreement refers to the first as containing the terms and conditions on which the business is to go on; and looking there we find that the capital, however represented, by money, tools, machinery, or material, was not to exceed $4,000, and was to be provided by Colwell and to remain his individual property. That contribution made him an equal partner, and upon dissolution of the firm, was to be repaid to him, with interest, before any division of surplus earnings should be made. Death of a partner, however, was not as of course to work a dissolution, but the wife and children of the decedent were immediately to succeed to his interest in the business, which thenceforward was to be prosecuted for their benefit and that of the surviving partner.

We do not need to ascertain whether this clause could have any effect without the assent of the parties named, for it never came into operation, being suspended by that of the agreement of October 13th, which provides for the continuance of the business "by the survivor," and the distribution of profits or losses "to the estate of the deceased partner, as would have been received and borne by him had he lived." It is to be seen, therefor, that the capital invested was to remain the same. It was not to exceed $4,000. It belonged to Colwell, but was to continue in the business notwithstanding his death, and could not be withdrawn until the expiration of five years from that event. So much the surviving partner might insist upon. I do not see that he could rightfully exact more, and, if he could not, how could third persons? There is in fact no partnership, for there are no partners. There is a surviving partner. Under the first article it might be said that, if the wife and children assented, they would have become partners. The executors cannot be deemed partners, for that capacity has

not been put upon them, nor have they assumed it directly or indirectly by taking any part of the management of the business. They knew of its continuance, and loaned Hepworth money upon security. Nothing more. A new partnership was not formed; nor can one be implied. But it is said the "estate" of the deceased partner is to share in profits or bear a portion of the losses. Of what? Not a partnership, but a business conducted by a surviving partner. An estate cannot be a partner. I think the provision in the agreement means nothing more than that the capital actually invested in the business before or at the death of the partner shall continue to be so subject or liable.

The general rule already adverted to does, upon the death of a partner, terminate the power of his associate or copartner to contract new debts on the credit of the firm. Assuming, with the appellant, that this general result of law may be varied by an express agreement, it will then depend upon the particular terms of that agreement to what extent the estate of a deceased partner may be bound by the surviving member of the firm, "whether his estate shall be generally liable for all the debts, or only to the extent of the property embraced and left in the partnership to be employed by the survivors." Story, Partn. 201a. But it is said in Burwell v. Mandeville's Ex'rs, 2 How. 560, 11 L. Ed. 378: Nothing, however, but the clearest and most unambiguous language, showing in the most positive manner an intention on the part of the testator to render his general assets liable for debts contracted after his death, will justify a court in extending the liability of his estate beyond the actual fund employed therein at the time of his death. * * *

In the case now before us the directions or authority are such only as we said in the former case would be insufficient to enable a creditor to reach the general assets of an estate. They are almost literally in every sense substantially the same as those actually presented by Burwell v. Mandeville's Ex'rs, supra, and in view of the decisions thus referred to it would be useless to go on in this discussion as a new one, or do more than call attention to the terms of the contract on which appellants must succeed or fail in their contention against the decision of the court below: First. The "capital" is fixed at $4,000, the sole property of Colwell. Second. It is with that capital that "the business of the copartnership is to be conducted." Third. The profits of the business are to be divided between the parties at convenient periods. Fourth. At the dissolution of the partnership, and the liquidation of its business the cash capital is to be repaid before any division of surplus earnings. These terms and conditions are by reference incorporated into the new agreement on which the appellants rely. The second agreement repeats the same general language. In the event of death "the business" shall be continued, i. e., the business already described as employing a certain capital, not an additional capital; and the profits and losses of the same "business" are to be shared in the same manner as if the deceased partner were alive, with only one addition; the survivor may, if he thinks necessary in consequence of his partner's death, employ an additional clerk, the expense of whose employment shall be borne by "the share of the profits of the deceased partner." Here are no words from which can be implied an intention to bring into the concern other capital, or make new debts a charge upon any assets outside of those already pledged to the business of the firm. It is nothing more than an authority to the surviving partner to continue

an existing business, and therefore within the authorities cited; and upon reason and common sense the plaintiffs cannot have the relief they seek in this action.

The respondents assail the validity of the agreement for any purpose. I do not think it necessary to determine the question so raised. It is enough to dispose of the present case that we find no language on the part of the deceased which indicates any intention on his part to put in hazard his general estate, or which by fair construction furnishes any ground for the present action. It follows that the judgment appealed from should be affirmed, with costs. All concur, except EARL, J., not voting.

SECTION 5.—RIGHTS OF PARTNERS AFTER DISSOLUTION WITH RESPECT TO THE DISPOSITION OF PARTNERSHIP ASSETS

Uniform Partnership Act, Section 38.[2] (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36 (2) he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement each partner who has not caused dissolution wrongfully shall have all the rights specified in paragraph (1) of this section.

SECTION 6.—RELATIONS OF THE PARTNERS AFTER DISSOLUTION UPON THEIR ELECTION TO CONTINUE THE BUSINESS

Uniform Partnership Act, Section 38. (2) (b) When dissolution is caused in contravention of the partnership agreement, the partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the

[2] *Lewis' Note to Section 38.*—The right given to each partner, where no agreement to the contrary has been made, to have his share of the surplus paid to him in cash, makes certain an existing uncertainty. At present it is not certain whether a partner may or may not insist on a physical partition of the property remaining after third persons have been paid.

dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2a II) of this section, and in like manner indemnify him against all present or future partnership liabilities.

Section 38. (2) (c) (II) If the business is continued under paragraph (2b) of this section, a partner who has caused the dissolution wrongfully shall have the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered.

Section 23. (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

Section 23. (2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.

SECTION 7.—RIGHT OF A PARTNER WHO HAS WRONGFULLY CAUSED A DISSOLUTION

The rights of a partner who has wrongfully caused a dissolution, in the event of a continuance of the partnership, were referred to in the preceding section. When the business is not continued, the following sections govern the rights of the partner who wrongfully caused the dissolution:

Uniform Partnership Act, Section 38. (2) (c) (I) If the business is not continued under the provisions of paragraph (2b) a partner who has caused the dissolution wrongfully shall have all the rights of a partner under paragraph (1) subject to clause (2a II) of this section.

Paragraph (1) and clause (2a II) are as follows:

Section 38. (1) When dissolution is caused in any way * * * each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is dis-

charged from all partnership liabilities, either by payment or agreement under section 36 (2) he shall receive in cash only the net amount due him from the partnership.

Section 36 (2) refers to discharge by novation.

Section 38. (2a II) Each partner who has not caused dissolution wrongfully shall have the right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

Section 43. The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

SECTION 8.—RIGHT OF A PARTNER WHO HAS RESCINDED A PARTNERSHIP CONTRACT FOR FRAUD

Uniform Partnership Act, Section 39. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled (a) to a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and (b) to stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and (c) to be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

CHAPTER VI

EFFECT OF DISSOLUTION UPON THE RELATIONS OF THE PARTNERS TO THIRD PARTIES

Section

1. Effect, as to Third Parties, of a Dissolution upon Partnership Liabilities Existing Prior to Dissolution.
2. Effect, as to Third Parties, of a Dissolution upon Transactions Subsequent to Dissolution.
3. Rights of Creditors of the Dissolved Partnership Against the Individuals or Partnership Continuing the Business.
4. Priorities Among Claimants in the Settlement of a Partnership Estate.

SECTION 1.—EFFECT, AS TO THIRD PARTIES, OF A DISSOLUTION UPON PARTNERSHIP LIABILITIES EXISTING PRIOR TO DISSOLUTION

Uniform Partnership Act, Section 36. (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner and subject to the prior payment of his separate debts.

WADHAMS et al. v. PAGE et al.

(Supreme Court of Washington, 1890. 1 Wash. 420, 25 Pac. 462.)

DUNBAR, J. This was an action by plaintiffs and appellants to recover a balance alleged to be due from defendants and appellees on account, amounting to $203.43, with interest thereon at the rate of 10 per cent. per annum from the 3d day of April, A. D. 1884. Service of summons was had only on defendant Joseph Green. The defendant Green, for an affirmative defense, alleged that on the 23d day of February, A. D. 1884, he and one Alfred Page were doing business under the firm name of Page & Green; that on or about the 3d day of April, 1884, they dissolved partnership; that at said time there was due Wadhams & Elliott about the sum of $203; that the said Page continued

to run and manage the said business of the said partnership; that the said Page was to pay the said Wadhams & Elliott the said amount due said firm; that Wadhams & Elliott were notified of said dissolution; that they accepted the said Alfred Page for the said indebtedness due them from said firm of Page & Green, and transferred the account of Page & Green to the said Alfred Page, and held the said Page only for the said amount of indebtedness, and did then and there release the defendant Green from any obligation or indebtedness due to plaintiffs by the said firm of Page & Green. The affirmative matter in defendant's answer was denied in plaintiffs' reply. Payment of the said indebtedness was also alleged in the answer, but no attempt was made to prove the payment on the trial, except as stated in the affirmative answer. The jury found a verdict in favor of defendants, judgment was rendered in accordance therewith, and from said judgment plaintiffs appeal to this court, also alleging certain errors in the instruction of the court.

While a "novation" was pleaded as an affirmative defense in this action, there was no proof tending to show that Wadhams & Elliott had ever, by express or implied contract, agreed to extinguish defendant Green's liability by substituting or accepting Page as the payor of the debt incurred by the partnership of Page & Green. It is true that the testimony of Green showed that it was agreed between Page and Green that Page should assume this debt, and that Green should be discharged, and that Wadhams & Elliott were notified of the dissolution and of the agreement between Page and Green. But the promise of one partner to pay the debt of another, for which he is already bound, is no consideration for an agreement to release the other partner. * * *

In order to give any weight to an agreement whereby liabilities are extinguished, it is essential that all parties in interest should be parties to the agreement. It would certainly be a loose and unjust law that would allow obligations to be thrown off or transferred at the will of the obligor. Such is not the law. If one partner transfers his liability to another, and the creditor does not assent to the transfer, his rights are not affected. As stated by Mr. Lindley, in his excellent work on Partnership, it cannot be too often repeated that, merely by retiring, a partner gets rid of no liabilities as to past transactions unless there is some statutory enactment applicable to his case; and the same observation applies to a total dissolution. To use the words of Mr. Justice HEATH: "When a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past the partnership continues." Indeed, so improbable was the idea that a creditor would release a part of his security, and rely on one debtor when he before had two, without taking any other security, that some of the early English courts held that where a partnership had been dissolved, one member retiring and the other continuing the business, and agreeing to pay the debts of the old firm, where the creditors knew of the arrangement, and consented to it, and transferred the debt to the new firm, and where there was strong testimony outside of this fact showing that the creditors had agreed to discharge the defendant, and look to the other partner, the retiring partner was liable; and the fact that no person had become liable to the defendant who was not so originally was relied upon by the court as showing that there was no consideration for the alleged discharge.

The most noted cases holding this doctrine were Lodge v. Dicas, 3 Barn. & Ald. 611, and David v. Ellice, 5 Barn. & C. 196. But, while this doctrine has been modified by the later decisions and authorities, no court that we know of has gone so far as to hold that the simple agreement between the partners that one of them should be discharged, and notice to the creditors of said agreement, will affect the rights of the creditors, or be construed as any implied promise on the part of the creditor to discharge either partner. But the opposite doctrine has been enunciated by many courts. * * *

The judgment is reversed, and the case remanded to the lower court, with instructions to grant a new trial; and it is so ordered. * * *

MOTLEY v. WICKOFF.

(Supreme Court of Michigan, 1897. 113 Mich. 231, 71 N. W. 520.)

Action by Ara E. Motley against James Wickoff. There was a judgment for plaintiff, and defendant brings error. Affirmed.

MONTGOMERY, J. This case was determined by the circuit court upon an agreed state of facts. The defendant and one Gill, as co-partners, became indebted to the plaintiff in the sum of about $140. In April, 1891, Wickoff retired from the firm of Wickoff & Gill, and Gill, in consideration of the partnership property all being turned over to him, assumed the payment of all the partnership debts. After the dissolution of the firm, and before this action was brought, the amount had been reduced from $140 to $116, by payments to plaintiff made by Gill. It further appears that Gill, shortly after the dissolution, stated to plaintiff that he had assumed, and agreed with Wickoff to pay, all the partnership indebtedness, and that to said statement plaintiff replied, "All right; pay as fast as you can;" that, some time after the dissolution, defendant saw the plaintiff, and stated to him that, according to the terms of the dissolution between himself and Gill, Gill was to pay the sum due and owing to the plaintiff, and asked plaintiff if he would release him (defendant) from the indebtedness, to which plaintiff replied that he would. Upon this state of facts, the case was submitted to the court upon a stipulation that the plaintiff was entitled to recover if the court should find that the defendant has not been released from the indebtedness. The court found, as matter of law, that there was no consideration for the promise of the plaintiff to defendant to release him from his liability on the partnership indebtedness, and entered judgment for the amount claimed, with costs.

Defendant suggests, rather than urges, that the case is one where the rule adverted to in Webber v. Alderman, 102 Mich. 639, 61 N. W. 57, namely, that where the surety is induced by the promise of the creditor to forego or relinquish means of indemnity to which he might otherwise have resorted, by the promise of the creditor to exonerate the surety, this may work an equitable estoppel to deprive the promisor of the power to retract, is applicable. But there are no facts found in this case which make this rule at all pertinent. There is no finding that the responsibility of Gill has in any way been changed, or that defendant has changed his position in the matter because of any assurances given by plaintiff.

The case must turn upon the question of whether there was a consideration to support the promise to look to Gill alone. The authorities are not agreed upon the question of whether the agreement of one

joint debtor or co-partner to pay the debt upon which the two are liable is a sufficient consideration to support a release of his co-debtor. The modern English doctrine appears to be that such an undertaking is a sufficient consideration, on the ground that the sole liability of one of two debtors may, under many circumstances, be more beneficial and convenient than the joint liability of two, and that whether it was actually a benefit in each particular case will not be inquired into, but that the changed relation will be held to be a sufficient consideration. See Thompson v. Percival, 5 Barn. & Adol. 925, and Lyth v. Ault, 7 Welsb., H. & G. 669.

This doctrine has also found support in this country, to the extent stated in Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370, in which it was said: "If, by a mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a release for a valuable consideration; one debt would have been substituted for the other." * * * In the case of Johnson v. Emerick, 70 Mich. 215, 38 N. W. 223, Mr. Justice Champlin, speaking for the court, said: "Such discharge from liability is based upon the express or implied assent of the creditor, upon a sufficient consideration; and a creditor, knowing of such relation, who goes on and deals with the other partners with reference to the debt, may well be held to have assented to the arrangement, and to have accepted the responsibility and promise of the partner assuming to pay such debt. This consideration need not be a money consideration. It may be the obtaining of an additional security, better terms of payment, negotiable securities which the creditor may use in his business, or any other benefit, or it may be the loss of some right or disadvantage suffered by the surety through the act of the creditor."

In the present case it will be noted that the transfer of the firm property by defendant to Gill was not induced by any promise of plaintiff, but had occurred before any promise of release was made; nor does it appear, as before stated, that the defendant lost any rights; nor was any security taken or accepted by the plaintiff; nor does it appear that the time for the payment of the debt was extended. Plaintiff relies upon Walstrom v. Hopkins, 103 Pa. St. 118, and Manufacturing Co. v. Jennings, 29 Kan. 657, 44 Am. Rep. 668. In the latter case it was claimed that the plaintiff had due notice of the dissolution of the firm, and the assumption of the liabilities by Whitney, and that they accepted him for the payment of the bill of exchange. The court said: "The dissolution of the partnership, the taking of all the partnership property, and the assumption of all partnership liabilities by Whitney, in no manner released defendant. The alleged promise of plaintiff was made after the dissolution, and not as an inducement to or consideration of it. The acceptance has never been paid. * * * No additional security of any kind was furnished. The acceptance was not destroyed, and new paper given. The plaintiff received absolutely no consideration, and, even if it did promise that it would look to Whitney, such promise was entirely without consideration, and in no manner discharged the defendant." In Walstrom v. Hopkins it was held that a promise by a creditor of a firm to release a partner who had retired from the firm, and to look to the continuing partner only, for the payment of his debt, unless founded upon a legal consideration,

is nudum pactum, and cannot be enforced. The weight of authority favors the contention that the promise of the continuing partner may be a sufficient consideration to support the release of the outgoing partner. But, in the absence of such concurring or binding promise, we think no well-considered case can be found, holding that the mere agreement between the partners will of itself support the agreement of the creditor to release the outgoing partner. Such an agreement does not establish a privity between the continuing partner and the creditor, entitling him to sue such creditor individually. It is only a private executory contract, intended to regulate the rights, duties, and obligations of the co-partners between themselves, consequent upon a dissolution of the firm. * * *

In the present case there was not only no extension of time, no acceptance of the paper of the individual partner, but the stipulation does not show an express agreement made to plaintiff by Gill to pay the debt. The finding is that Gill stated to plaintiff that he had agreed with Wickoff to pay all partnership indebtedness, and that to this the plaintiff replied, "All right; pay as fast as you can." It will be noted that this was not simultaneous with the release of Wickoff, nor did it in terms establish a privity between Gill and plaintiff as to the obligation of Gill to pay the debt individually.

We think the judgment should be affirmed. The other justices concurred.

PRESTON v. GARRARD.

(Supreme Court of Georgia, 1904. 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124.)

Action by E. H. Garrard against J. W. Preston and another. Judgment for plaintiff, and defendant Preston brings error.

Garrard brought suit against J. W. Preston and E. M. Brown, as partners, on a promissory note dated February 24, 1899, and due one year after date. Preston filed a plea setting forth that the firm was dissolved on December 27, 1900, all of the debts of the firm being assumed by Brown; that the dissolution was known to plaintiff's agent, who acted for her in making the loan for which the note was given, and that the fact that Brown had assumed the debts of the firm was also known to this agent, who recognized Brown as the principal debtor by treating with him as such thereafter; that on June 18, 1902, plaintiff, through her agent, agreed with Brown, upon a sufficient consideration, that she would extend the time of payment of the note sued on to February 24, 1903; that this extension was granted without the knowledge or consent of the defendant. The plea alleges that by reason of these facts the defendant became, after the dissolution of the firm, merely a surety for Brown upon the debts of the firm which he has assumed to pay; and that the extension of the time of payment of the note sued on without the defendant's knowledge or consent released him from all liability on the debt. The court struck this plea on oral motion, and the defendant excepted.

COBB, J. It is well settled that, where a partnership is dissolved by the retirement of one of the members, and the continuing partner assumes the payment of the debts of the firm, the retiring partner, as between himself and his copartner, is no longer a principal debtor, but merely a surety for the latter upon the debts of the firm. * * *

Some disagreement among the courts has arisen in fixing the rights of creditors after dissolution by the retirement of one member and the assumption of the debts by the other. Of course, if a creditor is a party to the agreement made between the partners, he will be bound by it, and must deal with the retiring partner as a surety. All are agreed as to this. The difficulty has arisen in determining whether mere knowledge by the creditor of the dissolution and the agreement of the partners would require him to deal thereafter with the retiring partner as a surety with reference to past transactions of the firm.

The case of Oakeley v. Pasheller, 4 Cl. & F. 207, a decision made by the House of Lords in 1836, was supposed to have held that mere knowledge of these things by the creditor would require him to treat the retiring partner as a surety, and that, if he extended the time of payment of his debt without the retiring partner's knowledge or consent, he would be released. But in the case of Swire v. Redman, L. R. 1 Q. B. 536, Cockburn, C. J., shows very clearly that the House of Lords did not, in Oakeley v. Pasheller, intend to rule as was supposed, but merely to hold that the retiring partner would be released only in the event the creditor consented to the arrangement between the partners. Some American courts have followed what was supposed to be the ruling in Oakeley v. Pasheller, and others have adopted the decision in Swire v. Redman, which was to the effect that something more than mere knowledge on the part of the creditor is required—that he must expressly consent to the arrangement between the partners before he will be bound by it; and that in the absence of such consent he can deal with the retiring partner as a principal debtor and as an active partner so far as past transactions are concerned.

Cases like Swire v. Redman proceed on the theory that when a creditor's rights once become fixed by contract no agreement on the part of the other parties to the contract can affect those rights or change their relation to the creditor so far as he is concerned; that it is wholly immaterial that the creditor was informed of such an agreement; that the partnership still continues relatively to his debt; and that any arrangement which he makes with the continuing partner in behalf of the partnership will be binding on the other. The other line of decisions holds that whenever the relationship of principal and surety arises between partners after dissolution and the assumption by one partner of the debts of the firm, every one having notice of the dissolution and the agreement between them is bound to take notice of the relationship which the law creates, and act accordingly; that while a creditor holding an obligation of the firm may regard the retiring partner as an active partner, so far as his debt is concerned, as long as he does nothing to affect the status of his claim, the moment he, with knowledge of the dissolution and the agreement, does anything which would release an ordinary surety, the retiring partner will be entirely released from his obligation; that this is no hardship on the creditor, because he can protect himself by granting no indulgence to the continuing partner, who has become alone the principal debtor, or doing anything without the retiring partner's consent which would affect the status of the claim to the prejudice of the surety partner. * * *

Strong arguments can be made in support of either view of this question, and we would experience some difficulty in determining on prin-

ciple what the rule ought to be. Previous decisions of this court have, however, settled that the rule to be followed in this state is the one supposed to have been announced in Oakeley v. Pasheller. The earliest case on the subject is that of Stone v. Chamberlin, 20 Ga. 259. It was there held that where a creditor of a partnership, with knowledge that it had been dissolved by the retirement of one of the members, took a note in renewal of another given by the firm before the dissolution, and extended the time of payment of the original indebtedness, without the knowledge or consent of the retiring partner, he would be discharged. There was nothing to show that the renewal note was expressly taken in settlement of the old indebtedness. * * * The only effect of the new note, therefore, so far as the retiring partner was concerned, was to extend the time of payment of the old indebtedness; and this extension operated as a release of the retiring partner. While the word "surety" is not used in the opinion, the decision was evidently based on the theory that the retiring partner was a surety, and as such released by the extension. This came out more clearly when the case was again before this court. Chamberlain v. Stone, 24 Ga. 310. There Judge Benning said: "The taking of the new note by the plaintiff was at least a suspension of the right to demand payment of the debt until the new note fell due; and therefore the effect was to put the debt in such a condition that Stone would not longer have the right to pay it up immediately and demand contribution from Johnson, but would have to wait till the note fell due before he could pay it up and demand contribution." * * *

The Code provides that after dissolution a partner has no power to renew or continue an existing liability of the partnership. Civ. Code 1895, § 2659. It was accordingly held in First National Bank v. Ells, 68 Ga. 192, that where a creditor, with knowledge of the dissolution, allowed one of the partners to make a payment on a draft which had been accepted by the firm, and substitute a new draft in its place, without the knowledge of the other partner, the latter was released. * * * Under these decisions mere notice of the dissolution and of the agreement between the partners that the continuing partner was to assume the payment of the firm debts prevented the plaintiff in this case from extending the time of payment of the original indebtedness, without the knowledge or consent of the defendant Preston. Notice to the creditor must, however, be actual. * * * The extension of the time of payment, under the circumstances alleged in the plea, had the effect of releasing the defendant; and the court erred in striking the plea.

Judgment reversed. * * *

SECTION 2.—EFFECT, AS TO THIRD PARTIES, OF A DISSOLUTION UPON TRANSACTIONS SUBSEQUENT TO DISSOLUTION

Uniform Partnership Act, Section 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Section 33. (2) Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act

for the partnership with respect to persons not partners as declared in section 35.

Section 35.[1] (1) After dissolution a partner can bind the partnership except as provided in paragraph (3), (a) by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution, (b) by any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction (I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or (II) though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution (a) unknown as a partner to the person with whom the contract is made; and (b) so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution (a) where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or (b) where the partner has become a bankrupt, or (c) where the partner has no authority to wind up partnership affairs, except by a transaction with one who (I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or (II) had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1b II).

(4) Nothing in this section shall affect the liability under section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

[1] *Lewis' Note to Section 35.*—At present in most jurisdictions it is doubtful whether "such third person" shall have "had dealings with the partnership prior to the dissolution" or whether as in clause (d) as drafted these dealings must have taken the form of an extension of credit. In support of the provision, as written, see Beale's Parsons, § 319; Mechem, § 262; Burdick, 57; 2 Bates, §§ 613, 614; 30 Cyc. 671; Civ. Code Cal. § 2453. There is also authority for merely requiring that such "third person" shall have had dealings with the partnership. James Parsons, §§ 179, 180, 181; Lindley, 249; Pollock, 98; 3 Kent, Comm. 67; Collyer, 163, note; Shumaker, § 121; Mechem, 261, 262; Bates, 612, 613.

The practical impossibility of the partners knowing, by any feasible system of bookkeeping, all the persons with whom they have had dealings, unless credit has been extended, supports the wording adopted by the Commissioners.

Section 3.[2] (1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice (a) states the fact to such person, or (b) delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

[2] *Lewis' Note to Section 3.*—The word "notice," in judicial opinions and in other legal writings, is often used when "knowledge," as here defined, is intended. This has led to a great deal of confusion, of which the extraordinary expression "constructive notice" is evidence. To avoid this confusion, the word "notice" as here defined designates definite things only, which, if proved to have been done, enable the person doing them to assert that notice has been had and claim the benefit thereof, irrespective of whether the person charged has had knowledge or not. By adhering strictly to this conception throughout the act, the things which a person must do in order to be confident that he can claim the benefit of "notice" are made plain.

A definition of the word "knowledge" enables it to be indicated clearly when "knowledge," as distinguished from "notice," must be had.

The present law in regard to that which must be done by the person who desires to be in a position to claim the benefit of "notice" is in considerable confusion. Under our case law, as a rule, in ordinary transactions, except those which relate to commercial paper, no one has had "notice" until he has "knowledge"; though, of course, "notice" to an agent is notice to a principal. Whether the delivery of a letter containing a "statement of a fact" would or would not be sufficient, if the addressee did not read the letter, is doubtful. The court might well hold that the addressee, by his neglect to read the statement, was estopped from denying that he had "notice." The change in the law, if it is a change, which the present section as now drawn effects, is, it is submitted, in the right direction. The section does not go to the extent of saying that the mere deposit of a "written statement of the fact" in the mail is enough to charge the addressee with "notice." The addressor, by selecting the post office, telegraph, or other public service corporation as the method by which the letter shall be transferred, makes them his agents, not the agents of the addressee. On the other hand, the section does go to the extent of declaring that, if such written statement is received at the residence or place of business of the addressee in the usual way, the addressor, having done all that was reasonably possible to do to give the addressee "knowledge," should have the benefit of his diligence.

The section as drawn, in dealing with the character of the "statement of fact," where the statement is not a verbal statement merely requires a "written statement." The omission of the word "printed" is after deliberation. To insert the word "printed" might raise a doubt as to the effect of the delivery of a newspaper containing a "statement of the fact." There ought to be no doubt that this is an insufficient statement. Unquestionably, such delivery is not a delivery of a "written statement of the fact"; but, on the other hand if a printed or typewritten statement of the fact—as the dissolution of the partnership—is made on a separate card, which is inclosed in an envelope and given to the addressee, there would appear to be no doubt that any court would hold that "a written statement of the fact" had been delivered to such person. The principle is clear. Nothing should be regarded as "a written statement of the fact" which is not so prepared as to cause the one to whom it is addressed, as a reasonably prudent man, to read it. An exact definition of the character of the statement which is to be made is practically impossible; neither do we believe it to be desirable. The words employed, "written statement of the fact," do not preclude the statement from being typewritten or printed, but they do emphasize—that which it is necessary to emphasize—that the statement must be a separate statement of the fact made to the addressee, and not a general statement, for all the world to read or not, as fancy dictates.

MEYER et al. v. KROHN et al.

(Supreme Court of Illinois, 1885. 114 Ill. 574, 2 N. E. 495.)

MULKEY, C. J. Moses Krohn and Leopold Feiss, wholesale merchants at Cincinnati, Ohio, doing business as partners under the firm name of Krohn, Feiss & Co., brought to the June term, 1883, of the Adams county circuit court an action of assumpsit against John Meyer, Moses Bachrack, Solomon Hoffheimer, and Eva Hoffheimer, as partners, lately doing business at Galesburg, Illinois, under the name and style of Hoffheimer & Co. The declaration was in the usual form, containing the common counts and six special counts on bills of exchange payable to appellees, and drawn by them upon and accepted by Hoffheimer & Co. The bills were given at different times, in due course of trade, for goods and merchandise sold by the plaintiffs to the defendants. The first of these bills bears date August 12, 1879, and the last, November 25th of the same year, and the whole series, interest included, together with a small account, amounts, in the aggregate, to near $1,100. The Hoffheimers made no defense. The appellants severally filed pleas in abatement, denying the partnership at the time of making the bills of exchange, and the purchase of the goods sued for. The plaintiffs traversed these pleas, and also severally replied in substance that appellants, on the 1st day of January, 1878, and for two years prior thereto, were members of the firm of Hoffheimer & Co., during which two years appellees had sold goods to said firm; and that at the time of making the said bills of exchange, etc., appellees had no notice that appellants had ceased to be members of the firm of Hoffheimer & Co. Appellants took issue on these replications, and also severally rejoined that they were, during the said two years, as between themselves, partners under the firm name of John Meyer & Co.; and that this firm and their co-defendants composed the firm of Hoffheimer & Co.; and that the appellants were not otherwise members of the latter firm. The court sustained demurrers to these rejoinders, and the appellants stood by them. By a second rejoinder the appellants severally alleged that, at the time of the making of the alleged promises sued on, the appellees did have notice of the withdrawal of the appellants from the firm of Hoffheimer & Co., concluding to the country. The cause was then tried upon the issues formed as above stated, resulting in a verdict and judgment in favor of plaintiffs for $1,093.21. On appeal to the Appellate Court for the Third District this judgment was affirmed, and the present appeal brings before us for review the judgment of the latter court. * * *

As indicated by the pleadings, and as the evidence tends to show, appellants were members of the firm of Hoffheimer & Co. prior to the second of January, 1878, and as such members of the firm were customers of appellees. On that day appellants withdrew from the firm, but the business continued to be carried on by the Hoffheimers just as it had been before, and, as claimed by appellees, without any notice of appellants' retirement from the firm. Whether appellees had such notice or not was put directly in issue by the pleading, and this was the controlling one in the case. The question of fact thus put in issue has been decided adversely to appellants, and this court is not permitted to review it. * * *

The evidence relating to the question of notice of appellants' withdrawal from the firm is circumstantial, and by no means conclusive. That a general notice was prepared and inserted in a newspaper published in Galesburg at the time of their withdrawal is conceded, and that a copy of this notice was mailed at Galesburg by appellants in an envelope properly addressed to appellees at Cincinnati, their place of business and residence, is proven by the testimony of appellants. That no such notice was ever received by appellees is established just as clearly by their testimony. This question, with other questions of facts, was properly left to the jury. If, as matter of law, in order to release appellants from further responsibility, it was necessary for them to prove, not only the preparing and mailing of the notice of their withdrawal, but also that it was actually received by appellees, then, for the purpose of supporting the judgment below, we must assume that the jury found, as matter of fact, that the notice was never received.

The important question in the case, so far as this court is concerned, is whether the law is as just suggested, and this question is presented by instructions both given and refused. The court, in behalf of appellees, instructed the jury, in substance, that although they might believe from the evidence that the appellants prepared and sent, in a letter or envelope properly addressed, to the appellees at Cincinnati a notice of their withdrawal from the firm, yet if they further believed from the evidence that appellees never received such notice, and that neither they nor their lawfully authorized agents otherwise received notice or had knowledge of such withdrawal or dissolution of the firm, then the appellants had failed to establish notice within the meaning of the law. On the other hand, the court refused to instruct the jury at the instance of appellants that it was sufficient for the purpose of establishing notice to prove the prepaying and sending a notice in the manner above stated. We have no doubt of the correctness of the ruling of the court on this subject. The general rule, as we understand it, is this: As to persons who have never had any business transactions with the firm, notice by publication is sufficient; but as to those who have had previous dealings with it, actual notice, or its equivalent, must be shown. This rule seems to be supported by an unbroken current of authorities, and it is certainly promotive of justice and fair dealing. To hold that the mere mailing of notices to patrons of a firm is sufficient, without regard to whether they were ever received or not, as is claimed by appellants, would be to establish by judicial legislation a species of constructive notice hitherto unknown to the law, so far as we are advised. It is doubtless true that proof of the mailing of notices properly addressed is prima facie evidence of their having been received by the party addressed. But this is a mere presumption of fact, which may be rebutted, as was done in this case. To give it the effect contended for would be to declare it a presumptio juris et de jure, for which we find no authority. Moreover, it would be but to invite the grossest frauds upon distant merchants who would have no adequate means of protecting themselves.

We prefer to leave the question with the jury, where we understand the law leaves it, unfettered and unembarrassed by any artificial rule of evidence that might prevent them from finding the real truth. Perceiving no cause for disturbing the judgment of the appellate court, it will therefore be affirmed. * * *

SECTION 3.—RIGHTS OF CREDITORS OF THE DISSOLVED PARTNERSHIP AGAINST THE INDIVIDUAL OR PARTNERSHIP CONTINUING THE BUSINESS

Uniform Partnership Act, Section 17.[3] **A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.**

[3] *Lewis' Note to Section 17.*—The present section eliminates the difficulty which arises when a new partner is admitted without liquidation of firm debts. The present theory of the common law is that a new partnership is formed; all the property of the partnership which existed up to the moment of the entrance of the new partner being transferred to the new partnership. The result of this theory is that, if the business fails, the creditors who have extended credit after the admission of the new partner have a prior claim on the assets in the business. The inequitable character of this result has led the courts, where no notice of the change of membership is had by the creditors, to be diligent in finding an assumption of liability on the part of the new partnership of the debts of the old partnership.

Though this section changes the formal statement of the law, which is to the effect that an incoming partner is not liable for debts contracted before his admission, as a matter of fact the section as worded conforms to the actual decisions of the courts, which, however, are arrived at by making every effort to impress an assumption of liability on the part of the new partnership, formed as a result of the admission of the new partner, of the debts of the old partnership.

The difficulty, which is overcome by this section as worded, is illustrated by the common case where all the property of the existing partnership is taken over, without notice of any break in the conduct of business, by the new partnership, composed of all the members of the existing partnership and the incoming partner, thereby depriving the existing partnership of all its property. Both the existing and the subsequent creditors may believe it is one and the same partnership; but, as stated, such would not be the case under the present law. There is no peculiar equity in the subsequent creditors, giving them a right to be preferred, as against the property employed in the business, to the existing creditors. The incoming partner partakes of the benefit of the partnership property and an established business. He has every means of obtaining full knowledge and protecting himself, because he may insist on the liquidation or settlement of existing partnership debts. The creditors have no means of protecting themselves. So as to preserve the present law as nearly as possible, it is declared that the liability of the incoming partner shall be satisfied only out of partnership property. It therefore results that existing and subsequent creditors have equal rights as against partnership property and the separate property of all the previously existing members of the partnership, while only the subsequent creditors have rights against the separate estate of the newly admitted partner.

The section should be read in connection with section 41, infra. Both sections are based on the principle that, where there has been one continuous business, the fact that A. has been admitted to the business, or C. ceased to be connected with it, should not be allowed to cause, as at present, endless confusion as to the claims of the creditors on the property employed in the business, but that all the creditors of the business, irrespective of the times when they became creditors and the exact combinations of persons then owning the business, should have equal rights in such property. The recognition of this principle solves one of the most perplexing problems of present partnership law.

Uniform Partnership Act, Section 41. (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved patnership are also creditors of the partnership so continuing the business.[4]

[4] *Lewis' Note to Section 41 (1).*—As originally passed by the Conference, paragraph 1 of section 41 read as follows:

"When any partner retires and assigns (or the representative of a deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, who continue the business without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the partnership so continuing the business."

It was subsequently pointed out that section 41 did not cover the situation which arises when a partnership is dissolved and a new partnership formed by the introduction of a new partner into the business without the liquidation of the affairs of the first partnership, and that it would be best not to rely on section 17, supra, to take care of the situation. The paragraph, reworded, as now printed, was submitted to the Commissioners present at the last Conference and they have signified their approval of the change.

The section as a whole deals primarily with the rights of creditors when a new partner is admitted or a partner retires, is expelled or dies, and the business is continued without liquidation of the debts of the partnership dissolved by the change in personnel.

At present the whole subject is in doubt and confusion. It is universally admitted that any change in membership dissolves a partnership, and creates a new partnership. This section as drafted does not alter that rule. Neither does it alter the rule that on any change of personnel the property of the dissolved partnership becomes the property of the partnership continuing the business. At present, however, creditors of the dissolved partnership do not become creditors of the new partnership Thus, if A., B., and C. are partners, and A. assigns to B. and C., who continue the business without any agreement to pay the partnership debts, under the present law the property of the first partnership becomes the property of the second partnership; but the creditors of the first partnership are not the creditors of the second partnership, though they are the creditors of all the members of that partnership. Such creditors, therefore, are often unable to secure satisfaction of their claims, though at the time of the assignment the partnership was solvent, and the business may have been continued by the second partnership without any notification of the change in membership. On the other hand, the creditors of the second partnership may be paid in full out of the property. This inequitable result the courts have attempted, in not a few instances, to prevent, by declaring that the assignment of the property of the first partnership to the second partnership was a fraud on the creditors of the first partnership, though no fraud was intended, the result being that the creditors of the second partnership are postponed until the creditors of the first partnership are paid in full.

The paragraph as drawn changes the law in the case supposed, and thereby does away with an injustice. In making the creditors of the first partnership creditors of the second it prevents such an assignment from affecting the rights of partnership creditors in the property embarked in the business.

Again, in the case supposed, if B. and C. promise to pay the debts of the partnership of A., B., and C., it is uncertain whether the court will hold that they promise as individuals or as a new partnership. If as individuals, the old partnership creditors are not creditors of the new partnership. If A. and B. are considered as promising as a new partnership, then whether the old partnership creditors can sue the new partnership as beneficiaries depends on the jurisdiction. The paragraph as drawn ends this uncertainty. In every case the creditors of the first partnership become creditors of the second, though, of course, they do not cease to be creditors of the first partnership. As, however, the first partnership has assigned all its property,

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.[5]

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.[6]

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.[7]

this is of little value to such creditors, unless the assignees have promised the retiring partner an additional consideration beyond the payment of the debts. The status of such additional consideration is treated in paragraph (8), infra.

The paragraph as a whole, as well as this entire section, is based on the opinion that when there is a continuous business carried on first by A., B., and C., and by A., B., C., and D., or by B. or C., or by B. and C., or by B. and D., or by C. and D., or by B., C., and D., without any liquidation of the affair of A., B., and C., both justice and business convenience require that all the creditors of the business, irrespective of the exact grouping of the owners at the times their respective claims had their origin, should be treated alike, all being given an equal claim on the property embarked in the business. Compare note to section 17, supra.

[5] *Lewis' Note to Section 41 (2).*—Where all the partners assign to one partner, the partnership creditors are, under this paragraph, the separate creditors of the partner continuing the business, where he continues the business alone, whether such partner promises to pay the debts of the dissolved partnerhip or not. If he takes one or more new partners, and they continue the business with the property of the dissolved partnership, the creditors of the dissolved partnership are the creditors of the partnerhip continuing the business. This paragraph changes the present law to the same extent as paragraph (1).

[6] *Lewis' Note to Section 41 (3).*—The paragraph extends the principle of the first and second paragraphs of the section to the case where the business is continued by two or more of the partners, alone or with others, after the retirement or death of a partner without any formal assignment to them of the retired or deceased partner's rights in partnership property. The neglect of the retiring partners or of the representatives of the deceased partner should not, as at present, create inextricable confusion between the creditors of the first and second partnership in regard to their respective rights in the property employed in the business. Both classes of creditors should be ahead of the claim of such retired partner or the representative of the deceased partner, and both classes of creditors should also have equal rights in the property. This paragraph probably effects a change in the present law, though the same result is often now brought about by implying a promise to pay the debts of the dissolved partnership on the part of the person or partnership continuing the business.

[7] *Lewis' Note to Section 41 (4).*—The existing law in relation to the subject-matter covered by this paragraph is so uncertain that it is not possible to say

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only.[8]

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.[9]

whether its adoption would modify the law. The paragraph does not apply to the case where the third person or persons do not promise to pay the debts of the dissolved partnership. In that case the creditors of the dissolved partnership have no claim on the partnership continuing the business, or its property, unless the assignment can be set aside as a fraud on creditors, or is affected by a Sales in Bulk Act. Where, however, there has been a promise to pay the debts of the dissolved partnership, then the creditors of the dissolved partnership are not only creditors of the promisor or promisors—which, in the United States, they would be as beneficiaries—but under this paragraph, if the business of the dissolved partnership is continued by a partnership, the creditors of the dissolved partnership become creditors of the partnership continuing the business, not merely the separate or joint creditors of the partners in such partnership.

[8] *Lewis' Note to Section 41 (7).*—The paragraph merely reiterates the principle of section 17, supra, which is that an incoming partner should be liable for the existing debts of the partnership, but that this liability should be limited to his right in partnership property. Though in cases under this section the person who joins the business on the dissolution of the first partnership is not an incoming partner, because the first partnership is dissolved. Under the circumstances, his liability for the debts of the business contracted before his admission should be the same as that of an incoming partner, if confusion is to be avoided in respect to the rights in the property employed in the business, between the creditors who were creditors before he joined the business and those who became creditors afterwards.

[9] *Lewis' Note to Section 41 (8).*—Suppose A., B., and C. are partners and A. retires, assigning his interest to B. and C., who continue the business with the property of the dissolved partnership, promising to pay A. $2,000. On the subsequent failure of both partnerships under paragraph (1) of this section, the creditors of the first partnership would be also creditors of the second. By the assignment the property employed in the business would be the property of the second partnership. By his contract A. would be a creditor of the second partnership for $2,000; but this claim, A. being insolvent,

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

Uniform Partnership Act, Section 42. When any partner retires or dies and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership: Provided, that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41(8) of this act.

SECTION 4.—PRIORITIES AMONG CLAIMANTS IN THE SETTLEMENT OF A PARTNERSHIP ESTATE

Uniform Partnership Act, Section 40. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:

I. The partnership property;

II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.[10]

would belong under the wording of this paragraph, not to A.'s separate estate, but to the creditors of the first partnership.

The uncertainty of existing law renders it impossible to say whether the adoption of this paragraph would change the law. The Commissioners believe that certainty of the law is essential, and that the rule stated in the paragraph is sound. A., in the case put, has sold his property rights in the partnership before settling with the creditors of the partnership, and therefore those creditors should have an equitable lien on the consideration of the sale as against the separate creditors of the retiring partner, or as against the representatives of a deceased partner who have sold the rights of their decedent to the persons continuing the business.

[10] *Lewis' Note to Section 40 (a) II.*—The adoption of this clause will end the present confusion as to whether the contributions of the partners towards the losses of the partnership are partnership assets or not. See In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986 (1907); In re Forbes (D. C.) 128 Fed. 137 (1904); Barry v. Foyles, 1 Pet. 311, 7 L. Ed. 157 (1828); George M. West Co. v. Lea Bros., 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098 (1899); Vaccaro v. Security Bank, 108 Fed. 436,

(b) The liabilities of the partnership shall rank in order of payment as follows:

I. Those owing to creditors other than partners;

II. Those owing to partners other than for capital and profits;

III. Those owing to partners in respect of capital;

IV. Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18 (a), the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt, or his estate is insolvent, the claims against his separate property shall rank in the following order:

I. Those owing to separate creditors;

II. Those owing to partnership creditors;

III. Those owing to partners by way of contribution.

RODGERS v. MERANDA et al.

(Supreme Court of Ohio, 1857. 7 Ohio St. 180.)

The original proceeding was a petition for an order of distribution of the separate or individual assets of an insolvent debtor, as between separate and partnership creditors.

It appears from the record that about the 13th of June, 1854, Peter Murray, an insolvent debtor, made an assignment of all his estate, real and personal, to the plaintiff, in trust for the payment of their respec-

43 C. C. A. 279 (1900); In re Mercur, 122 Fed. 384, 58 C. C. A. 472 (1903). The Commissioners believe that the opinion that such contributions are assets is supported by the better reasoning See In re Forbes, supra.

tive demands. Though possessed of a large and valuable estate, it had been found insufficient to pay his separate debts and liabilities in full. At the date of his failure and assignment he was a partner with John W. Dever in a mercantile firm under the name and style of Dever & Murray, which firm had also become insolvent, and likewise Dever, and the firm had made an assignment of the partnership property and assets about the same time to John Meranda, one of the defendants, in trust for the payment of the joint debts or liabilities of the firm.

In this condition of affairs the partnership creditors, although they have filed their claims with the assignee of the firm for their distributive shares out of the partnership property, claim the right to be admitted to a participation in the dividends of the separate estate of Murray, pari passu with his individual creditors; while the latter deny the right, and insist that his separate estate shall be applied to the satisfaction of his individual debts in preference to his partnership debts.

It appears, further, that Murray, besides advancing his part of the capital of the firm also loaned money to the firm to a large amount, for which he held the obligations of the firm, which obligations, by the assignment of Murray, came into the hands of the plaintiff, who has presented the same to the assignee of the firm, and claims to have the same paid out of the assets of the firm, pari passu with the other partnership debts. The other creditors resist this, and plaintiff asks an order of distribution to that effect out of partnership assets.

Defendants demurred to the petition. The court below sustained the demurrer, and gave judgment in favor of the defendants; and this petition in error is filed to review and reverse that judgment.

BARTLEY, C. J. Two questions are presented for determination in this case. The first is whether, in the distribution of the assets of insolvent partners, where there are both individual and partnership assets, the individual creditors of a partner are entitled to be first paid out of the individual effects of their debtor, before the partnership creditors are entitled to any distribution therefrom. It is well settled that, in the distribution of the assets of insolvent partners, the partnership creditors are entitled to a priority in the partnership effects, so that the partnership debts must be settled before any division of the partnership funds can be made among the individual creditors of the several partners. This is incident to the nature of partnership property. It is the right of a partner to have the partnership property applied to the purposes of the firm, and the separate interest of each partner in the partnership property is his share of the surplus after the payment of the partnership debts. And this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and a correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, in equity, only look to the surplus of the separate property of a partner, after the payment of his individual debts, and, on the other hand, the individual creditors can in like manner only claim distribution from the debtor's interest in the surplus in the joint fund after the satisfaction of the partnership creditors.

The correctness of this rule, however, has been much controverted; and there has not been always a perfect concurrence in the reasons

assigned for it by those courts which have adhered to it. By some it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit is given—that in contracts with a partnership, credit is given on the supposed responsibility of the firm, while in contracts with a partner as an individual reliance is supposed to be placed on his separate responsibility. * * * And, again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner, and that there is consequently a clear equity in confining the creditors, as to preference, to each estate respectively, which has been thus benefited by their transactions. * * * But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than a mere consideration of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners, as well as that of the firm, and also those who contract with a partner in his separate capacity place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm. Unsatisfactory reasons may weaken confidence in a rule which is well founded.

What, then, is the true foundation of the rule which gives the individual creditor a preference over the partnership creditor in the distribution of the separate estate of a partner? To say that it is a rule of general equity, as has been sometimes said, is not a satisfactory solution of the difficulty; for the question is whether it be a rule of equity or not. In the distribution of the assets of insolvents, equality is equity; and to say that the rule which gives the individual creditor a preference over the partnership creditor in the separate estate of the partner is a rule of equality does not still rid the subject of difficulty. For, leaving the rule to stand which gives the preference to the joint creditors in the partnership property, and perfect equality between the joint and individual creditors is perhaps, rarely attainable. That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint estate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and, for the purpose of justice, became necessary as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and, concurrently with the rest, entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors; and it frequently happens that the separate debts are contracted to raise means to carry on the partnership business.

Independent of this rule, the joint creditors have, as a general thing, a great advantage over the separate creditors. Besides being exclusively entitled to the partnership fund, they take their distributive shares in the surplus of the separate estate of each of the several partners after the payment of the separate creditors of each. It is a rule of equity that, where one creditor is in a situation to have two or more distinct securities or funds to rely on, the court will not allow him, neglecting his other funds, to attach himself to one of the funds to the prejudice of those who have a claim upon that and no other to depend on. And besides the advantage which the joint creditors have, arising from the fact that the partnership fund is usually much the largest, as men in trade, in a great majority of cases, embark their all, or the chief part of their property, in it, and besides their distributive rights in the surplus of the separate estate of the other partners, the joint creditors have a degree of security for their debts and facilities for recovering them which the separate creditors have not. They can sell both the joint and the separate estate on an execution, while the separate creditor can sell only the separate property and the interest in the joint effects that may remain to the partners, after the accounts of the debts and effects of the firm are taken, as between the firm and its creditors, and also as between the partners themselves. With all these advantages in favor of the partnership creditors, it would be grossly inequitable to allow them the exclusive benefit of the joint fund, and then a concurrent right with individual creditors to an equal distribution in the separate estate of each partner. What equality and justice is there in allowing partnership creditors, who have been paid 80 per cent. on their debts out of the joint fund, to come in pari passu with the individual creditors of one of the partners, whose separate property will not pay 20 per cent. to his separate creditors? How could that be said to be an equal distribution of the assets of insolvents among their creditors?

It is true that an occasional case may arise where the joint effects are proportionably less than the separate assets of an insolvent partner. But, as a general thing, a very decided advantage is given to the partnership creditors, notwithstanding this preference of the individual creditors in the separate property; and that advantage, arising out of the nature of a partnership contract, is unavoidable. Some general rule is necessary; and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate results as a principle of equity from the preference of partnership creditors in the partnership funds, and their advantages in having different funds to resort to, while the individual creditors have but one.

It has been argued that partnership contracts are several as well as joint, and consequently have an equal legal right with separate creditors upon the individual property of a partner. But the right of partnership creditors against the separate property of individual partners in proceedings at law is not in controversy. The question here relates to the relative equitable rights of two classes of creditors in the distribution of the estates of insolvents. Much of the confusion upon this subject has probably arisen from confounding the abstract rights of creditors in proceedings at law with their relative

rights to an equitable adjustment in marshaling the assets of insolvents in chancery.

The rule here adopted appears to have been followed in England for nearly a century and a half. We find it distinctly recognized in the case of Ex parte Crowder, 2 Vern. 706, decided in 1715. And in Ex parte Cook, 2 P. Wms. 500, Lord Chancellor King declared it settled as a rule of convenience in bankruptcy that joint creditors should be first paid out of the partnership estate and the separate creditors out of the separate estate of each partner, and, if there be a surplus of the joint creditors, the share of each partner should be distributed to his separate creditors, and if, on the other hand, there should be a surplus of the separate estate of a partner after the satisfaction of his individual creditors, it should be applied to any deficiency of the joint funds in the satisfaction of the partnership debts. Lord Hardwicke followed the same rule, in Ex parte Hunter, 1 Atk. 228. But it appears that in Ex parte Hodgson, 2 Bro. C. C., decided in 1785, Lord Thurlow made an innovation on the rule in bankruptcy, declaring that there was no distinction between joint and separate creditors, that they ought to be paid out of the bankrupt's estate and his moiety of the joint estate, and that the joint creditors ought to come in pari passu with the separate creditors. This ruling of Lord Thurlow appears to have had reference to proceedings at law and in bankruptcy, for it is said that, consistently therewith, it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners and obtaining an injunction on the order in bankruptcy.

But how far this innovation went, in practice, to affect the ultimate rights of the parties, is wholly immaterial, inasmuch as Lord Loughborough, in Ex parte Elton, 3 Ves. Jr. 238, in the year 1796, restored the rule which previously prevailed, holding that the rule introduced by the Case of Hodgson was inconvenient, inasmuch as every order which he passed in bankruptcy, giving a joint creditor a dividend out of the separate estate of a partner, would give rise to a bill in equity, on the part of the separate creditors, to restrain the order and secure the application of the separate estate to the satisfaction of the separate debts; and, although it was adjudged that a joint creditor might prove his claim under a separate commission, yet he could not receive any dividend therefrom until the amount of his distribution in the joint fund could be ascertained and the claims of the separate creditors satisfied. And the opinion of the Lord Chancellor, in this case, puts an end to the assertion, which has been sometimes made, that this rule was peculiar to proceedings in bankruptcy. Touching this he said: "If it stands as a rule of law, we must consider what I have always understood to be settled by a vast variety of cases, not only bankruptcy, but upon general equity, that the joint estate is applicable to partnership debts and the separate estate to the separate debts." Again, in speaking of the inconvenience of Lord Thurlow's rule, he said: "What I order here to-day, sitting in bankruptcy, I shall forbid to-morrow, sitting in chancery; for it is quite of course to stop the dividend on a bill filed. The plain rule of distribution is that each estate shall bear its own debts. The equity is so plain that it is of course upon a bill filed."

Lord Eldon, with some characteristic doubts and misgivings, consistently followed this rule of his immediate predecessor. [Citing

cases.] And it has ever since remained the settled law of England, applicable, not simply to proceedings in bankruptcy, but as a general rule of equity, in the distribution of the assets of insolvents.

The supposition that this rule arose from any provision of the statutes concerning bankruptcy in England is a mistake. It was long and well settled as a rule of equity before any statute was enacted touching this subject. It does not appear to have been sanctioned by any positive enactment until St. 6 Geo. IV, c. 16, § 16.

It is not a little remarkable that this rule of equity, so long settled and acted on in England, should have encountered so much opposition as it has in the courts of the several states of this country.

In Pennsylvania the rule was discarded by a majority of the court in the case of Bell v. Newman, 5 Serg. & R. (Pa.) 78, decided in 1819. And the rule adopted in that case was that where a surviving partner dies indebted to partnership and also to individual creditors, and leaving joint assets and also separate assets, the separate creditors should receive as much out of the separate property as the joint creditors could receive from the separate portion or share of such partner in the joint property, and that then the balance of the separate property should be divided pro rata among both classes of creditors. This was placed partly on the ground of equity and partly on the ground of a statute directing equality of distribution of the assets of deceased persons. Judge Gibson, however, dissented, insisting forcibly on the rule adopted in England as a general principle founded in equity.

And it has been insisted that this case did not strictly fall within the application of the principle, inasmuch as the estate to be distributed in that case was the estate of a surviving partner, against which the claims of the joint creditors were as purely legal as those of the separate creditors. And Chief Justice Tilghman remarked, in the opinion of the case, that "no rule was intended to be laid down which may affect cases differently circumstanced."

The case of Sperry's Estate, 1 Ashm. (Pa.) 347, did not directly affect the question, inasmuch as it came fully within the exception that where there is no joint fund, and no solvent partner, the separate and joint creditors should be paid ratably out of the separate estate. The question was again brought to the attention of the court in that state in Walker v. Eyth, 25 Pa. 216, where the court expresses the opinion that it is a rule of equity "that, where there are partnership and separate creditors, each estate should be applied exclusively to the payment of its own creditors, the joint estate to the joint creditors and the separate estate to the separate creditors." But the question was not directly decided; the decision of the case being put upon another ground. So that the general principle, in a case proper for its application, is said to remain still an open question in Pennsylvania. * * *

In Virginia the question was presented in 1848, in the case of Morris' Adm'r v. Morris Adm'r, 4 Grat. (Va.) 293, and was elaborately discussed on both sides; but the court was equally divided on the question of adoption of the rule as a general rule of equity, and the decision was put on other grounds.

In New Jersey, in the case of Wisham v. Lippincott, 9 N. J. Eq. 353, the rule was doubted as a general principle of equity, although not decided.

In Vermont, in the case of Bardwell v. Perry et al., 19 Vt. 292, 47 Am. Dec. 687, the rule was discarded as a principle of equity, with this qualification: That the separate creditors could require, in equity, that the joint creditors should first exhaust the partnership funds, before coming in with the separate creditors of a partner for a pro rata distribution out of his separate estate.

It does not appear that the doctrine of the English courts on this subject was ever adopted as a rule of equity by the courts of Massachusetts; but it is said that a statute was enacted in that state in 1838, providing, as a rule for the distribution of insolvents' estates, that the net proceeds of the separate estate shall go to the separate creditors and that of the partnership estate to the joint creditors.

The rule appears to have been discarded in Connecticut, in the case of Camp v. Grant et al., 21 Conn. 41, 54 Am. Dec. 321, and also in Mississippi, in the case of Dahlgren v. Duncan, 7 Smedes & M. (Miss.) 280, but adopted in Alabama, in Bridge v. McCullough's Adm'rs, 27 Ala. 661.

In New York it has been adjudged that "the rule of equity was uniform and stringent that the partnership property of a firm shall all be applied to the partnership debts to the exclusion of the creditors of the individual members of the firm, and that creditors of the latter are to be first paid out of the separate effects of their debtor before the partnership creditors can claim anything therefrom." Jackson v. Cornell, 1 Sandf. Ch. 348. The history of the English rule was somewhat reviewed by Chancellor Kent in Murray v. Murray, 5 Johns. Ch. 60, and upon full consideration adopted as a rule of equity by Chancellor Walworth in Wilder v. Keeler, 3 Paige, 167, 23 Am. Dec. 781, Payne v. Matthews, 6 Paige, 19, 29 Am. Dec. 738, and Hutchinson v. Smith, 7 Paige, 26.

The same doctrine was adopted by Chancellor Desaussure in South Carolina as early as 1811 in Woddrop v. Ward, 3 Desaus. 203, and also by the Supreme Court of New Hampshire in Jarvis v. Brooks, 23 N. H. 136.

The subject was very fully reviewed in the Court of Appeals of Maryland in McCulloh v. Dashiell's Adm'r, 1 Har. & G. 96, 18 Am. Dec. 271, wherein it was settled in that state that in equity the individual creditors of a partner were entitled to a preference over the joint creditors in a distribution of the separate estate of their debtor.

And the same doctrine was settled by the Supreme Court of the United States, on full consideration, in Murrill v. Neil, 8 How. 414, 12 L. Ed. 1135. And it has been laid down generally by the elementary writers, both in England and in this country, as a settled rule of equity. * * *

The remaining matter for determination, in this case, involves the inquiry whether, in case of an indebtedness for money lent to the partnership by a partner who afterward becomes insolvent, the separate creditors of the latter shall be entitled therefor to a pro rata distribution with the partnership creditors, out of the joint fund. * * *

It was at one time held to be the law * * * that if a partner has loaned money to the partnership, or the partnership has loaned money to the separate estate of one of the partners, according to the equitable rule of distribution of the assets after insolvency, in the former case, the separate creditors of the partner would be entitled to an equal share out of the joint assets to the extent of the debt created for the money

lent, and that, in the latter case, the partnership creditors would be entitled to payment to the same extent, out of the individual estate of the partner. * * * But this doctrine has long since been overruled, and the contrary appears now to be well settled. * * *

This doctrine proceeds upon the principle that, in the distribution of the assets of insolvents, the equities of the creditors, whether joint or separate, must be worked out through the medium of the partners; that creditors can only step into the shoes of their immediate debtors in reaching their effects where there are conflicting claims; and that inasmuch as an individual partner could not himself come in and compete with the partnership creditors, who are in fact his own creditors, in the distribution of the fund, and thereby prejudice those who were not only creditors of the partnership but also of himself, therefore the separate creditors of a partner could not enforce any claim to a distributive share of the joint effects against the partnership creditors, which could not have been enforced by the partner himself for his own benefit. The rule, however, that these several funds are to be thus administered as they stood at the time of the insolvency is to be received with this important limitation: That it does not apply in case, either where the effects obtained, creating the debt, were taken from the separate estate to augment the joint estate, or from the joint estate to augment the separate estate, fraudulently, or under circumstances from which fraud may be inferred, or under which it would be implied.

In the case before us, however, it is not pretended that the firm obtained the borrowed money from Murray improperly. The separate creditors of Murray, therefore, are not, on account of this claim for money lent by Murray to the firm, entitled to participate with the partnership creditors in the distribution of the joint effects.

Judgment of the common pleas reversed; and ordered that the separate effects of Peter Murray be distributed pro rata first among his individual creditors, before any application thereof be made to the payment of the partnership debts of Dever & Murray, and that the partnership effects be applied first to the payment of the partnership debts, irrespective of the claim of the partner, Peter Murray, for money loaned by him to the firm.

IVES et al. v. MAHONEY et al.

(Supreme Court of Minnesota, 1898. 71 Minn. 155, 73 N. W. 720.)

In re assignment of Arthur H. Ives and Amos P. Ireland, as copartners under the firm name of Ives, Ireland & Co. From an order of distribution to Stephen Mahoney, receiver of the Irish-American Bank, and others, Alfonso B. Hawkins, as assignee of Ives, Ireland & Co., appeals.

START, C. J. Arthur H. Ives and Amos P. Ireland, partners under the firm name of Ives, Ireland & Co., duly made an assignment of all of their partnership and unexempt individual property, for the benefit of their creditors, under the insolvent laws of this state. The net assets of the partnership, for distribution, amount to $3,151.65, and the partnership debts are $19,736.34. Ireland's net individual assets are $4,000; and his individual debts, $2,997.47. Ives' net assets are $100, and his personal debts, $415.40. Included in the firm debts proved is that of the Irish-American Bank, for $4,078.89, which is

based upon the notes of the firm given to the bank for a loan by it to the firm, in the sum of $4,000, and signed by the firm, and by Ireland in his individual name. There is also included in the firm debts that of the St. Anthony Falls Bank, for $5,512.50, which is based upon notes executed by the firm to it for a loan of $5,500, but none of the notes were signed by either of the individual partners. Each of these banks made the loan to the firm in express reliance upon the individual property and credit of Ireland. The trial court, by its order of distribution, directed the assignee to pay the net assets of the firm, pro rata, to the firm creditors, including the Irish-American Bank; net individual assets of Ireland, pro rata, to his individual creditors, excluding the firm creditors, except the Irish-American Bank, which was included therein to the full amount of its debt, without any deduction for the payment thereon it was to receive by its dividend from the firm assets; and the net assets of Ives to his individual creditors. The assignee and certain firm creditors appealed from this order. The appeals present two general questions for our decision. They are, did the trial court err (a) in distributing the firm assets to the firm creditors, and the individual assets to the individual creditors? (b) in directing a dividend to be paid to the Irish-American Bank from both funds?

The trial court adopted the general equity rule in insolvency and bankruptcy for the distribution of firm and individual assets, respectively, which is that, where there are both partnership and individual assets for distribution, the partnership assets will be first applied to the payment of partnership debts, and the individual assets, in like manner, to the payment of the individual debts of the partners. If there is a surplus in either fund after paying in full the creditors to whom it primarily belongs, it is carried to the other fund, and distributed as a part thereof. The rule seems to be limited to cases where there are substantial firm assets for distribution. This we do not decide. The first half of the rule, that equity gives to the firm creditors priority in the firm assets over the creditors of the individual partners, is conclusively settled, and everywhere accepted as the law; but the other and reciprocal half of the rule, that the separate debts of the partners are to be first paid from the individual assets, has been controverted by able courts in this country, while those which have adhered to it have not always agreed as to the reasons for its adoption.

The principles upon which the rule rests are clearly stated in the dissenting opinion of Chief Justice Gibson in the case of Bell v. Newman, 5 Serg. & R. (Pa.) 91, and the opinion of Chief Justice Bartley in Rodgers v. Meranda, 7 Ohio St. 179. The latter wrote thus of the rule: "That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint estate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and, for the purposes of justice, became necessary, as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and concurrently with the rest entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors, and it frequently happens that the separate debts are contracted to carry on the

partnership business." Judge Story, in his time, declared the rule to be firmly established. He, however, questioned its equity and propriety, but added, "Such as it is, however, it is for the public repose that it should be left undisturbed, as it may not be easy to substitute any other rule which would uniformly work with perfect equality and equity in the mass of intricate transactions connected with commercial operations." Story, Partn. §§ 377, 382. The rule was expressly approved by Chancellor Kent, who declared it to rest upon just and obvious principles of equity, and to be settled by a series of English and American decisions. 3 Kent, Comm. *65. Prof. Parsons declared it to be distinctively settled, and a simple rule, eminently practical, and founded upon obvious principles of policy. T. Pars. Partn. pp. 382, 383.

Whatever question there may have been as to this rule half a century ago, it is now thoroughly and decidedly established by the great weight and number of adjudged cases, and must be followed, unless it is contrary to the letter or spirit of our insolvency law. The assignee claims that it is so, in that it violates the fundamental principles of equal distribution and no preferences, upon which the insolvency law rests, and asks us to adopt the Kentucky rule, which is, in effect, that where a firm is insolvent, and there are both firm and individual assets to be distributed to firm and individual creditors, the partnership assets are to be distributed exclusively to the firm creditors; then the individual creditors are to receive a percentage on their claims from the individual assets, equal to that received by the firm creditors on their claims from the partnership assets; and the balance, if any, to all of the creditors, pro rata. Bank v. Keizer, 2 Duv. 169. The original of this rule seems to be the rule adopted in Pennsylvania, in Bell v. Newman, 5 Serg. & R. 78, for the distribution of firm and individual assets, in a case where a surviving partner died, leaving both partnership and separate creditors, and firm and separate assets in the hands of his administrator. Gibson, J., dissented, and, in his opinion, ably vindicated the equity rule, and tersely stated the objections to the rule laid down in the opinion of the court, in these words: "It is evident, therefore, the rule would operate unequally, by making the separate creditors share their fund with the joint creditors, where it happens to be the largest, without subjecting the latter to share theirs under like circumstances. It may be said, it is impossible to put them on a footing in this respect. I grant that it cannot be done on any plan of participating in the same fund, but you precisely put them on a footing by making each fund bear the burden of its own debts; and, if that of the separate creditors should happen to be the most productive, I know not on what principle of equity they can be deprived of the advantage." Bell v. Newman was practically overruled in Black's Appeal, 44 Pa. 503, and the equity rule adopted. The objections to the now discarded rule of Pennsylvania apply precisely to the Kentucky rule, which has not, so far as we are advised, been followed by any other court.

As to the claim that the equity rule is contrary to the express prohibition of our insolvency law as to preferences, it is to be noted that the equity rule is the unquestioned rule in England for the distribution in bankruptcy of the firm and separate assets, and was expressly adopted by section 14 of the federal bankruptcy act of 1841, and section 36 of the act of 1867. This is significant for the prohibition of

preferences is a pronounced feature of all bankrupt laws, and especially so of the bankrupt acts of 1841 and 1867. If it be held that the prohibition of preferences in our insolvency law abrogates any part of the equity rule, the whole thereof is annulled, and firm and individual assets constitute a single fund, to be distributed to firm and individual creditors pro rata. It is clear that the law cannot be so construed, and that the prohibition as to preferences relates to, and is directed against, the acts of the insolvents. The same suggestions apply with equal force to the claim that the requirement of the insolvency law of equality in the distribution of the net assets to the creditors abrogates the equity rule. It is difficult to see upon what principle we can consistently hold, as we are, in effect, asked to do by the assignee, that the equity rule is annulled by the provisions of the insolvent law forbidding preferences, and requiring equality of distribution, and adopt in place of it the Kentucky rule; for the latter permits the firm creditors to have the exclusive benefit of the firm assets, if they are greater and pay a greater dividend to firm creditors than the individual assets do to individual creditors; but, if they are less, then, and only then, the two classes of creditors share equally. The firm creditors never share their fund with the separate creditors, but the latter must share theirs with the former, whenever it is the largest. If one of these rules is forbidden by the insolvency law, the other is, also.

The fact that the insolvency law contains no directions for the marshaling the assets of insolvents where there are different classes of creditors and different funds, indicates that it was the intention of the legislature to leave the settled equity rule in force. The insolvency law's requirement of equality and no preferences is subordinate to the settled equities and priorities of partnership creditors in and to the firm assets, and the correlative equities and priorities of the separate creditors in and to the separate assets, when the assets are marshaled and distributed by the court in insolvency proceedings. The direction of the statute for the equal distribution of the insolvent's property means a distribution in accordance with the recognized rules of equity. See Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441; Kells v. McClure, 69 Minn. 60, 71 N. W. 827.

It is further urged that the rule of distribution and priority in the insolvency court and probate court should be the same, and that the equity rule cannot be followed in the latter court, in the allowance and payment of claims against the estate of a deceased partner, because the Probate Code (Gen. St. 1894, § 4521) provides, in effect, that when two or more persons are indebted on a joint contract, and one of them dies, his estate is liable thereon, and it may be allowed by the probate court as if it were joint and several. We are not called upon here to construe this statute, or determine what the rule of distribution in the probate court would be. It may, however, be suggested, without deciding the question, that it seems to be well settled in other states that statutes making partnership debts joint and several, and statutes providing for the allowance of joint claims in the probate court as if joint and several, are not intended to abrogate all equitable priorities of partnership and individual creditors, respectively, in the partnership and individual estates, or to introduce any new rule for marshaling the assets of the joint and separate estates. 2 Bates, Partn. § 828.

The claim of the Irish-American Bank was based upon promissory notes executed by the firm of Ives, Ireland & Co., and by Ireland in his individual name; and for this reason the trial court permitted the bank to receive a dividend on the full amount of its claim, from both the partnership and individual funds. The trial court's order in this respect is claimed to be erroneous, for the reason that the consideration of the notes determines the character of the debt, which was for money loaned to, and used by, the firm; hence it is immaterial whether or not the individual name of the partner is on the notes, for with or without it they represent a partnership debt, for which he is liable; consequently the bank has no equities superior to the other firm creditors. The question of double proof in such a case is not a new one. It was at one time the rule in England that a creditor holding a note signed by the firm and an individual partner must, in bankruptcy, elect which estate he would prove his claim against. The rule is, and always has been, otherwise in this country, and it is settled by a very decided weight of authority that such double proof is permissible. T. Pars. Partn. p. 390; 2 Bates, Partn. § 841; 17 Am. & Eng. Enc. Law, 1210; Emery v. Bank, 7 N. B. R. 217, Fed. Cas. No. 4,446; In re Bradley, 2 Biss. 515, Fed. Cas. No. 1,772; Ex parte Nason, 70 Me. 363; Bank v. Hall, 160 Mass. 171, 35 N. E. 666.

It is true, as claimed, that the federal bankrupt law provided for double proof in certain cases; but Judge Clifford, in Emery v. Bank, clearly indicates, independent of the statute, that where a creditor has taken the precaution, before parting with his money, to secure an express written contract for its repayment from both the firm and the individual partner, his right is clear, in case of bankruptcy, to the benefit of his caution, and to prove his claim against, and receive a dividend from, the fund belonging to the partnership, and also from the estate of the individual partner. This precise question was involved in the cases of Ex parte Nason and Bank v. Hall, supra, and in each the rule as to double proof was maintained on principle. In the last-named case the court, after citing the authorities in support of the rule, concludes thus: "In view of the modern decisions, and the general agreement of opinion, we think it unnecessary to argue elaborately for the right of a creditor who has required two contracts, binding two distinct estates, to insist upon both."

Our conclusion on this question is that the Irish-American Bank was entitled to receive a dividend on its claim from both funds. The trial court, however, directed a dividend to be paid to it from both funds, concurrently, on the full amount of its debt. There are authorities sustaining this part of the order, but it is manifestly inequitable to other creditors. When the bank receives a dividend from the firm assets, the primary fund for the payment of its claim, its debt is paid pro tanto; and to permit it to receive a dividend from the individual assets, on the part of its debt paid from the firm assets, to the prejudice of other creditors, is not just, and therefore not legal, in the absence of any statute declaring it to be so. It follows that the order appealed from must be modified so as to permit the bank to receive a dividend from the individual assets of Ireland only on the balance of its claim after applying as a payment its dividend from the firm assets, and that this case must be remanded, with direction to the district court to so do. So ordered, without statutory costs.

Upon these facts the plaintiffs, the appellants here, contend that this attempt of Gilligan to prefer and pay his individual debts out of the said assets is a fraud upon the firm creditors, which, according to well-settled principles, a court of equity will not permit. Ordinarily the partnership estate is liable for the payment of the firm debts, in preference to the individual debts of the partners. This is the right of the partners inter se. The creditors of the partnership have no such right of priority over the creditors of the partners individually, otherwise than by substitution to the rights of the partners inter se. The partners may release this right, and, if they do so bona fide, the creditors of the partnership cannot complain; for it is not their right, except subject to the proper disposition and control of the partners themselves, to whom it belongs. This right is generally called the "partner's lien." It differs from a common-law lien in that it is not dependent on possession, and any single partner can convey a good title to specific chattels by a bona fide sale in the course of trade; and a lien does not involve the right to deal with the property, whereas the partner's equity is a right to have it applied for certain purposes, and the one partner cannot assert the lien as a sole plaintiff. The existence of this equity may be explained in a variety of ways, as on an implied contract that the assets shall not be used for private purposes; on the doctrine of suretyship, since each partner is liable in solido for the debts, and therefore, inter se, virtually a surety for the copartners for their proportions, and entitled to have the assets applied so as to relieve him. The partners have jointly the same right of absolute disposition of their joint property that any individual has. They may sell it, pledge it, convert it into other forms, divide it up among themselves, devote it to the payment of all or part of the debts, or exercise other ownership over it, subject only to each other's rights, and to the operation of statutes forbidding voluntary or fraudulent conveyances, to hinder, delay, and defraud creditors.

It is clear from what has preceded that while the partnership is solvent and going on the partners may, by unanimous assent or joint act, do what they please with the assets, if the act is bona fide. Where in such case, one partner sells or assigns his interest to the other, bona fide, for a valuable consideration, or an agreement to pay the debts of the firm, and indemnify against them, this will change the joint into a separate property. The only question is upon the bona fides of the transaction. If such an arrangement could not be made, a partner never could retire. Bates, Partn. §§ 559, 820, 824; Story, Partn. §§ 97, 360. On the other hand, according to the better reason and the weight of authority, if the firm is insolvent, or on the eve of insolvency, and both of the partners are insolvent, a purchase by one partner of the interest of the other, in consideration of the former's assumption of all the debts of the firm, will be regarded as a purchase upon a consideration which is of no value whatever; and, no equivalent having been given, the transfer is in effect voluntary, and its only effect, if sustained, would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property, as against the firm creditors. * * *

In the case at bar the firm as well as the individual partners were indebted, to insolvency, at the time the contract of dissolution was made by the terms of which Gilligan assumed to pay, not only the debts of the firm, but $1,000 to Burns. As the firm and Gilligan were then

both insolvent, there was no valuable consideration for either this assumption of the firm debts or said $1,000. Less than two months after this transaction, Gilligan, without paying a single firm debt, so far as the record shows, assigned all the assets in such a manner as to devote the whole of them to the payment of his individual debts. It seems to me plain that to uphold this scheme, against the rights of the social creditors, would violate, not only the general principles of equity, but the express provisions of our statute against voluntary and fraudulent conveyances. It is, however, claimed for the appellees that if this transaction is held void as to the firm creditors, then, for the like reasons, the act of Gilligan in putting his own stock of goods into the firm must be held void as to his individual creditors. But there is no analogy in the two transactions. It does not appear that either Burns or Gilligan was insolvent at that time, and it does appear that Burns paid into the concern $1,000, and also that the debts due the plaintiffs and others were contracted by the firm on the faith of the social assets.

For these reasons the decree of the circuit court is reversed, and the cause remanded. * * *

CHAPTER VII

LIMITED PARTNERSHIPS

EXPLANATORY NOTE AS TO THE UNIFORM LIMITED PARTNERSHIP ACT BY WILLIAM DRAPER LEWIS.[1]

The business reason for the adoption of acts making provisions for limited or special partners is that men in business often desire to secure capital from others. There are at least three classes of contracts which can be made with those from whom the capital is secured: One, the ordinary loan on interest; another, the loan where the lender, in lieu of interest, takes a share in the profits of the business; third, those cases in which the person advancing the capital secures, besides a share in the profits, some measure of control over the business.

At first, in the absence of statutes, the courts, both in this country and in England, assumed that one who is interested in a business is bound by its obligations, carrying the application of this principle so far, that a contract where the only evidence of interest was a share in the profits made one who supposed himself a lender, and who was probably unknown to the creditors at the times they extended their credits, unlimitedly liable as a partner for the obligations of those actually conducting the business.

Later decisions have much modified the earlier cases. The lender, who takes a share in the profits, except possibly in one or two of our jurisdictions, does not by reason of that fact run a risk of being held as a partner. If, however, his contract falls within the third class mentioned, and he has any measure of control over the business, he at once runs serious risk of being held liable for the debts of the business as a partner; the risk increasing as he increases the amount of his control.

The first Limited Partnership Act was adopted by New York in 1822; the other commercial states, during the ensuing 30 years, following her example. Most of the statutes follow the language of the New York statute, with little material alteration. These statutes were adopted, and to a considerable degree interpreted by the courts, during that period when it was generally held that any interest in a business should make the person holding the interest liable for its obligations. As a result the courts usually assume in the interpretation of these statutes two principles as fundamental:

First. That a limited (or as he is also called a special) partner is a partner in all respects like any other partner, except that, to obtain the privilege of a limitation on his liability, he has con-

[1] Proceedings of the Twenty-Sixth Annual Meeting of National Conference of Commissioners on Uniform State Laws, p. 384 (1916).

formed to the statutory requirements in respect to filing a certificate and refraining from participation in the conduct of the business.

Second. The limited partner, on any failure to follow the requirements in regard to the certificate or any participation in the conduct of his business, loses his privilege of limited liability and becomes, as far as those dealing with the business are concerned, in all respects a partner.

The courts in thus interpreting the statutes, although they made an American partnership with limited members something very different from the French Société en Commandité, from which the idea of the original statutes was derived, unquestionably carried out the intent of those responsible for their adoption. This is shown by the very wording of the statutes themselves. For instance, all the statutes require that all partners, limited and general, shall sign the certificate, and nearly all state that: "If any false statement be made in such certificate all the persons interested in such partnership shall be liable for all the engagements thereof as general partners."

The practical result of the spirit shown in the language and in the interpretation of existing statutes, coupled with the fact that a man may now lend money to a partnership and take a share in the profits in lieu of interest, without running serious danger of becoming bound for partnership obligations, has, to a very great extent, deprived the existing statutory provisions for limited partners of any practical usefulness. Indeed, apparently their use is largely confined to associations in which those who conduct the business have not more than one limited partner.

One of the causes forcing business into the corporate form, in spite of the fact that the corporate form is ill suited to many business conditions, is the failure of the existing limited partnership acts to meet the desire of the owners of a business to secure necessary capital under the existing limited partnership form of business association.

The draft herewith submitted proceeds on the following assumptions:

First. No public policy requires a person who contributes to the capital of a business, acquires an interest in the profits, and some degree of control over the conduct of the business, to become bound for the obligations of the business, provided creditors have no reason to believe at the times their credits were extended that such person was so bound.

Second. That persons in business should be able, while remaining themselves liable without limit for the obligations contracted in its conduct, to associate with themselves others who contribute to the capital and acquire rights of ownership, provided that such contributors do not compete with creditors for the assets of the partnership.

The attempt to carry out these ideas has led to the incorporation into the draft submitted of certain features, not found in, or differing from, existing limited partnership acts:

First. In the draft, the person who contributes the capital, though in accordance with custom called a limited partner, is not in any sense a partner. He is, however, a member of the association. See section 1.

Second. As limited partners are not partners securing limited liability by filing a certificate, the association is formed when substantial compliance, in good faith, is had with the requirements for a certificate. Section 2 (2). This provision eliminates the difficulties which arise from the recognition of de facto associations, made necessary by the assumption that the association is not formed, unless a strict compliance with the requirements of the act is had.

Third. The limited partner not being in any sense a principal in the business, failure to comply with the requirements of the act in respect to the certificate, while it may result in the non-formation of the association, does not make him a partner or liable as such. The exact nature of his liability in such cases is set forth in section 11.

Fourth. The limited partner, while not as such in any sense a partner, may become a partner as any person not a member of the association may become a partner, and, becoming a partner, may nevertheless retain his rights as limited partner; this last provision enabling the entire capital embraced in the business to be divided between the limited partners, all the general partners being also limited partners. Section 12.

Fifth. The limited partner is not debarred from loaning money or transacting other business with the partnership as any other non-member, provided he does not, in respect to such transactions, accept from the partnership collateral security, or receive from any partner or the partnership any payment, conveyance, or release fom liability, if at the time the assets of the partnership are not sufficient to discharge its obligations to persons not general or limited partners. Section 13.

Sixth. The substitution of a person as limited partner in place of an existing limited partner, or the withdrawal of a limited partner, or the addition of new limited partners, does not necessarily dissolve the association. Sections 8, 16 (2b). No limited partner, however, can withdraw his contribution until all liabilities to creditors are paid. Section 16 (1a).

Seventh. As limited partners are not principals in transactions of the partnership, their liability, except for known false statements in the certificate (section 7), is to the partnership, not to creditors of the partnership (section 17). The general partners cannot, however, waive any liability of the limited partners to the prejudice of such creditors. Section 17 (3).

UNIFORM LIMITED PARTNERSHIP ACT

Section 1. Limited Partnership Defined. A limited partnership is a partnership formed by two or more persons under the provisions of section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

Section 2. Formation. (1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate, which shall state—

I. The name of the partnership;

II. The character of the business;

III. The location of the principal place of business;

IV. The name and place of residence of each member; general and limited partners being respectively designated;

V. The term for which the partnership is to exist;

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner;

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made;

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned;

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution;

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution;

XI. The right, if given, of the partners to admit additional limited partners;

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority;

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner; and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(b) File for record the certificate in the office of (here designate the proper office).

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).

Section 3. Business Which may be Carried on. A limited partnership may carry on any business which a partnership without limited partners may carry on, except (here designate the business to be prohibited).

Section 4. Character of Limited Partner's Contribution. The contribution of a limited partner may be cash or other property, but not services.

Section 5. A Name Not to Contain Surname of Limited Partner—Exceptions. (1) The surname of a limited partner shall not appear in the partnership name, unless—

(a) It is also the surname of a general partner; or

(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

Section 6. Liability for False Statements in Certificate. If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false—

(a) At the time he signed the certificate; or

(b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its concellation or amendment as provided in section 25 (3).

Section 7. Limited Partner Not Liable to Creditors. A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

Section 8. Admission of Additional Limited Partners. After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of section 25.

Section 9. Rights, Powers and Liabilities of a General Partner. (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to—

(a) Do any act in contravention of the certificate;

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership;

(c) Confess a judgment against the partnership;

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose;

(e) Admit a person as a general partner;

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate;

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

Section 10. Rights of a Limited Partner. (1) A limited partner shall have the same rights as a general partner to—

(a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them;

(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable; and

(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in sections 15 and 16.

Section 11. Status of Person Erroneously Believing Himself a Limited Partner. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

Section 12. One Person Both General and Limited Partner. (1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner.

Section 13. Loans and Other Business Transactions with Limited Partner. (1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim—

(a) Receive or hold as collateral security any partnership property; or

(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

Section 14. Relation of Limited Partners Inter Se. Where there are several limited partners, the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing.

Section 15. Compensation of Limited Partner. A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

Section 16. Withdrawal or Reduction of Limited Partner's Contribution. (1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until—

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them;

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2); and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution—

(a) On the dissolution of a partnership; or

(b) When the date specified in the certificate for its return has arrived; or

(c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(3) In the absence of any statement in the certificate to the contrary, or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when—

(a) He rightfully but unsuccessfully demands the return of his contribution; or

(b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (1a) and the limited partner would otherwise be entitled to the return of his contribution.

Section 17. Liability of Limited Partner to Partnership. (1) A limited partner is liable to the partnership—

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made; and

(b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(2) A limited partner holds as trustee for the partnership—

(a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned; and

(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

Section 18. Nature of Limited Partner's Interest in Partnership. A limited partner's interest in the partnership is personal property.

Section 19. Assignment of Limited Partner's Interest. (1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with section 25.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the

time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under sections 6 and 17.

Section 20. Effect of Retirement, Death or Insanity of a General Partner. The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners—

(a) Under a right so to do stated in the certificate; or

(b) With the consent of all members.

Section 21. Death of Limited Partner. (1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner.

Section 22. Rights of Creditors of Limited Partner. (1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

In those states where a creditor on beginning an action can attach debts due the defendant before he has obtained a judgment against the defendant it is recommended that paragraph 1 of this section read as follows:

On due application to a court of competent jurisdiction by any creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of such claim; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this act shall be held to deprive a limited partner of his statutory exemption.

Section 23. Distribution of Assets. (1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners;

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions;

(c) Those to limited partners in respect to the capital of their contributions;

(d) Those to general partners other than for capital and profits;

(e) Those to general partners in respect to profits;

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

Section 24. When Certificate Shall be Cancelled or Amended.

(1) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when—

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner;

(b) A person is substituted as a limited partner;

(c) An additional limited partner is admitted;

(d) A person is admitted as a general partner;

(e) A general partner retires, dies, or becomes insane, and the business is continued under section 20;

(f) There is a change in the character of the business of the partnership;

(g) There is a false or erroneous statement in the certificate;

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution;

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate; or

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

Section 25. Requirements for Amendment and for Cancellation of Certificate. (1) The writing to amend a certificate shall—

(a) Conform to the requirements of section 2 (1a) as far as necessary to set forth clearly the change in the certificate which it is desired to make; and

(b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the (here designate the proper court) to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the (here designate the responsible official in the office designated in section 2) in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or canceled when there is filed for record in the office (here designate the office designated in section 2) where the certificate is recorded—

(a) A writing in accordance with the provisions of paragraph (1), or (2); or

(b) A certified copy of the order of court in accordance with the provisions of paragraph (4).

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this act.

Section 26. Parties to Actions. A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

Section 27. Name of Act. This act may be cited as the Uniform Limited Partnership Act.

Section 28. Rules of Construction. (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

Section 29. Rules for Cases Not Provided for in This Act. In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

Section 30. Provisions for Existing Limited Partnerships. (1) A limited partnership formed under any statute of this state prior to the adoption of this act, may become a limited partnership under this act by complying with the provisions of Section 2; provided the certificate sets forth—

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made; and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this state prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of (here insert proper reference to the existing limited partnership act or acts), except that such partnership shall not be renewed unless so provided in the original agreement.

Section 31. Act (Acts) Repealed. Except as affecting existing limited partnerships to the extent set forth in section 30, the act (acts) of (here designate the existing limited partnership act or acts) is (are) hereby repealed.

PART VI

CORPORATIONS

Chapter

Introduction.
I. Organization of a Corporation.
II. Contracts of Promoters.
III. Corporate Powers.
IV. The Relation of Stockholders to the Corporation.
V. The Relation of Creditors to the Corporation.
VI. Relation of the Corporation to the State.

INTRODUCTION

The law of private corporations is that branch of the law which prescribes the rights and liabilities and other relations of the various persons who may be interested in the conduct of a business organized in a particular way. The law of partnerships and of corporations taken together comprise what has been called the law of business associations. The chapters devoted to the subject of partnership have shown what the relations of the partners are as between themselves and as to third parties under the normal circumstances which arise during the conduct of the business. The law of private corporations is similarly concerned with the establishment of a form of business organization which produces legal relations of different nature and extent.

Surveying the broad outlines of the law of partnership, with a view of determining whether or not, in the light of particular situations, it is desirable to establish and conduct a business enterprise in this form, the following aspects of the partnership form of organization stand out rather distinctly: (1) Each partner is liable individually for the debts of the firm. (2) The interest of the individual partner in specific partnership property is not a subject of transfer. (3) The interest of a partner in the partnership—that is, his interest in the profits and surplus—may be transferred by him. (4) The interest of each partner to participate in the management is not the subject of transfer. An individual partner cannot, therefore, transfer to another person all of the rights, privileges, and powers which he possesses. (4) The partnership relation is of an unstable nature. It may readily be dissolved. While a dissolution does not necessarily interrupt the continuance of the business, the risk that it may seriously cripple the business or terminate it is always present. These aspects of the partnership relation from a business standpoint may be regarded as disadvantageous.

The economic reasons which have operated to produce the corporate form of business organization are to be found in the desire to devise some method by which individuals may combine their

resources for a common end without incurring these risks incident to the partnership relation. Specifically, the desire is to establish a form of organization which (1) eliminates the individual liability of each owner of the business for the debts of the business; (2) which enables an owner to transfer his entire interest with respect to the business, his property interest, his interest with respect to profits, and his privileges of participating in the management; and (3) which is not liable to interruption by the various acts which cause a dissolution of a partnership. The law of corporations accomplishes these objects.

Obviously, a group of individuals should not, of their own will, be able to accomplish these results. The granting and exercise of special privileges, such as these, ought to be and are within the control of the state. A business possessing these incidents may not, therefore, be organized without the consent of the state. Individuals may secure these special privileges by a special act of the state Legislature, where the Constitution does not forbid, but it is much more common for the Legislature to enact a general law prescribing the method of organization of business enterprises in the corporate form.

It is common to speak of a corporation as though it were something separate and distinct from the members who compose it. It is referred to as an intangible thing, as an entity. It is convenient to so regard the corporation, and, when understood, simplifies the discussion of problems incident to the conduct of a business by individuals who by law possess these special privileges. But this convenient designation of a group of individuals as a legal entity should not blind one to the facts. Human beings conduct business. Business requires capital. Capital must be contributed by individuals. A contribution of capital does not mean its transfer to some other person necessarily. Nor may capital be contributed to an intangible thing. An individual conducting his own business contributes capital to that business by employing certain property belonging to him with particular objects in view. Where two or more persons combine their property for the purpose of using it with a view to profit, this merely means that they commingle it, sell it or permit it to be sold by others, or use it in the manufacture of goods for sale. These are physical acts. The legal effect to be given to them arises from the law. And so, where two or more persons desire to engage in business with limited liability, with full power of transferring their entire interest therein, and without incurring the risks that the business be terminated by the death of a member, a sale of the interest of a member, or otherwise, these privileges are conferred upon them by their compliance with the conditions established by law. After obtaining these privileges, it is common to speak of the broad legal effect of these facts as the organization of a corporation.

If A., B., and C. organize a partnership and also a corporation, and conduct these two business enterprises in buildings side by

side, the physical facts would appear very much alike; but the legal relations between A., B., and C., and between A., B., C. and third persons, would be very different, and sooner or later physical facts would arise because of the relations which, to a close observer, or even to a casual observer, would show that the two business organizations were different. The law of corporations is therefore taken up with the establishment of the legal relations between the parties so organized and the legal relations which may arise between those conducting the business and third persons.

Just as in other branches of the law, the first question is to ascertain what facts will operate to confer upon individuals these special privileges. A statute authorizing the incorporation of business enterprises will provide that certain acts must be done as conditions precedent to the right to do business in the corporate form. Usually these formalities are relatively simple. The parties seeking incorporation must declare their intentions, state the purposes for which they desire a charter, give the names of certain interested parties, the amount of capital to be employed, the name and location of the proposed business, etc. In other words, the law will require the parties to make a fairly detailed disclosure of their intentions, and will usually require that this information be filed with some public officer, so that it will be open to the public. A subordinate problem, but nevertheless an important one, arises at this point. The law will not only prescribe what must be done before the parties may be said to be incorporated, but also the law must prescribe the effect of a failure to conform to these requirements. If the failures to comply with the statute were of the same kind and degree, the problem would not be a difficult one; but the various detailed requirements of a general incorporation act will not all be of the same importance. Consequently a failure to comply with some of the requirements may produce certain results, while a failure to comply with other requirements may produce quite different results.

Having established what constitutes a corporation, the general problem thereafter is to determine the nature and extent of the relations of the parties who have so organized themselves, and to ascertain what their relations are to all other persons.

CHAPTER I

ORGANIZATION OF A CORPORATION

Section
1. Effect of Complete Organization—The Corporate Entity.
2. When Corporate Entity may be Disregarded.
3. Effect of Incomplete Organization.

SECTION 1.—EFFECT OF COMPLETE ORGANIZATION—THE CORPORATE ENTITY

PEOPLE ex rel. NATIONAL EXP. CO. v. COLEMAN et al., Tax Commissioners.

(Court of Appeals of New York, 1892. 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.)

Proceedings on the relation of Lock W. Winchester, as treasurer of the National Express Company, to review the action of the tax commissioners in taxing the company on its capital stock as a corporation. From a judgment of the general term, affirming a judgment of the special term vacating the assessment, the commissioners appeal.

FINCH, J. The relator was taxed upon its capital, on the ground that it had become a corporation, within the meaning of the provision of the Revised Statutes which enacts that "all moneyed or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." 1 Rev. St. pt. 1, c. 13, tit. 4, § 1. The company was formed as a joint-stock company or association, in 1853, by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common-law rights of the individuals, and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement, and dependent in no respect upon the grant or authority of the state. * * *

There is no doubt, therefore, that, when the company was formed and went into operation, the law recognized a distinction and substantial difference between joint-stock companies and corporations, and never confused one with the other; and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock companies or associations. But two things have since occurred. The legislature, while steadily preserving the distinction of names, has, with equal persistence, confused the things, by obliterating substantial and characteristic marks of difference; until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. * * *

It is added that such result may happen even without the legislative

intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes, beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations (Laws 1853, c. 53; Laws 1854, c. 245; Laws 1867, c. 289); that the lines of distinction between the two, however far apart in the beginning, have steadily converged, until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated; and no reason remains why joint-stock associations should not be, in all respects, treated and regarded as corporations. Some of this contention is true.

The case of People v. Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303, shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive, and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. * * *

This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest or out of which it grew; for the distinction so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint-stock companies, known to our law, which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical, and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in Supervisors of Niagara v. People, 7 Hill, 512, and in Gifford v. Livingston, 2 Denio, 380, by the statement that the corporators lost their individuality, and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined, on behalf of the respondents, to be "an artificial person created by the sovereign from natural persons, and in which artificial person the natural persons of which it is composed become merged and nonexistent."

I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted, if it successfully bears some sufficient test. In putting it on trial, we may take the nature of the individual liability of the corporators on the one hand, and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character. It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as

The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand, corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other, the joint-stock companies have been clothed with most of the corporate attributes; but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two. We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new, or retention of the old, liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members; the debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liability of its corporators; the creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other, from the sovereignty of the state. The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say, in Van Aernam v. Bleistein, 102 N. Y. 360, 7 N. E. 537, that a joint-stock company is a partnership, with some of the powers of a corporation. Beyond that we do not think it is our duty to go.

The order should be affirmed, with costs.

BUTTON v. HOFFMAN.

(Supreme Court of Wisconsin, 1884. 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.)

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer. In his instructions to the jury the learned judge of the circuit court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural person who procured its creation, and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged into the corporate identity. * * * A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. * * * The corporation is the trustee for the management of the property, and the stockholders are the mere cestui que trust. * * *

The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. * * * The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. * * * The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. * * * A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. * * * A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder. * * *

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not, therefore, own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property, and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and, at

the same time, it would belong to the corporation. One stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do. * * *

The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

COMMONWEALTH v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, 1913. 152 Ky. 320, 153 S. W. 459, 45 L. R. A. [N. S.] 344, Ann. Cas. 1915B, 617.)

SETTLE, J. The appellee, Illinois Central Railroad Company, was indicted in the court below for the crime of involuntary manslaughter, committed, as, in substance, alleged, by its servants in charge of an engine and cars, which they unlawfully and with gross and willful negligence ran at unreasonable speed into another of appellee's cars, in which John Benedict was a passenger, whereby the latter was killed. The circuit court sustained a demurrer to and dismissed the indictment, and from the judgment manifesting those rulings the commonwealth has appealed.

The question presented for decision by the appeal, is: Will an indictment lie against a corporation, such as a railroad company, for involuntary manslaughter? The rule, as announced in the text-books and by the decisions, is that a corporation cannot, in general, be indicted for ordinary crimes and misdemeanors that involve a criminal or immoral intent, such as are often grouped in books of the common law under the threefold designation of treason, felony, or breach of the peace. There has been no departure from the above rule in this jurisdiction. We have, it is true, held that a corporation is liable to indictment whenever the offense consists either in a misfeasance or nonfeasance of duties to the public, and the corporation can be reached for punishment as by a fine and the seizure of its property; and that if the penalty prescribed for the offense be both fine and imprisonment the statute is inoperative as to the imprisonment, as that part of the punishment cannot, from the nature of the offender, be carried out. * * *

An interesting discussion of the doctrine in question is contained in volume 5, §§ 5620 and 5621, Thompson on Corporations. In section 5621 it is, among other things, said: "Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason and felony; of perjury or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. * * * Though a corporation is not subject to imprisonment, still it may be punished by a fine, and the fine may be enforced against its property, or it may have its charter forfeited for abuse."

In section 5621 it is also said: "The corporation cannot be prosecuted for a crime, where the punishment prescribed cannot be imposed upon a corporation. Thus a corporation cannot be indicted for a fel-

ony, because the punishment for felony is death or imprisonment. But if the penalty provides for fine or imprisonment, then the corporation may be indicted, because punishment by fine may be imposed for the offense. A corporation cannot, in the nature of things, be guilty of treason, felony, or perjury. So a corporation cannot be prosecuted for larceny, assault and battery, or homicide. But it has been held that a corporation, owner of a steam vessel, may be guilty of manslaughter under the federal statute, which provides that every owner of a vessel through whose misconduct, fraud, or violation of law lives are lost on such vessel, shall be deemed guilty of manslaughter, and upon conviction thereof shall be sentenced to confinement at hard labor, though it cannot be subjected to the punishment imposed; and this fact has been held not to affect the right of the government to prosecute individuals under said statute, who aid and abet the corporation in the commission of a crime." 1 Bishop's New Criminal Law, §§ 417–419, 421, 422. * * *

The crimes murder and manslaughter are not defined by statute in this state, though the punishment for the former and voluntary manslaughter is prescribed by statute, but both are defined by the common law and accepted by the courts of the state as thereby defined. Involuntary manslaughter, a lesser degree of manslaughter, is an offense at the common law for which no penalty is prescribed by statute in this state; consequently the punishment inflicted upon persons convicted in the state of involuntary manslaughter is that prescribed by the common law for the offense, viz., a fine in any amount, or imprisonment in jail any length of time, or both, in the discretion of the jury. * * *

It is insisted for the commonwealth that, as involuntary manslaughter is but a misdemeanor, the commission of which does not require an intent, it is an offense for which a corporation may be indicted, and, if convicted, punished by a fine, although it could not be imprisoned in jail, if imprisonment were a part of or all the punishment inflicted by the verdict of the jury. This contention is, in our opinion, unsound for two reasons: First, because, however certain its civil liability therefor when committed by its servants in the apparent scope of their authority, a corporation cannot be criminally prosecuted for offenses against the person, such as assault and battery or homicide. Second, because involuntary manslaughter is homicide, and homicide is the killing of one human being by another human being.

Involuntary manslaughter is the killing by one person of another person in doing some unlawful act not amounting to a felony, nor likely to endanger life, and without an intention to kill, or where one kills another while doing a lawful act in an unlawful manner. * * *

We are aware that section 457, Kentucky Statutes, declares that "the word 'person' may extend and be applied to bodies politic and corporate, societies, communities, and the public generally, as well as individuals, partnerships, persons and joint stock companies." But in a case of homicide, though it be involuntary manslaughter, it would, we think, be giving the word "person" a tortured meaning to say that it includes a corporation. The word "person" may include in its meaning a corporation, but it does not in all cases necessarily do so. Besides, as in homicide of whatever degree there must be a killing by one person of another person, the word "another" can only mean another member of the same class as the slayer, and a corporation,

though a "person" in law, is but an artificial person, and therefore not of the class to which the person slain belongs. * * *

While the tendency of the later cases is to extend the doctrine of corporate civil liability for torts involving personal violence to criminal prosecutions, in most states in which that has been done, the indictments provided for are designed mainly to furnish a civil remedy in favor of the estate of the deceased, although in the form of a criminal action; therefore the decisions in those states are of little importance in determining the question before us.

Manifestly, a corporation cannot be indicted for a form of homicide, the only punishment for which is death or imprisonment; for, being an intangible thing, it cannot be subject to such penalties. But, as intimated by the learned commentator in a footnote to People v. Rochester R. & L. Co., 195 N. Y. 102, 88 N. E. 22, 21 L. R. A. (N. S.) 908, 133 Am. St. Rep. 770, 16 Ann. Cas. 837, as to the lesser degrees, at least those not involving actual intent, for which the penalty prescribed may be a fine, it would seem that an indictment might be made to lie, if authorized by a statute including corporations.

It is patent, however, that we have no such statute in this state; and the statute which provides that the word "person" may include a corporation makes of the corporation only an artificial person, incapable, without a legislative enactment to that effect, of committing a crime which the common law declares to be involuntary manslaughter.

In our view of the law the circuit court ruled correctly in sustaining the demurrer. Wherefore the judgment is affirmed.

SECTION 2.—WHEN CORPORATE ENTITY MAY BE DISREGARDED

PEOPLE v. NORTH RIVER SUGAR REFINING CO.

(Court of Appeals of New York, 1890. 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843.)

Action in the nature of a quo warranto brought by the people of the state of New York for the forfeiture of defendant's corporate franchises, and for its dissolution. From a judgment affirming a decree for its dissolution defendant appeals.

FINCH, J. The judgment sought against the defendant is one of corporate death. The state, which created, asks us to destroy, and the penalty invoked represents the extreme rigor of the law. * * *

Two questions, therefore, open before us: First, has the defendant corporation exceeded or abused its powers? and, second, does that excess or abuse threaten or harm the public welfare?

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control 16 other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for as an unquestiona-

ble truth we find it there. All its stock has been transferred to the central association of 11 individuals denominated a "board." In exchange it has taken and distributed to its own stockholders certificates of the board, carrying a proportionate interest in what it describes as its capital stock. * * *

But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For if it has done nothing—if what has happened and all that has happened is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the 11 men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may—if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellants stand, and which they submit to our examination. * * *

The combination, therefore, framed by the deed was a trust; and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument, which is that, if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers, and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and, admitting the sins of the latter, to adjudge that the former remains pure. * * *

And yet it is argued that the corporation, the legal entity, has done nothing. * * * I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and, if illegal and injurious, may deserve and receive the penalty of dissolution. * * *

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what, in a given case, has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but, as between it and the state, the substantial inquiry is only what that collective action and agency has done; what it has in fact accomplished; what is seen to be its effective work; what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpa-

ble, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to rebound to their benefit, to strengthen their hands, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction. * * *

And so we have reached our conclusion, and it appears to us to have been established that the defendant corporation has violated its charter, and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade, and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this state there can be no partnerships of separate and independent corporations, whether directly or indirectly, through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints; but that manufacturing corporations must be and remain several as they were created, or become one under the statute. The judgment appealed from should be affirmed, with costs. * * *

DONOVAN v. PURTELL.

(Supreme Court of Illinois, 1905. 216 Ill. 629, 75 N. E. 334, 1 L. R. A. [N. S.] 176.)

Action by Julia Purtell against Joseph T. Donovan. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals.

This is an action in assumpsit, begun by appellee against appellant on November 24, 1903, by attachment in the circuit court of St. Clair County. A bill of particulars was filed, which, besides the items for money loaned and due in 1901, contains items for money lent by appellee to appellant in the name of the Fidelity Realty Company in 1901, and for money lent to appellant by appellee and promised to be paid by him in the name of the J. T. Donovan Real Estate Company in 1901. The general issue was filed to the declaration. A trial was had before the court and jury, resulting in a verdict in favor of appellee against appellant for the sum of $1,430, from which the plaintiff remitted the sum of $71.80, making the amount of the verdict $1,358.20, which remittitur was approved by the court. Motion for new trial was overruled, and judgment rendered on the verdict in favor of appellee against appellant for $1,358.20 and costs.

MAGRUDER, J. * * * The salient facts of this case are that the appellee had a note and trust deed for $1,200 against a man named

Hayden; that they became due in January, 1901, and she took them to the office of the appellant, with directions to him, or to his son in the same office with him, to collect them for her and reinvest the money; that the money was collected by appellant, or some one of his sons in the office with him, either in his own name or in the name of one of the corporations doing business in his office, and which he controlled and managed. The evidence tends to show that the $1,200 belonging to appellee went into appellant's hands, or into the hands of some one or more of his sons or clerks. Appellee's money, therefore, was had and received by the appellant. Appellant turned over to Miss Slaterly, appellee's agent and friend acting for her while she was out of the city, a note for $1,200, payable in three years, together with certain interest notes, and a trust deed securing the same upon a 25-foot lot in St. Louis. * * * The principal note for $1,200, and the interest notes, dated January 19, 1901, were signed by the Fidelity Realty Company, by J. M. Donovan, president. They were payable to the order of George N. Cooper, a clerk in appellant's office, who indorsed them without recourse. The trust deed securing them was made to appellant, as trustee. The evidence tends to show that appellant controlled and managed the Fidelity Realty Company, and, the trust deed being made to himself as trustee and the notes being made to the order of his clerk, the conclusion is almost irresistible, in the light of the facts set forth in the statement preceding this opinion, that the papers thus prepared were really the papers of the appellant, though nominally those of a corporation in his office and under his control.

The written deed of guaranty, dated January 22, 1901, was signed by the J. T. Donovan Real Estate Company, by J. T. Donovan, president. It begins as follows: "Witnesseth, that for and in consideration of the sum of $1,200, paid to us by Miss Julia Purtell, we have assigned and transferred to her certain notes of Fidelity Realty Company, dated January 19, 1901, secured by a deed of trust," etc. Appellant signed this indenture, and in it recites that the sum of $1,200, belonging to Miss Purtell, was paid to "us," meaning thereby the J. T. Donovan Real Estate Company, of which he was president. In this guaranty he also recites that "we have assigned and transferred to her certain notes," etc. The notes were indorsed without recourse by his clerk, Cooper; but, in view of the recital thus quoted, Cooper merely acted for the appellant or his company, the J. T. Donovan Real Estate Company. * * * The evidence also tends to show that there were judgments then existing against the Fidelity Realty Company, and that it had no financial standing whatever, but that it was, as is said by one of the witnesses, "gotten up to keep the property out of judgment." The proof shows that none of these corporations, controlled by appellant, paid their debts. One of the witnesses swears that, "when any adjustment was to be made, Mr. Donovan would use the property of any of these companies to make it, indiscriminately. He would settle the debts of the J. T. Donovan Real Estate Company with these properties, no matter to which company it [they] belonged." * * *

The evidence tends to show that, although the appellant and his sons turned over to appellee these worthless securities in exchange for her money, yet that appellant himself received the money and used it for his own private purposes, and sought to escape personal liability by covering up the transaction in the name of a corporation, which was entirely under his own control. * * *

Appellant was president of the J. T. Donovan Real Estate Company, and his son, Joseph M. Donovan, was the vice president of that company, and Joseph M. Donovan, the appellant's son, was the president of the Fidelity Realty Company. Both of these concerns were controlled, managed, and dominated by the appellant, J. T. Donovan. The officer or controlling manager of a corporation cannot use it and its name for the transaction of his own private business and to escape personal liability on his part. The theory upon which the appellant defends this suit is that the liability to appellee was not his liability, but that of the corporation known as the Fidelity Realty Company. * * * In the case of Bank v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834, it was said: "The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members—and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction." In Cook on Corporations (5th Ed., 663), it is said: "A corporation is often organized to act as a 'cloak' for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud." * * * So, in the case at bar, appellant, as an officer of one or more of the corporations here involved, was guilty of such a fraud in transferring to appellee these worthless securities in payment of the money which he owed her that he can be held liable personally for the loss inflicted upon her. * * *

For the reasons above stated, we are of the opinion that the judgments of the lower courts were correct. Accordingly the judgment of the Appellate Court, affirming that of the circuit court, is affirmed. * * *

SECTION 3.—EFFECT OF INCOMPLETE ORGANIZATION

BERGERON v. HOBBS et al.

(Supreme Court of Wisconsin, 1897. 96 Wis. 641, 71 N. W. 1056, 60 Am. Rep. 85.)

Action by J. A. Bergeron against A. A. Hobbs and others. From a judgment on a verdict directed for plaintiff, defendants appeal.

The defendants, under the name of Bayfield Agricultural Association, employed several persons to perform labor in improving their grounds and in erecting fences and buildings. Time checks given by the defendants to such laborers, for such labor, were assigned to the plaintiff, who brings this action to recover their amount, alleging that the defendants were a co-partnership. The defendants alleged that they were members of a corporation, and denied that they were co-partners, or liable as such. This was the issue which was tried. It

appeared upon the trial that articles of organization of the defendants as the Bayfield County Agricultural Association, and a certificate showing the election of officers, had been recorded in the office of the register of deeds of Bayfield, but were not on file there. They had been deposited, with instruction to record and return them, which had been complied with. When the testimony of both sides was in, the court directed a verdict for the plaintiff for the amount of the time checks. From a judgment on that verdict the defendants appeal.

NEWMAN, J. * * * There are two questions raised on this appeal: (1) Was the mere recording of the articles of incorporation, with the certificate of the election of officers, without the intention or fact of the papers themselves remaining in the office, a sufficient compliance with the statute, so that the organization of the corporation became complete, as upon a proper filing of the papers themselves? And (2) if the recording was not sufficient for that purpose, are the defendants liable to the plaintiff only as a de facto corporation, or are they liable as co-partners?

1. The statute (section 1460, Rev. St.) provides that, upon the filing of "a certificate of organization, * * * with a copy of the constitution, * * * in the office of the register of deeds of the county, such society shall have all the powers of a corporation, necessary to promote the objects thereof." It cannot be doubted that the filing of the proper papers in the proper office is made, by the statute, a condition precedent to the vesting of corporate powers. The court may not be able to clearly define the respect wherein the mere recording and removal of the papers from the office fails to serve the full purpose which the legislature intended to accomplish by the filing of them. The legislature, no doubt, had good and sufficient reasons for its choice of means to promote its purpose. For the court it is not a question of equivalents. A literal filing of the papers is necessary because it is so written in the law. The term "filing" and the verb "to file," as related to this subject, include the idea that the paper is to remain in its proper order on file in the office. A paper is said to be filed when it is delivered to the proper officer, and by him received, to be kept on file. * * * The statute is plain and easy of observance. Valuable rights and exemption from personal liability are to be secured by its observance. It is no undue severity to require its strict observance. The defendants had not observed it, and had not secured corporate powers.

Had the defendants secured immunity from individual liability? No doubt, as a general rule, where an attempt to organize a corporation fails, by omission of some substantial step or proceeding required by the statute, its members or stockholders are liable as partners for its acts and contracts. * * * But the defendants' contention is that they are not within this rule, because they are, at least de facto, a corporation, and their right to be a corporation cannot be inquired into in a collateral action, but only in a direct action for that purpose by the state. The infirmity of the defendants' contention is in the assumption that they are, de facto, a corporation. In order to secure this immunity from inquiry into its right to be a corporation in a collateral action, its action, as a corporation, must be under a color, at least, of right. It is immaterial that they have carried on business under the supposed authority to act as a body corporate, in entire good faith. If they had not color of legal right, they have obtained no im-

munity from individual liability for the debts of the supposed corporation. Until the articles of incorporation are filed in the office of the register of deeds of the county, there is no color of legal right to act as a corporation. The filing of such paper is a condition precedent to the right to so act. So long as an act, required as a condition precedent, remains undone, no immunity from individual liability is secured. * * * The defendants are not a corporation either de jure or de facto, but are liable for the plaintiff's claim, as partners. It was not necessary to prove a co-partnership by evidence. That was established by implication of law. Nor was it necessary to prove that the debt was unpaid. There was no presumption that it had been paid to be rebutted. The judgment of the circuit court is right, and must be affirmed. The judgment of the circuit court is affirmed.

MARSHALL, J. (dissenting). With the decision that the defendants failed to comply with all the conditions precedent to the corporate existence of the agricultural association I concur, but from the decision that because of such failure such association was not a corporation de facto I respectfully dissent; hence dissent from the conclusion reached that the defendants are personally liable to plaintiff, and that the judgment should be affirmed, but, on the contrary, hold that it should be reversed. * * * If we hold with Missouri, Arkansas, and some other states, that unless all the steps necessary to the creation of the corporation have been taken there is no corporate existence, and that the members of the association are personally liable, we, in effect, say that it is not sufficient to enable such members to escape personal liability to show that their organization is a corporation de facto; that nothing short of a corporation de jure will do. But if we adopt the growing doctrine, supported, as we shall show, by the overwhelming weight of authority in this country, that a person who contracts with a de facto corporation, the members of the latter and such person believing, in good faith, in its legal existence, such members cannot be held personally liable, then we concede, necessarily, that it is not essential to freedom from such liability that all the statutory requisites to the existence of a corporation be complied with, because, when that is done, the organization, obviously, is not a corporation de facto only; it is a corporation de jure. This is too plain to admit of serious discussion.

While the decision in this case, as I read the opinion of the court, in one view, goes upon the ground that the members of a de facto corporation are not responsible personally, inasmuch as it may be held that the decision really is to the effect that personal liability exists because all the conditions precedent to a corporation de jure were not complied with, some reference to authorities on the subject of whether to escape such liability it is necessary that the corporation exist in fact may be proper.

The development of the law on this subject has been rapid in recent years in the direction of holding that the state only can challenge the legality of the exercise of corporate powers. The ancient doctrine was that all contracts made by a corporation in excess of its powers were void. That has not been changed, but the doctrine has grown up, and become well-nigh universal, that the state only can raise the question by proceedings to punish the corporation. Our court is fully committed to such doctrine. John V. Farwell Co. v. Wolf, 96 Wis. 10, 70 N.

ple that only the state can question the existence of a corporate organization, or the legality of its exercise of powers; and by still others upon the ground that broad principles of justice and public policy require that persons who, in good faith, assume to exercise corporate powers, and have a de facto right so to do, should not be compelled, in all their business transactions, in all courts and places, to be ready to successfully meet attacks upon their right in this regard; that so long as the law exists under which they might legally do the very thing they assume to do, and the failure to comply with the law is a mere usurpation of power, which only concerns the community in its sovereign capacity, without prejudice to the individual members of the state, justice, and the certainty of contracts, upon which prosperous business in the complicated, practical affairs of life depend, require that such persons, as against all but the state, shall be regarded as that which they assume to be, and might in fact be, except for some act on their part not attributable to bad faith. In our judgment, all of the reasons strongly support the doctrine, and either is sufficient, particularly the one sanctioned by this court in John V. Farwell Co. v. Wolf, supra, that only the state can question the legality of corporate existence when there is a colorable right to so exist.

It only remains to be considered whether the association in question was a de facto corporation. My brethren say no, and, as I understand it, because there was a failure to perform some condition precedent to its being a corporation de jure. I must assume that such is really not the doctrine of this court, for the essential element of a mere corporation de facto is failure to comply with some provision of law requisite to its legal existence. Where such conditions are all complied with, then the corporation becomes an organization de jure, as well as de facto, and the doctrine pertaining to the latter class of official bodies has no application whatever. If it were the law that a corporation must be such de jure in order to be such de facto, obviously, the doctrine pertaining to the latter, upon which much learning has been displayed by the courts and text writers, would stand as the result of much useless expenditure of mental energy. The true doctrine is that it is sufficient to constitute a corporation de facto, as against one who has recognized its corporate existence, that there be a law under which it might exist de jure, an attempt in good faith to organize under such law, and a subsequent user of the assumed corporate powers. This is not an open question in this state. * * *

One of the earliest and best considered cases on this subject is Union Church v. Pickett, 19 N. Y. 482. The corporation claimed to exist under a general law. Such law required the making, acknowledging, and recording of a certificate of organization, showing certain facts. That was complied with, except that the certificate did not show the existence of all facts requisite to a legal corporation. After acting as a corporation for some time, in an action brought as such, to which a private person was a party, its corporate existence was challenged. On the question thus presented, Mr. Justice Seldon, speaking for the court, said: "It has been repeatedly held that, as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations de facto, and to that end two things are necessary: (1) The existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2)

a user by the party to the suit of the rights claimed to be conferred by such charter or law. The rule established by law, as well as by reason, is that parties recognizing the existence of corporations, by dealing with them, have no right to object to any irregularity in their organization. As long as it is overlooked or tolerated by the state, it is not for individuals to call it in question." And further, in effect, if the law exists, and the record exhibits a bona fide attempt to organize under it, or there is even a slight evidence of user, that is all that is required to establish the corporation de facto; and evidence, in a contest between it and one who has dealt with it as a corporation, of defects in its organization, short of such as would show a want of good faith on the part of those concerned in the proceedings, would be wholly immaterial. * * *

The condition precedent which defendants here failed to perform was that as to filing in the office of the register of deeds of their constitution and certificate of organization. They recorded their articles of organization, which were adopted, in form, under the general incorporating act, not that relating specially to agricultural societies; so that the record, speaking with reference to the papers required to be on file with the register of deeds, was not merely defective; it did not exist at all. Now it may be contended that, while such official record need not show that all the steps requisite to the organization of the corporation were taken, in order to give it colorable existence, an official record of some sort, showing an attempt to comply with the law, is necessary. * * * This may be deemed to signify that the record referred to must be an official record,—the record which the law requires shall be made. The same language is used in Ang. & A. Corp. § 635, but a careful examination of the authorities will clearly show that the record intended is not the record of the corporation papers required by law. The word "record" refers solely to the acts shown by the evidence to have been actually done by the persons assuming to act as a corporation, by way of complying with the law authorizing its organization. Such facts constitute the record, in a legal sense, of their doings, and by such record it must appear that they, in good faith, intended to acquire corporate power.

In Vanneman v. Young, 52 N. J. Law, 403, 20 Atl. 53, there was, as here, an absolute failure to comply with the law in respect to the official record. The certificate of incorporation was not filed in the office of the secretary of state. That, under the New Jersey law, was essential to corporate existence. Plaintiff sold to the pretended corporation some merchandise, and, upon payment therefor not being made, suit was brought by him against the members of the corporation, to charge them personally as partners, upon the ground that the corporation had no legal existence. In deciding the question thus presented, Mr. Justice Dixon said, in effect: "The statute authorized the incorporation of the associates. They attempted to organize under its provisions. The contract was entered into by plaintiff on the assumption that he was dealing with a corporation de jure. The failure of the associates to comply with the statute did not, in the least, impair the rights which the plaintiff intended to secure by his contract. Under these circumstances, the plaintiff cannot bring into question the legality of the corporation. Where the law authorizes a corporation, and there is an effort in good faith to organize under the law, and, as a result of such effort, corporate functions are assumed and ex-

ercised, the organization becomes a corporation de facto. * * * and its existence can only be inquired into in a direct proceeding brought in the name of the state. No private person having dealings with a de facto corporation can be permitted to say that it is not a corporation de jure." In McTighe v. Construction Co., 94 Ga. 309, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153, there was a general law under which the organization might have been incorporated. It organized under a special law that was held unconstitutional. There was an entire absence, it will be observed, of any official record of any act done under the general law. It was held that the special law was unconstitutional and void; hence that the organization had no de jure existence; nevertheless, that it was a corporation de facto; that the essentials of a de facto corporation were all present: (1) A law under which the organization might have been incorporated; (2) a bona fide attempt to become incorporated; and (3) an assumption and exercise of the powers of a corporation, unchallenged by the state.

The foregoing authorities are believed to fairly state the law in respect to what is necessary to constitute a corporation de facto. The very meaning of the term "de facto" indicates that nothing more is necessary to the existence of a de facto corporation than the exercise of corporate powers in good faith. Corporation de facto,—that is, a corporation from the fact that it is acting as such under color of right in good faith. The existence of the law, and some attempt to comply with it, are essential, because without them there can be no assumption of the right to corporate existence in good faith. Persons cannot be said to honestly claim the right to corporate existence, in the absence of any law authorizing the organization, or in the absence of some honest attempt to comply with such law. The law and such attempt, or user of the franchise, whatever mistakes may be made in so doing, —such as the filing of articles of organization when they are required to be recorded, or the recording of articles when they are required to be filed, or the filing of such articles in the wrong office, or any other of the numerous mistakes that might be made,—make a corporation good everywhere, in all courts and places, till successfully challenged by the state. There is hardly any end of authority, all in harmony on this subject. * * *

From the foregoing, we are warranted in asserting that, by well-settled principles of law, the agricultural association with whom plaintiff contracted was a de facto corporation. Every element necessary to make it such appears clearly by the record. There was a law under which it might have existed. The association prepared their constitution, and adopted it in the form of ordinary articles of organization, under the general incorporating act, and by mistake they filed it for record, and it was recorded and returned, instead of filing it to be left in the office, as the law requires. They supposed that they had corporate existence by reason of the recording of their articles of organization. They assumed to act as a corporation, and exercised corporate powers for a considerable length of time, and, for aught that appears, in the utmost good faith. Certainly, the existence of the law, the making and recording of articles of organization, in an honest attempt to become a corporation, and the honest assumption and exercise of corporate powers, prima facie establishes good faith. Plaintiff supposed that the corporation was a corporate body till long after his contract relations with the association ceased. Now to allow him to come in

and say that the corporation did not exist which all supposed had legal existence; that, though the officers of the association and plaintiff contracted for a corporate liability on the part of the former, it shall be held, nevertheless, that the members of such association are bound as partners, in direct violation of the well-settled law that such an association, under the circumstances, was a de facto corporate body; that, as between the parties, the relations are the same in all respects as though the corporation had a de jure existence, and contrary to the settled doctrine, as I believe, of this and most other courts,—is what the judgment in this case does, in my opinion.

I think the judgment of the circuit court, holding the defendants liable as partners, was wrong, and that it should be reversed, and the cause remanded for a new trial.

CHAPTER II

CONTRACTS OF PROMOTERS

Section
1. Relation of the Promoter to the Corporation.
2. Relation of the Subscriber to the Corporation on Promoters' Contracts.

SECTION 1.—RELATION OF THE PROMOTER TO THE CORPORATION

WEATHERFORD, M. W. & N. W. RY. CO. v. GRANGER.

(Supreme Court of Texas, 1894. 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837.)

GAINES, J. This suit was brought by the defendant in error against the plaintiff in error to recover upon open account for services rendered. The plaintiff in the trial court obtained a judgment which was affirmed by the Court of Civil Appeals. * * *

The trial judge, as conclusions of fact, found, in substance, that some kind of a company was formed to build the railroad from Weatherford to Mineral Wells; that Anderson was the "principal mover in said scheme, and was so recognized by all parties;" that he employed plaintiff to assist him in procuring a bonus and in otherwise advancing the enterprise, and that the plaintiff rendered services under said employment both before and after the articles of the company were filed; that the bonus was raised, and was, after its incorporation, accepted by said company. * * * Although the trial court found that the services for which plaintiff sued were rendered in part before and in part after the filing of the articles, their value was assessed as an entirety at $500, and judgment was rendered for the whole amount. In this there was error. We are of opinion that, under the circumstances of this case as shown by the evidence, the defendant corporation cannot be held liable to the plaintiff for any services rendered by him before it was brought into legal existence.

Upon the question as to the liability of a corporation growing out of contracts made on its behalf by its promoters there is considerable diversity and some conflict of opinion. But there are some propositions affecting this question upon which the authorities seem to be in substantial accord. A promoter, though he purport to act on behalf of the projected corporation, and not for himself, cannot be treated as agent, because the nominal principal is not then in existence; and hence, where there is nothing more than a contract by a promoter, in which he undertakes to bind the future corporation, it is generally conceded that it cannot be enforced. * * * The promoters themselves are liable upon the contract, unless the person with whom they engage agrees to look to some other fund for payment. * * * The statute, however, which authorizes the incorporation, may provide that the corporation, when formed, shall pay the necessary expenses of promoting the scheme. In such a case, though the right of action is dependent upon the contract, the liability is created by the statute. * * *

It is also generally held that contracts by promoters, made on behalf of the corporation within the scope of its general authority, may

be adopted by the latter after its organization. Some of the courts say they may be ratified, but ratification presupposes a principal existing at the time of the agent's action, and it seems to us, therefore, that the term is not applicable in its technical sense. * * * With the exception of the law courts of England, the rule is also very generally recognized that if a contract be made on behalf of a corporation by its promoters, and the corporation, after its organization, with a knowledge of the facts, accept its benefits, it must take it with its burdens; and, if the other party has performed the stipulation binding upon him, it may be enforced as against the corporation. * * * But as to the application of the rule last announced the courts differ in opinion. * * *

Having exercised rights and enjoyed benefits secured to it by the terms of a contract made by its promoters in its behalf, a corporation should be held estopped to deny its validity. Again, where the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right inconsistent with the nonexistence of such contract ought to be deemed conclusive evidence of such adoption. But there are some cases which go a step further. * * * In Hall v. Railway Co., 28 Vt. 401, a corporator was held entitled to recover for necessary services in organizing the company, although there was no express promise by any one that he should be paid. Unless the charter of the company provided for the payment of such expenses, this decision, we think, is unsupported by authority. It is generally held that, in the absence of such provision in the act of incorporation in case of a special charter, or in the general law, or in the articles of incorporation under a general law, no implied promise can be imputed to a corporation to pay for the services of a corporator or promoter before the corporation comes into existence. A contract made by promoters may be adopted by a corporation expressly or impliedly by exercising rights under it; but otherwise it is not binding upon such corporations. * * *

Now, when it is said that when a corporation accepts the benefit of a contract made by its promoters it takes it cum onere, it is important to understand distinctly what is meant. There is, so far as this matter is concerned, a radical difference between a promise made on behalf of the future corporation in the contract itself, the benefits of which the corporation has accepted, and the promise in a previous contract to pay for services in procuring the latter to be made. This is well illustrated by the facts of the present case. Here a proposition was made on behalf of the company, by its promoters, that if a bonus should be subscribed and paid to it, it would build its road between certain points, and would carry coal at a certain stipulated rate. By accepting the bonus, the company became bound to fulfill the stipulations of that contract. That was the burden which it took with the benefit of the agreement. But it also appears that one of the promoters promised the plaintiff that if he would assist in procuring subscribers to the bonus the company would pay him for his services. This was no part of the contract the benefits of which were taken by the defendant. The benefits of a contract are the advantages which result to either party from a performance by the other, and in like

manner its burdens are such as its terms impose. A more accurate manner of stating the nature of the plaintiff's demand is to say that the defendant has accepted the benefit of the plaintiff's services, and should pay for them.

It is true in one sense that the company has had the benefit of plaintiff's services, and it is equally true that it would have had that benefit if the services had been rendered under an employment by the subscribers to the bonus; and yet in the latter case it could not be claimed that the company would be liable for such services unless payment for them by the company were made one of the terms of the contract between the company and the subscribers. In Re Rotherham, etc., Co., 50 Law T. (N. S.) 219, in the opinion of one of the justices, this language is used: "It is said that Mr. Peace has an equity against the company because the company had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer, but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done by somebody else he is liable to pay the person who did the work."

There is more doubt as to the plaintiff's right to recover for his legal services in advising as to the articles of incorporation, and in correcting and preparing this paper. Such services are usually necessary, and it would seem that the corporation should pay for them. Such payment is frequently provided for in the act of incorporation or in the articles when the incorporation is effected under a general law. When such is the case, persons who take stock in the company are chargeable with notice that a liability for this purpose has already been created, and it is proper for the corporation to discharge it. But, in the absence of such provision in the statute or in the articles, it may be unjust to shareholders to charge the corporation with liabilities of which they had no actual knowledge at the time they accepted the shares. We therefore hold with some hesitation that claims for the necessary expenses of the organization under our statute should not be excepted from the general rule applicable to contracts made before the corporation has come into legal existence.

Applying the rules we have announced to the case before us, it is apparent that the plaintiff has recovered, in part at least, for services for which the defendant was not bound to pay. He made his contract before the company had a legal existence as a corporation, with a single promoter; and it is a matter of no moment that the promoter was the general manager of the project, and became the owner of the majority of the stock upon its organization. There were other stockholders. The law requires that there should be 10 at least. * * * The evidence does not disclose that his contract with Anderson was actually known to any other person, nor do we see any other circumstance from which knowledge should necessarily be inferred. Since Anderson had no power to bind the future corporation, but could bind himself, the inference from his assisting Anderson would be that he was acting gratuitously, or that Anderson had agreed to pay him. Anderson was interested in shifting his contract upon the company, and it may be doubted whether, although he became a director, notice to him could be deemed notice to the company. The court of civil appeals find, however, that the company had notice. * * *

The plaintiff's contract with Anderson, though made by latter on

behalf of the company, was not a lien, incumbrance, or burden upon the contract between the subscribers to the bonus and the defendant, and it incurred no liability on the former contract by accepting the benefit of the latter. The evidence was sufficient to sustain a recovery by plaintiff for the value of his services rendered after the corporation was created; but the court below failed to find separately the reasonable worth of such services. Therefore the entire judgment must be reversed.

We deem it proper to say in conclusion that if the opinion in the case of McDonough v. Bank, 34 Tex. 309, is to be construed as holding that by merely accepting the benefit of the plaintiff's labor the defendant ratified and became bound under the promoter's contract, it does not meet our approval. Whether the contract in that case was one which the bank had the power to ratify is, to say the least, a doubtful question; but it is one that does not concern us here, and upon which we express no opinion. The judgments of the district court and of the Court of Civil Appeals are reversed, and the cause remanded.

CUSHION HEEL SHOE CO. v. HARTT.

(Supreme Court of Indiana, 1914. 181 Ind. 167, 103 N. E. 1063, 50 L. R. A. [N. S.] 979.)

Action by Obder M. Hartt against the Cushion Heel Shoe Company. Judgment for plaintiff, and defendant appeals.

SPENCER, J. It appears from the record in this case that in April, 1909, appellee, who was experienced in the manufacture of shoes, inserted in a shoe journal an advertisement for a shoe factory to locate in the city of Ft. Wayne. Among the answers which he received thereto was one from a man named Johnson, who was the patentee of a certain cushion heel shoe. Johnson came to Ft. Wayne, and with him appellee went to the president of the Commercial Club whom they interested in the proposition of starting appellant company. Subscription lists were prepared and appellee started out to get subscribers to the undertaking. He testified that Johnson then promised him the position of superintendent when the factory should be established, and also promised that he (appellee) should be paid for his time and money spent in securing the stock subscriptions; that after the company was organized appellee talked with several of the directors and officers of appellant company and told them that he expected to be paid for his services; that one of the directors said to appellee: "I believe you should be compensated. I have told the people, the directors, to settle with you." No testimony was introduced to show that the board of directors ever acted on appellee's claim, but it is his contention that, by accepting the results of his services and receiving the benefits thereof, appellant is now bound on an implied contract to pay for such service.

It is certain that, under ordinary circumstances, a corporation cannot be successfully sued on a contract made for its benefit by its projectors before its incorporation. Contracts of this character, however, are not void, but voidable, and it is well settled in nearly all jurisdictions that, in so far as they are not ultra vires, such contracts may become binding on the corporation if ratified by it, either expressly or by implication, after its organization. * * *

But the rule that a corporation may be bound, like any individual,

by an implied contract is limited in its application to contracts in which the promoters of such corporation are interested. The law does not prohibit a promoter from dealing with his company, and a corporation has the right to purchase property from its promoters and to pay them for their services if it so elects; but the burden is on the promoter to show that he acts openly and in good faith in such transactions. A promoter of a corporation, who brings about its organization and aids in securing subscriptions thereto, is considered in law as occupying a fiduciary relationship toward such corporation and toward its stockholders. * * * It will be observed that this relationship is twofold. It extends toward the corporation as a separate legal entity and charges the promoter with fair dealing in respect to corporate property. * * * It extends also toward the stockholders in respect to their property rights in their stock and toward those who, it is expected, will buy such stock. * * *

Applying this latter rule, the Supreme Court of Massachusetts uses this language in Hayward v. Leeson, supra, 176 Mass. at page 320, 57 N. E. 661, 49 L. R. A. 725: "The persons to whom the promoters owe the duty, which they owe by reason of their fiduciary relation, are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders. It is to the future stockholders that the promoters must make the disclosure of the remuneration which is, or is to be, paid to them, and it is the consent of the future stockholders that must be obtained to make that payment valid; if the promoters undertake to make to themselves remuneration for their services as promoters, without making a full disclosure of the fact to the future stockholders, their principals, and getting their consent, they are guilty of a fraud. Promoters can make the necessary disclosure of the remuneration they stipulate for by including in the prospectus a full statement thereof; if such a statement is not made therein, they cannot honestly take any remuneration for promoters' services, unless it is voted by the stockholders after the capital stock has been taken by the public." * * *

We are aware that cases may be found which seem to sustain appellee's position, but, as is suggested in 10 Cyc. at page 265, "it is difficult to understand how the corporation could be estopped by accepting benefits which it had no power to reject, without uncreating itself." We believe that the better reason and the weight of authority support the holding that, in the absence of statutory or charter provisions, a corporation will be held liable for services rendered by its promoters before incorporating only when, by express action taken after it has become a legal entity, it recognizes or affirms such claim. The evidence before us does not indicate such an affirmance. * * *

Judgment reversed.

MOORE et al. v. WARNER COAL & LAND CO.

(Supreme Court of Alabama, 1912. 178 Ala. 234, 59 South. 219, Ann. Cas. 1915B, 173.)

DOWDELL, C. J. The Warrior Coal & Land Company, a corporation organized under the laws of this state, files this bill against its promoter, Walter Moore, and his alleged guilty confederates, and the bill also makes all of the stockholders of the complainant parties respondent. The bill charges infidelity and fraud in the organization of the

corporation by the promoter, both prior and subsequent to the issuance of its charter, and seeks to have an accounting by the promoter, and prays also the cancellation of the certificates of stock in said corporation illegally issued to the promoter. * * *

The case as made by the bill is fairly summarized in brief of counsel for appellee as follows: Walter Moore, as a promoter, induced J. B. Cavanaugh and others to go into the scheme of forming a corporation, the Warrior Coal & Land Company, complainant in this bill, upon the basis of all, including himself and his associates, paying for stock at par, the money to be used for buying coal lands through him, the said Moore; such lands to be turned in to the company at cost and paid for with money derived from such issuance of stock. Moore was to organize the company, handle the money, do the buying; and, in fact, do everything. He was intrusted with, and exercised such management and control from the time of the formation of the project before the company was actually formed, until several years after it was organized. The bill specifically and in detail sets out a series of concealments, frauds, and misrepresentations practiced by said Moore, running down to a short while before the filing of the bill, practiced by him to such effect that the innocent stockholders holding original issues had contributed for such stock at par $116,000, of which only about $90,000 has been so expended by him; that he and his guilty associates owed the company on that account alone $26,000, besides $29,000 for stock issued without consideration to Moore and sold to innocent holders; and that there was left outstanding, in the names of Moore and his associates in the fraud, $73,500 at par of stock for which nothing was paid. C. S. Simmons, one of the respondents, was used by the said Moore as the company's trustee for conduit of title from the vendors to the company. Only money so paid into the company was used in the purchase of the lands. * * *

Moore and his confederates organized the company on August 17, 1906, and soon thereafter said Cavanaugh, for his associates, resumed sending, and continued to send, in money until he had sent Moore, for the company, $107,500 for which stock at par, as agreed, was issued. Moore represented during the negotiation, and before the company was formed, that he and his associates had arranged to pay in for stock at par, under such understanding with Cavanaugh, approximately $80.000, which was false. Moore, as president of the company and Simmons, as secretary, issued shares to dummies, in whose names original certificates of shares were made out, later canceling the same and reissuing them to Moore. * * * Moore had paid in nothing for himself, but had then already been furnished by Cavanaugh, for himself and associates, $47,500. Steve Smith had paid in nothing, and Simmons had paid in nothing. The lands had not been acquired from the original owners, or, if any, only a small part, and payment had been made out of the $47,500 furnished by Cavanaugh and his associates. * * *

Moore and Simmons each interposed the general demurrer which tests the equity of the bill as to him. These demurrers were overruled by the chancellor, and the present appeal is prosecuted from the decree overruling the demurrers. * * *

Moore was a promoter of the complainant corporation, and his relation as such to the corporation as well as to those whom he might induce to put their money into the project and become stockholders,

was of a fiduciary character, calling for the utmost good faith and fair dealing. * * *

The following principles of law may be deduced in respect to the relations promoters occupy to the corporation and to those whom they induce to enter into the enterprise and become stockholders, as well as towards each other, and the duties they owe to the company and the stockholders. Their relation is of a fiduciary character, calling for the utmost good faith, and they will not be permitted to take secret profits in the form of stock or otherwise. Where their interests are antagonistic, they cannot be silent; they must disclose. A failure to inform is a fraud. Their position is, in a sense, that of a trustee, and they may be held to an accounting for any breach of the trust. The corporation is a proper party in such cases to file the bill and to obtain relief; it is not necessary to rescind or set aside the transaction. The bill may, however, be maintained by the injured shareholders, where redress cannot be had through the corporation, because of being under control of the perpetrators of the wrong.

Applying the principles of law as stated to the facts charged in the bill, which are to be taken as true on demurrer, we think there can be no doubt as to the equity of the bill. The project proposed by the promoters was to organize a corporation and issue shares of stock, for money paid in, at par value, and with this money to purchase coal in place in lands in small tracts and body the same up into one tract, and by so doing increase the value of the holding, and, as a result, give a greater value to the shares of stock issued for the money so paid in. Such was the inducement held out by the promoters and those paying in their money have an equity in preserving and carrying out the project, and to this end to call to an accounting the unfaithful promoters who, by their fraud, have thwarted the project.

It is no answer to this theory of the bill to say that the lands conveyed to the corporation and now held by it were sold to it at a fair price and are equal in value to the par value of the total capital stock of the corporation. Those who were induced to pay in money for stock upon the representations made by the promoters were entitled to have the lands at cost and to be purchased under the proposed scheme. * * *

The bill, moreover, seeks the cancellation of shares of stock charged to have been fraudulently issued, and also to have an accounting for money charged to have been fraudulently used or misappropriated by Moore and his confederates. Taking the statements of the bill as true, and which we must do on the general demurrer for want of equity, interposed by the respondents Moore and Simmons, we have no doubt that the bill contains equity, and hold consequently that there was no error in overruling the demurrer. The decree will be affirmed. * * *

SECTION 2.—RELATION OF THE SUBSCRIBER TO THE CORPORATION ON PROMOTERS' CONTRACTS

WRIGHT BROS. v. MERCHANTS' & PLANTERS' PACKET CO.

(Supreme Court of Mississippi. 1913. 104 Miss. 507, 61 South. 550, Ann. Cas. 1915C, 1111.)

Certain business men of the city of Vicksburg undertook the organization of a packet company for the purpose of plying a steamboat on the Yazoo river, in order to secure better service and rates. The

promotion of the undertaking was in the hands of C. J. Searles and others, who secured subscription to the capital stock of the company. Searles approached C. G. Wright of the firm of Wright Bros., hardware merchants, and asked for a subscription, and was told by Wright that they would help, and would let him know later about the amount. Searles entered the name of Wright Bros. on the subscription list, but left the amount blank. Afterward, at a meeting of the promoters, when some proposition was to be voted upon, C. G. Wright voted $500 of stock in the name of Wright Bros. This was before the organization of the corporation, and Wright claims that before organization he advised Searles that he would withdraw his subscription. The corporation was subsequently organized, and met with financial reverses, and suit was brought against the firm of Wright Bros. for the unpaid subscription appearing on the subscription list, and a judgment secured for the full amount.

SMITH, C. J. Appellee instituted this suit in the court below to recover from appellants the sum of $500, alleged to have been subscribed by them to its capital stock prior to its organization. In addition to the general issue, appellants filed several special pleas, one of which set up that they had withdrawn their subscription to the capital stock of appellee, and notified the promoters thereof, prior to appellee's organization as a corporation, to which plea a demurrer was interposed and sustained. This demurrer should have been overruled, for the reason that, in the absence of a special agreement to the contrary, supported by a valuable consideration, a subscription to the capital stock of a corporation, thereafter to be organized, is nothing more than an offer of a specific sum to the use of the corporation when it comes into existence, and therefore, under familiar principles of law, may be withdrawn at any time before the organization of the corporation. While there are authorities to the contrary, this view is in accord with the great weight thereof and of reason, as will appear from an examination of 1 Thompson on Corporations (2d Ed.) § 518; 1 Cook on Corporations, § 167. * * *

While this question seems not to have been heretofore presented to this court for decision, the rule as herein announced was evidently understood to be the correct one by the judges who composed the High Court of Errors and Appeals when the case of Hayne v. Beauchamp, 5 Smedes & M. 515, was decided; for Judge Sharkey, in delivering the opinion therein, used the following language: "But it is insisted that a distinction is to be taken between those cases in which the subscription is made to an existing corporation, and a mere subscription in view of a subsequent charter. True, there is a distinction. In the latter case the subscription, or the undertaking is not always obligatory; in the first it is," etc. And Judge Clayton, in his dissenting opinion, said: "Before the bank went into operation, and incurred liabilities, he [referring to a subscriber to its capital stock] might have withdrawn; to permit him to do so afterwards would, in my apprehension, violate some of the elementary principles of law and justice." * * *

Reversed and remanded.

CHAPTER III

CORPORATE POWERS

Section
1. Scope of Corporate Powers.
2. Ultra Vires Contracts.

SECTION 1.—SCOPE OF CORPORATE POWERS

There are two main questions relating to corporate powers: (1) What transaction may be entered into by a corporation, such that the resulting legal relations will be the same as those produced by the same kind of transaction when entered into by individuals? (2) What is the abnormal effect produced upon the relations of the parties when the corporation has entered into some transaction which admittedly lies outside its powers? The case following deals with the second of these questions. No cases have been inserted which raise individual problems involving the first question. With respect to this question the general principle is fairly clear. The corporation will possess only such power as has been conferred upon it. The source of this power, in the first instance, is the state incorporating it. Other states in which the corporation may engage in business may also affect transactions which are governed by the laws of that state. Where a corporation is incorporated by special act the source and extent of its power is the statute which created the corporate entity. Where the corporation is incorporated under the provisions of an incorporation law, the source and extent of corporate powers is the statute or statutes under which the corporation was organized.

In determining the scope of power of a particular corporation statutes other than the incorporation law itself must be taken into consideration. Statutes enacted under the police power of the states, either prior to or subsequent to incorporation will operate as limitations upon corporate powers. Limitations will be found not only in the actual text of the statutes but will rest in the nature of the corporate organization itself, as, for example, the question as to whether a corporation may purchase its own stock; the English rule and the rule in some of the states of the United States being that such a purchase cannot be made, while the majority rule is that a corporation may purchase its own stock when made in good faith and the rights of creditors are not prejudiced thereby. The powers of a corporation may not be as extensive as the statutes of the state of incorporation permit. Such a situation as this arises when the articles of incorporation place limitations upon corporate activities in addition to those found in legislative acts. In its broader aspects, therefore, the problem of determining the extent of corporate powers is a problem of interpreting the various

statutes of the state and of the articles of incorporation in the light of transactions which have in fact been entered into. The determination of these questions will vary according to the kind of corporation which is concerned with the transaction under examination. It might be held in one case that a particular corporation did not have power to enter into a contract of suretyship, but such rule would obviously not apply to surety companies. The powers of banking corporations, manufacturing companies, railroad companies, and religious corporations could not be coextensive. In the process of reasoning the ascertainment of the scope of a corporation's power is not essentially different from that involved in determining the scope of an agent's power.

SECTION 2.—ULTRA VIRES CONTRACTS

APPLETON v. CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK.

(Court of Appeals of New York, 1906. 190 N. Y. 417, 83 N. E. 470, 32 L. R. A. [N. S.] 543.)

CULLEN, C. J. This action is brought by the plaintiff as receiver of a dissolved bank against the defendant, who is the successor of the Central National Bank of the city of New York. * * * The plaintiff has been defeated on the theory that the execution of the guaranty by the defendant bank was ultra vires, and not binding upon it, and upon this ground the judgments below are sought to be sustained. Had the guaranty been limited to the amount which the bank, under its agreement with Samuels, was to receive out of the loan, we should be entirely clear that it was within the legitimate powers of the bank under the decisions of the Supreme Court of the United States. * * *

We think, however, that the defendant's power to guarantee was limited by the extent of its interest in the subject-matter of the guaranty. To allow a bank to guarantee the payment by one of its debtors of a larger sum in order that the bank might receive or retrieve a lesser sum would be to permit it to enter upon very hazardous speculation, and authorize very wild and unsafe banking. * * * We may assume that the contract was ultra vires. We may further assume that in transactions by national banks we should adopt the law of ultra vires as it prevails in the Federal courts, and not the local law on the subject. Yet the defendant, in our opinion, became plainly liable for the amount which it received under the ultra vires contract. The law which obtains in this state and in several other jurisdictions is that, where one party has received the full benefit of an ultra vires contract, he cannot plead the invalidity of the contract to defeat an action upon it by the other party. * * *

A contrary rule obtains in the Supreme Court of the United States. There it is held that the execution of an ultra vires contract by one party cannot confer upon it validity or authorize the other party to sue on its obligations (Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55); but at the

same time it is also held that a party cannot retain money or property received by it under an ultra vires contract when it refuses to perform that contract (Logan County Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107). It was there said by Judge Harlan: "The bank, in this case insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. 'The obligation to do justice,' this court said in Marsh v. Fulton County, 10 Wall. (U. S.) 676, 684, 19 L. Ed. 1040, 'rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.'" In a great many cases the difference between the law prevailing in the federal courts and that in our own would lead to great difference in results. In this case, however, as the plaintiff disclaims any right to recover beyond the amount actually received by the defendant, the result is exactly the same whether we adopt one rule or the other. Whatever the difference of view there may be as to the effect of ultra vires on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract, and refuse to perform the contract. * * *

Nor is there any force in the suggestion that this action is not brought in disaffirmance of the contract for money had and received, but on the contract of guaranty. All the facts are set forth in the complaint, and if these facts entitle the plaintiff to relief on any theory, then the complaint states a good cause of action.

The judgments of the Appellate Division and Special Term should be reversed, and judgment rendered for plaintiff on demurrer. * * *

HARRIS et al. v. INDEPENDENCE GAS CO. et al.

(Supreme Court of Kansas, 1907. 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. [N. S.] 1171.)

MASON, J. Cornelius Carr and his wife executed to the Independence Gas Company an oil and gas lease—that is, an instrument granting the right to explore a tract of land for oil or gas, and to appropriate either if found. The company is a Kansas corporation, and, at the time of the execution of the lease, the only purpose mentioned in its charter was "to dig or mine for natural gas, and sell the same for heat and lighting purposes." Later, an amendment was made adding thereto the mining and selling of oil. What are called the "gas rights" under the lease have been transferred to another gas company, and no point is raised with regard to them. The Carrs, claiming that the lease so far as it related to oil was void, because at the time it was executed the lessee had no authority to engage in the oil business, undertook to grant the oil privileges anew to C. C. Harris, who, upon that ground, brought an action against the Independence Company to cancel all of its contract excepting that portion relating to gas—joining his grantors as coplaintiffs. The trial court sustained a demurrer to a petition setting out substantially these facts, and this proceeding is brought to review that ruling.

The defendant maintains: (1) That it had the implied power to produce and market oil as an incident to the express power granted to it to produce and market gas; (2) that if it originally lacked such power the defect was supplied by the charter amendment; and (3) that even if it had no authority to enter into the contract the plaintiffs cannot take advantage of the fact. It will only be necessary to consider the questions involved in the third proposition.

Although the decisions relating to the doctrine of ultra vires are characterized by some confusion, as well as by much conflict, they admit of classification into fairly well-defined groups, and exhibit a development in the direction of restricting the scope of its operation. Those courts which accord it the most favorable treatment—allow it the largest field of action—proceed upon the conception that a corporation, being the creature of the state, possesses no power whatever beyond that granted in its charter, and cannot directly or indirectly acquire rights, or incur liabilities, under any contract not thereby authorized. They refuse, under any circumstances, to enforce or give effect to an unauthorized contract as such, but, where it has been acted upon, will protect the parties against hardship and injustice, by allowing whatever relief may be suited to the facts of the case—for instance, by permitting either party to recover money or property which has been parted with in the transaction, or to have compensation therefor. * * *

The theory is consistent and logical, but its practical effect is so to circumscribe the power of the court as to make the relief furnished at times inadequate to the occasion. In a larger number of jurisdictions, although the same conception of corporate capacity is adopted, its effect is greatly changed by the application of another principle. Here the courts concede that a corporation has no power to make a contract except such as is conferred by its charter, expressly, or by necessary implication. But they hold that as it must have some discretion in the manner of carrying out the purposes of its creation—some freedom of action—it is amenable to the same rules of conduct as a natural person, and may estop itself to question the validity of an agreement it has assumed to make or may acquire the right to invoke a similar estoppel in its own behalf. Where this theory is accepted, recovery may be had upon a contract which is in fact void, simply because its validity cannot be put in issue. * * *

These cases have been criticised for the use they make of the word "estoppel," as descriptive of the principle upon which they are based. It is argued that, as a a corporation must know the terms of its own charter, and as one dealing with it is charged with like knowledge, neither party to an ultra vires contract can be misled in that respect, and therefore there must always be lacking an essential element of what could, with technical accuracy, be called estoppel. This, however, is a mere question of terminology. The requirement that one shall be consistent in conduct—shall not occupy contradictory positions, shall not retain the advantages of a transaction, and reject its burdens—is often spoken of as a form of estoppel. The term is convenient, and, if inaccurate, is not misleading. This rule of estoppel affords a good working hypothesis to accomplish just results. If it fails to accomplish all that might be desired in a practical way, it is because it is not made sufficiently far-reaching. It is generally held to be inapplicable to purely executory contracts, one reason stated being that, "Where

neither party has acted upon the contract, the only injustice, caused by a refusal to enforce it, is the loss to the parties of prospective profits, and this is too slight a consideration to weigh against the reasons of public policy for declaring it void and not enforceable." 29 A. & E. Encycl. of L. 49, 50.

It might seem reasonable that a system which attempts not only to protect a party to an ultra vires contract from actual loss, but, where equity requires it, to insure to him the actual fruits of his bargain, ought, for the sake of completeness and symmetry, to enable him to insist upon the performance even of a purely executory contract. It certainly seems against conscience that one who has entered into a contract in the expectation of deriving a profit from it, may, upon discovering the probability of a loss, repudiate it, and escape responsibility by raising the question of want of corporate capacity. Parties to a contract, who deal with each other upon the assumption that one of them is a corporation, are ordinarily precluded from questioning the validity of its organization. * * *

A large majority of the adjudications on the subject of ultra vires fall into one or the other of the two groups already referred to. The conception of corporate power, upon which they depend, has been styled that of "special capacities," in distinction from that of "general capacities." * * * The conception, designated by the latter term, is, in brief, that while a corporation has no right to exceed the limits of its charter it has the power to do so. The theory was elaborated in the opinion of Chief Justice Comstock, in the celebrated case of Bissell v. Mich. So. & Nor. Ind. R. Cos., 22 N. Y. 258, where it was said: "Like natural persons, they (corporations) can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong. * * * The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons. * * * Why, it may be asked, does the law provide the remedy of quo warranto against corporations for usurpation and abuse of power? Is it not the very foundation of that proceeding, that corporations can, and do, perform acts, and usurp franchises beyond the rightful authority conferred by their charters? Most assuredly this is so. The sovereign power of the state interposes, alleges the excess of abuse, and, on that ground, demands from the courts a sentence of forfeiture." * * *

This theory, logically followed out, would obviously make all corporate contracts, executory as well as executed, enforceable between the parties. It has not, however, met with any large acceptance, at least in the form stated. * * * But a recent tendency has been developed to reach substantially the same result by a somewhat different course of reasoning, resulting in a doctrine which is thus stated in 10 Cyc. 1164: "A most important doctrine connected with this subject, and one which arises above the mere principle of estoppel, is that, whether a corporation has acted without authority conferred on it by the Legislature, or has acted in contravention to an act of the Legislature, cannot be set up collaterally, by individuals who deal with it, or by third persons, but can be set up only by the state in a direct proceeding to forfeit its charter, to oust it of some particular franchise, or to subject it to punishment; or where the question is otherwise litigated between the state and the corporation."

The cases applying or discussing the doctrine are collected in notes

to this text, and to succeeding paragraphs in the same work. The principle referred to, if sound, is manifestly sufficient in itself to defeat the defense of ultra vires, even when interposed against the enforcement of an executory contract, but it must be admitted that, in practice, it seems to have been applied only where the agreements had been at least partially performed. It seems often to have been invoked, however, in aid of the ordinary doctrine of estoppel, in cases where the contract upon one side or the other had already been performed. The best and most complete expression of it is found in the decisions of the Wisconsin court. In Farwell Co. v. Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 37 L. R. A. 138, 65 Am. St. Rep. 22, it is said: "Judge Thompson, in his valuable treatise on the Law of Corporations, vol. 5, §§ 6033–6038, commenting on the subject, appears to deprecate the prevalence of the 'new doctrine,' and to argue against its further extension, upon the ground that it practically destroys the effect of the doctrine of ultra vires, as applied to the unauthorized exercise of corporate power; but the learned author is manifestly in error in that respect. Such doctrine, notwithstanding the limitation which modern development has placed on the means by which it may be called into use, still exists, and may and will continue to exist, adapted as fully as ever to restrain the abuse of corporate franchises and authority, and to punish such abuse, whenever the state, in its sovereign capacity, sees fit to exercise it. That such doctrine cannot be resorted to as a weapon for attack and defense in the hands of mere private persons, and used as a ready means of embarrassing business operations by and with corporate bodies, which directly or indirectly touch and administer to human desires at every turn of the individual in modern life, while its effectiveness for all essential purposes of restraint and punishment is fully preserved, furnishes no cause for regret, but rather cause for gratification at the evidence of how certainly principles, by natural growth and development, adapt the law and its administration to the everchanging needs of advancing civilization, so as best to promote justice and the common welfare. When a corporation offends against the law of its creation, such offense is against the sovereignty of the state; hence, it is most proper that the state should apply the remedy, and be charged with the sole responsibility in that regard, and such is the law by the trend of modern authorities, which we approved." * * *

The question whether a corporation has a legal existence is a question whether it has capacity to act at all; this is essentially of the same character as the question whether it has capacity to enter into a particular contract—in other words, whether it has a legal existence for that purpose. The state grants the corporation the right to do business under limitations expressed in language to which both agree. Whether the language of the charter shall be interpreted to authorize a given act is a matter between the parties to it. If the state is satisfied with the construction upon which the corporation acts, no reason is apparent why it should be open to question by a stranger, much less by one who has recognized it as valid by contracting with the corporation upon that basis. * * *

No Kansas statute declares that a contract made by a corporation in excess of its legitimate powers shall be void; or in terms permits the question of corporate capacity to be raised by one of the parties. Where it is held that no recovery can ever be had upon an ultra vires

contract, as such, whatever relief is afforded is logically made to turn upon whether and how far the agreement has been acted upon. Where a recovery is sometimes permitted under the contract itself, upon the principle of estoppel, the question whether it has been carried out is likewise of manifest importance, there being a difference in degree, at least, between the attitude of one who has merely entered into an engagement in expectation of obtaining an advantage from it, and that of one who has actually reaped its benefits in whole or in part. But the doctrine that only the state can challenge the validity of acts done under color of a corporate charter, if accepted, must necessarily protect an executory contract from collateral attack, equally with one that has been executed. The court is convinced of the soundness of the view that, in the absence of special circumstances affecting the matter, neither party to even an executory contract should be allowed to defeat its enforcement by the plea of ultra vires. The doctrine is logical in theory, simple in application, and just in result. * * *

Upon these considerations the judgment is affirmed.

CHAPTER IV

THE RELATION OF STOCKHOLDERS TO THE CORPORATION

Section

1. Nature of a Share of Stock.
2. Rights of the Preferred Stockholder.
3. Right to Inspect Corporate Books.
4. Right to Participate in New Issues of Stock.
5. Stockholders' Meetings.
6. Voting Trusts.
7. Rights of the Minority.
8. Right to Maintain Actions upon Corporate Causes of Action.
9. Rights with Respect to Declared Dividends and Surplus.
10. Apportionment of Interests Between Life Tenant and Remainderman.
11. Rights of the Corporation Against Officers and Directors.
12. Rights and Liabilities of Parties with Respect to Transfers of Stock.

SECTION 1.—NATURE OF A SHARE OF STOCK

UNITED STATES RADIATOR CORPORATION v. STATE.

(Court of Appeals of New York, 1913. 208 N. Y. 144, 101 N. E. 783, 46 L. R. A. [N. S.] 585.)

Claim by the United States Radiator Company against the State of New York for refund of taxes paid under protest on stock transfers. From a judgment dismissing the claim, claimant appeals.

COLLIN, J. The action is to recover from the state of New York a sum paid by the plaintiff, under protest and without prejudice to its rights, for stock transfer stamps.

The facts were agreed upon by the parties for submission to the Court of Claims. The plaintiff, a corporation, purchased certain assets of each of four corporations. Under the contracts of purchase, each of the four corporations was entitled to a designated number of shares of the capital stock of the plaintiff as a consideration for the sale. Each of the four corporations and a trust company entered into a lawful voting trust agreement, which provided that the trust company as voting trustee should hold and vote for a designated period the full number of the shares of stock to which the four corporations were so entitled and a certificate for those shares was issued by the plaintiff, upon the request of each of the four corporations, to the trust company, which thus became the record owner of the shares for voting purposes. Each of the four corporations (no condition forbidding) requested the issue to each stockholder therein by the trust company of a certificate for the number of shares proportionate to the number of the shares of its stock owned by him, and thereupon the trust company issued to each stockholder of the four corporations a certificate that he, the stockholder, was the owner of a designated number of shares of the capital stock of the plaintiff deposited with and to be held by the trust company under the agreement as voting trustee, and might transfer the certificate, and that all dividends received by the trust company should be paid to the holder of

the certificate who should at the termination of the voting trust agreement, upon surrender of the certificate, be entitled to receive a certificate or certificates of the plaintiff for said shares of capital stock. Pursuant to the decision of the Comptroller of the State that the certificates of the trust company were taxable under section 270 of the Tax Law (Consol. Laws 1909, c. 60), the plaintiff paid for the transfer stamps without prejudice to its rights, and brings this action to recover the sum paid. * * *

The section imposes the tax upon all agreements or instruments for the transfer of shares of corporate stock. It is in the nature of an excise tax on the transfer. * * * The language expresses clearly the intention of the Legislature that every transfer of or agreement to transfer a share in the capital stock of a corporation, or in other and definitive words, a right to share in the dividends declared by the directors of a corporation from its surplus profits and in the assets upon the distribution of them pro rata among the shareholders at its dissolution shall be subject to the tax.

A share of corporate stock is the right which the shareholder has to participate according to the number of shares in the surplus profits of the corporation on a division, and in the assets or capital stock remaining after payment of its debts on its dissolution or the termination of its active existence and operation. * * * It is created by the joint action of the corporation and the shareholder. It imports a contribution to the capital stock made by the shareholder and accepted by the corporation. When a corporation has agreed that a person shall be entitled to a certain number of shares for a consideration permitted by law and executed by the person, those shares come into existence and are owned by him.

The statement in the certificate of incorporation or charter of the corporation that the capital stock is a designated amount divided into a certain number of shares, each of a named value, creates neither shares nor capital stock. It expresses the power of the corporation to acquire a capital stock. It creates potential shares which, transferred into actual shares by the acquisition of members and their payments, produce the money or property which, put into a single corporate fund, is the actual capital or capital stock on which the corporate business is undertaken and in which are the shares. It also fixes the sum of the payment necessary to create a share.

The certificate of the corporation for the shares, or the stock certificate, is not necessary to the existence of the shares or their ownership. It is merely the written evidence of those facts. It expresses the contract between the shareholder and the corporation and his coshareholders. But it is the payment, or the obligation to pay for shares of stock, accepted by the corporation, that creates both the shares and their ownership. * * * Flour City National Bank v. Shire, 88 App. Div. 401, 84 N. Y. Supp. 810, affirmed 179 N. Y. 587, 72 N. E. 1141. In the last case cited, Judge Hiscock, then Justice Hiscock, writing for the court, said: "The company having thus acquired property under an agreement to give therefor to various people certain interests or shares in its capital stock, we think that such latter persons, immediately upon the acceptance of transfers by the corporation, became entitled to and vested with said interests or shares, and that no further steps were necessary to accomplish this latter result. It may be admitted at once that ordinarily the corporation

would issue certificates for these shares of capital stock, but it is too well settled to permit of doubt that said certificates would be merely representative of and not the real interest in the property and assets of the corporation constituting its actual capital stock." * * *

Each of the four corporations became, upon the transfer of its assets to the plaintiff, the owner of the shares of the capital stock of the plaintiff, which were the consideration for it. The transaction did not involve a transfer of those shares. The shares were not transferred to the vendor corporation by plaintiff; they were created by the transaction. At no time were they owned by the plaintiff. At the instant of their creation they were owned by the vendor corporation, which might at any time thereafter transfer them, and any transfer of them by it would be subject to the tax imposed by said section 270.

The four corporations did not transfer the shares owned by them to the trust company. They caused the record title to them to be placed in the trust company temporarily and for an expressed and limited purpose. They remained the owners of the stock. Their ownership was subject to the right of the trust company to vote the shares at corporate elections, but the power to transfer the shares, subject to the right of the trust company to vote them, remained in the corporations. The trust company could not sell or agree to sell the shares. It had no assignable interest in them. It had evidence in the certificate that it as trustee held the legal title, but this was notice of the existence of the trust agreement which disclosed the ownership of the corporations.

The valid request of each of the four corporations to the trust company that it issue its certificate to each of the holders of shares of the stock of those corporations for shares of the stock of the plaintiff proportionate to his holding, and the compliance of the trust company, was a transfer of the shares by the corporations to their shareholders. Upon the completion of those acts the corporations ceased having the right to receive the dividends declared upon those shares and the shareholders acquired it. The ownership of the shares is in their stockholders severally, as certified by the trust company, by virtue of the assignment of it inherent in the request and the execution of the request by the trust company. The appellant does not assert or claim that the corporations own the shares. It, on the contrary concedes that their shareholders are the owners, but asserts that they were such through and from the time of the purchase by the plaintiff of the assets of the corporations, and therefore there was no transfer of the shares from the corporations to them—an assertion erroneous, as already stated.

The appellant urges, with ability and earnestness, that if the four corporations did in the first instance own the shares, the transfer of them to the shareholders was a division among the true owners of their own property, and therefore not a taxable transfer. Without deciding whether or not the conclusion correctly expresses the law, it suffices in this case to point out that the premise given for its support is fallacious. While conditions may exist under which equity will consider the shareholders as the proprietors and the ultimate beneficiaries of the corporate interests, the fact is that a corporation is an individual being incapacitated through statutory powers to acquire the title to, own, and dispose of real and personal property, enter in-

to contracts, engage in business, sue and be sued and taxed. It is the owner of all the corporate property, real and personal, and within the powers conferred upon it by the charter can deal with it as absolutely as a private individual can with his own. The whole title to it is in the corporation, and the shareholders are neither tenants in common nor in any legal sense the owners of it. * * * A shareholder cannot acquire title to any of the property of the corporation through the operation of the law as an administrator acquires the title to the personal property of his intestate. A corporate act alone can affect that result. When the act, as did the act in the present case, transfers to the shareholders shares of the capital stock of another corporation, it is taxable under said section 270.

The judgment should be affirmed, without costs. * * *

SECTION 2.—RIGHTS OF THE PREFERRED STOCKHOLDERS

STERNBERGH et al. v. BROCK et al.

(Supreme Court of Pennsylvania, 1909. 225 Pa. 279, 74 Atl. 166, 24 L. R. A. [N. S.] 1078, 133 Am. St. Rep. 877.)

POTTER, J. On July 7, 1899, four manufacturing concerns, the Pennsylvania Bolt & Nut Company, J. H. Sternbergh & Son, the Lebanon Iron Company, and the East Lebanon Iron Company, entered into an agreement, by which they were to transfer to a proposed corporation the whole of their respective "plants, franchises, good will, business, patents, trade-marks, and property of every sort and kind." The agreement further provided that they should receive for the property so transferred full-paid and nonassessable preferred stock of the proposed corporation of the par value of $50 per share, of which $3,000,000 worth were to be issued and divided among them in designated proportions. The agreement also provided: "The said preferred stock shall have an accumulative preference of five per cent. (5%) dividend annually, payable quarterly on the first days of January, April, July and October, and the first preference as to the distribution of the assets of the company; and further none of the property or franchises of the proposed company can be mortgaged without the consent of at least a majority of the preferred stock." Common stock to the extent of $17,000,000 was also to be issued, divided into 340,000 shares, with a par value of $50 each, upon which $5 per share was to be paid in cash. In pursuance of this agreement, the American Iron & Steel Company was incorporated on August 21, 1899, under the laws of Pennsylvania, for the manufacture of iron and steel products. * * *

By resolution adopted at the stockholders' meeting of August 23, 1899, it was provided "that the preferred stock whose issue was thereby authorized to the amount of $3,000,000 should be entitled (a) 'to receive a cumulative yearly dividend of five per cent., payable quarterly on the first days of January, April, July, and October, in each year, before any dividends shall be set apart or paid on the common stock; (b) to be paid in full both principal and accrued dividends in the event of liquidation or dissolution of the company before any amount shall

be paid to the holders of the common or general stock; (c) to require the consent in writing of a majority of the holders thereof to the creation of any mortgage.'" * * * From the organization of the company until the year 1907 the holders of preferred stock were paid the stipulated 5 per cent. annual dividend, and no more, while all profits above the amount so paid were distributed by dividends to the common stockholders. In March, 1907, a quarterly dividend of 2 per cent. was declared by the directors upon all the stock, both preferred and common, which was at the rate of 8 per cent. per annum.

J. H. Sternbergh, who was a holder of the common stock, filed this bill in equity against the directors and treasurer of the company and the corporation itself, alleging that the preferred stockholders were not entitled to receive more than 5 per cent. per annum on the par value of their stock, and praying the court to enjoin the payment to them of the dividend declared in excess of one-quarter of that amount. * * *

Three questions are raised by the arguments of counsel on this appeal:

(1) Whether preferred stock issued by a company incorporated under the corporation act of 1874 is limited as to dividends to the amount of its preference; or whether, after payment of an equal amount as dividend on the common stock, it is entitled to participate in the distribution of the remaining profits, if any.

(2) Whether, under the agreement and resolution in the present case, the preferred stockholders can receive dividends of more than 5 per cent. per annum on the par value of their stock.

(3) Whether the alleged fact that for a long series of years the preferred stockholders were paid without objection on their part only 5 per cent. per annum and the entire balance of profits was paid to the common stockholders is to be considered in determining the present rights of the parties. * * *

Where there is no stipulation in the contract to the contrary, the weight of authority clearly favors the right of preferred stockholders to share with the common stockholders in all profits distributed, after the latter have received an amount equal to the stipulated dividend on the preferred stock. "In the absence of special provisions, the holders of preferred stock in a corporation are in precisely the same position, both with respect to the corporation itself and with respect to creditors of the corporation, as the holders of common stock, except only that they are entitled to receive dividends on their shares, to the extent guaranteed or agreed upon before any dividends can be paid to the holders of common stock." 2 Clark & Marshall on Priv. Corp. (1901) § 417c. "A share of stock is a share of stock, whether preferred or common." 1 Cook on Corps. § 269, note. See, also, 1 Elliott on Railroads (2d Ed.) § 84; 2 Beach on Priv. Corp. § 501. We do not find anything in the agreement or resolution in the present case which limited the preferred stockholders to a dividend of 5 per cent. per annum upon their stock.

With regard to the contention that the court should follow the construction placed upon the contract, which it is alleged the parties followed for a series of years—that is, by paying to the preferred stockholders only the stipulated 5 per cent. dividends, and awarding the remaining profits to the common stockholders—the trial judge does not find that any such construction was established, and he further finds

that, except in the years 1905 and 1906, the dividends paid on the common stock were less than 5 per cent. of its par value. In discussing this feature he says: "Has there grown up any usage in the company at variance with the rights of the preferred stockholders as ascertainable from a fair reading of the resolutions under which the preferred shares were issued? The plaintiffs assert that there is such a custom, and, in support of their statement, point to the dividends paid on the common stock during the first 16 months of the company's existence, which aggregated $1.25 per share on the common stock, a return of more than 18 per cent. per annum on the sum paid in on this stock, while during the same period the holders of preferred stock accepted without murmur dividends at the yearly rate of 5 per cent. on their shares.

The effect of this evidence is entirely overcome, however, by the consideration that the dividends paid on the common stock yielded less than 2 per cent. on its par value. It is to be assumed that, before the holders of preferred stock could claim more than the 5 per cent. dividends that they received, the holders of the common stock were entitled to receive a dividend of the same percentage on the par value of their shares. To refuse them this right would be unjust. True it is that they had paid in only 10 per cent. of the amount of their subscriptions, and that the company had the use of but a comparatively small part of what they were obligated to pay in if called on, but the company enjoyed the credit of having such a resource as the unpaid subscriptions to its stock, and the common stockholders had at risk in the venture, not only what money they had paid in, but all for which they were still liable. It was proper, therefore, that the par value of their stock should be taken as the basis of their share in the company's profits, and, until they received more than 5 per cent. per annum on that basis (which they never did prior to 1905), the holders of preferred stock had no reason to complain." This conclusion commends itself to us. * * *

We see no need in the present case for looking beyond the terms of the contract. We think it was properly construed by the court below. The assignments of error are overruled, and the decree is affirmed.

SECTION 3.—RIGHT TO INSPECT CORPORATE BOOKS

POWELSON v. TENNESSEE EASTERN ELECTRIC CO. et al.

(Supreme Judicial Court of Massachusetts, 1915. 220 Mass. 380, 107 N. E. 997, Ann. Cas. 1917A, 102.)

DE COURCY, J. This is a petition in equity under section 30 of the business corporation law, seeking an inspection of the stock and transfer books of the defendant corporation. It is provided in that section that "the stock and transfer books of every corporation, which shall contain a complete list of all stockholders, their residences and the amount of stock held by each, shall be kept at an office of the corporation in this commonwealth for the inspection of its stockholders." Liability for damage caused by a refusal to exhibit the books, etc., is specified; and the section concludes as follows: "The Supreme Judi-

cial Court or the superior court shall have jurisdiction in equity, upon petition of a stockholder, to order any or all of said copies, books or records to be exhibited to him and to such other stockholders as may become parties to said petition, at such a place and time as may be designated in the order."

The preliminary objection that Powelson, as one of the three voting trustees, cannot exercise the rights of a stockholder under the statute need not be considered. It is admitted that the intervening petitioner, the Tennessee Mutual Development Company, was the owner of ten shares of the common stock of the defendant corporation, that it duly made a demand to inspect the stock and transfer books of the electric company, and that the demand was refused. It has become a party to the petition and can invoke the statute. Hereinafter it will be referred to as the plaintiff.

It is settled that the common-law right of a stockholder to inspect the books of a corporation is a qualified and not an absolute right. * * * Where the right has been given by statute it has been decided in many jurisdictions that unless the statute imposes restrictions or limitations, the right is absolute, and the motive or purpose of the stockholder in seeking to exercise it is not the proper subject of judicial inquiry. * * *

The scope of our statute is narrower than the common-law right of inspection, as it deals only with the records, stock and transfer books. The present application is confined to the stock and transfer books and is made for the alleged purpose of obtaining a complete list of the stockholders and their residences. The right of a stockholder to obtain this information has been recognized by the Legislature of this commonwealth since 1858. * * * The language of St. 1903, c. 437, § 30, and the history of the legislation on the subject indicate that the stockholder's right to know the names, addresses and extent of interest of his associates in the common enterprise, who with him must elect directors to manage the business of the company, is an absolute right.

As we construe the report, however, it is not necessary to decide whether a stockholder is entitled to the relief here asked for regardless of his motive or purpose. The single justice, after hearing the parties, ruled that the plaintiff should have the right to make the inspection prayed for. It is reasonably to be inferred that he was satisfied that the plaintiff was acting in good faith. The fact, if it is a fact, that Powelson, by reason of prior litigation, desires to change the administration of the company, and has instituted these proceedings with that in view, is entirely consistent with an honest belief that a change in management and policy will advance the interests of the corporation and his own rights as a stockholder. * * *

The order for inspection is to issue as prayed for. The details as to time and manner will be designated in the order as settled by a single justice.

Ordered accordingly.

SECTION 4.—RIGHT TO PARTICIPATE IN NEW ISSUES OF STOCK

STOKES v. CONTINENTAL TRUST CO. OF CITY OF NEW YORK.

(Court of Appeals of New York, 1906. 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. [N. S.] 969, 9 Ann. Cas. 738.)

This action was brought by a stockholder to compel his corporation to issue to him at par such a proportion of an increase made in its capital stock as the number of shares held by him before such increase bore to the number of all the shares originally issued, and in case such additional shares could not be delivered to him for his damages in the premises.

VANN, J. * * * Thus the question presented for decision is whether according to the facts found the plaintiff had the legal right to subscribe for and take the same number of shares of the new stock that he held of the old? The subject is not regulated by statute, and the question presented has never been directly passed upon by this court, and only to a limited extent has it been considered by courts in this state. * * *

In other jurisdictions the decisions support the claim of the plaintiff. * * * The leading authority is Gray v. Portland Bank, decided in 1807 and reported in 3 Mass. 364, 3 Am. Dec. 156. * * * The court held that stockholders who held old stock had a right to subscribe for and take new stock in proportion to their respective shares. As the corporation refused this right to the plaintiff he was permitted to recover the excess of the market value above the par value, with interest. In the course of its argument the court said: "A share in the stock or trust when only the least sum has been paid in is a share in the power of increasing it when the trustee determines or rather when the cestuis que trustent agree upon employing a greater sum. * * * A vote to increase the capital stock, if it was not the creation of a new and disjointed capital, was in its nature an agreement among the stockholders to enlarge their shares in the amount or in the number to the extent required to effect that increase. * * * If from the progress of the institution and the expense incurred in it any advance upon the additional shares might be obtained in the market, this advance upon the shares relinquished belonged to the whole, and was not to be disposed of at the will of a majority of the stockholders to the partial benefit of some and exclusion of others." This decision has stood unquestioned for nearly a hundred years and has been followed generally by courts of the highest standing. It is the foundation of the rule upon the subject that prevails, almost without exception, throughout the entire country. * * *

In Jones v. Morrison, 31 Minn. 140, 152, 16 N. W. 854, it was said: "When the proposition that a corporation is trustee of the corporate property for the benefit of the stockholders in proportion to the stock held by them is admitted (and we find no well-considered case which denies it), it covers as well the power to issue new stock as any other franchise or property which may be of value, held by the corporation. The value of that power, where it has actual value, is given to it by the property acquired and the business built up with

the money paid by the subsisting stockholders. It happens not quently that corporations, instead of distributing their profits way of dividends to stockholders, accumulate them till a larg plus is on hand. No one would deny that, in such case, each holder has an interest in the surplus which the courts will p No one would claim that the officers, directors or majority stockholders, without the consent of all, could give away the s or devote it to any other than the general purposes of the corp But when new stock is issued, each share of it has an interest surplus equal to that pertaining to each share of the original And if the corporation, either through the officers, directors or ity of stockholders, may dispose of the new stock to whomso will, at whatever price it may fix, then it has the power to dimir value of each share of old stock by letting in other parties to a interest in the surplus and in the good will or value of the est business." * * *

If the right claimed by the plaintiff was a right of prop longing to him as a stockholder, he could not be deprived c the joint action of the other stockholders, and of all the direct officers of the corporation. What is the nature of the right a by a stockholder through the ownership of shares of stock? rights can he assert against the will of a majority of the stock and all the officers and directors? While he does not own an dispose of any specific property of the corporation, yet he an sociates own the corporation itself, its charter, franchises, rights conferred thereby, including the right to increase th He has an inherent right to his proportionate share of any declared, or of any surplus arising upon dissolution, and he vent waste or misappropriation of the property of the corpor those in control. Finally, he has the right to vote for direc upon all propositions subject by law to the control of the stoc and this is his supreme right and main protection. Stockhold no direct voice in transacting the corporate business, but throu right to vote they can select those to whom the law intrusts t of management and control.

A corporation is somewhat like a partnership, if one were conducted wholly by agents, where the copartners have pow point the agents, but are not responsible for their acts. The manage its affairs resides in the directors, who are its agents power to elect directors resides in the stockholders. This vote for directors, and upon propositions to increase the mortgage the assets, is about all the power the stockholder long as the management is honest, within the corporate power volves no waste, the stockholders cannot interfere, even if t istration is feeble and unsatisfactory, but must correct s through their power to elect other directors. Hence, the the individual stockholder to vote in proportion to the numb shares is vital, and cannot be cut off or curtailed by the act the other stockholders, even with the co-operation of the dire officers.

In the case before us the new stock came into existenc the exercise of a right belonging wholly to the stockholders right to increase the stock belonged to them, the stock when belonged to them also, as it was issued for money and not fo

or for some purpose other than the sale thereof for money. By the increase of stock the voting power of the plaintiff was reduced one-half, and while he consented to the increase he did not consent to the disposition of the new stock by a sale thereof to Blair & Co. at less than its market value, nor by sale to any person in any way except by an allotment to the stockholders. The increase and sale involved the transfer of rights belonging to the stockholders as part of their investment. The issue of new stock and the sale thereof to Blair & Co. was not only a transfer to them of one-half the voting power of the old stockholders, but also of an equitable right to one-half the surplus which belonged to them. In other words, it was a partial division of the property of the old stockholders. The right to increase stock is not an asset of the corporation any more than the original stock when it was issued pursuant to subscription. The ownership of stock is in the nature of an inherent but indirect power to control the corporation. The stock when issued ready for delivery does not belong to the corporation in the way that it holds its real and personal property, with power to sell the same, but is held by it with no power of alienation in trust for the stockholders, who are the beneficial owners, and become the legal owners upon paying therefor. * * * It has the same voting power as the old, share for share. The stockholders decided to enlarge their holdings, not by increasing the amount of each share, but by increasing the number of shares. The new stock belonged to the stockholders as an inherent right by virtue of their being stockholders, to be shared in proportion upon paying its par value or the value per share fixed by vote of a majority of the stockholders, or ascertained by a sale at public auction.

While the corporation could not compel the plaintiff to take new shares at any price, since they were issued for money and not for property, it could not lawfully dispose of those shares without giving him a chance to get his proportion at the same price that outsiders got theirs. He had an inchoate right to one share of the new stock for each share owned by him of the old stock, provided he was ready to pay the price fixed by the stockholders. If so situated that he could not take it himself, he was entitled to sell the right to one who could, as is frequently done. Even this gives an advantage to capital, but capital necessarily has some advantage. Of course, there is a distinction when the new stock is issued in payment for property, but that is not this case. The stock in question was issued to be sold for money and was sold for money only. A majority of the stockholders, as part of their power to increase the stock, may attach reasonable conditions to the disposition thereof, such as the requirement that every old stockholder electing to take new stock shall pay a fixed price therefor, not less than par, however, owing to the limitation of the statute. They may also provide for a sale in parcels or bulk at public auction, when every stockholder can bid the same as strangers. They cannot, however, dispose of it to strangers against the protest of any stockholder who insists that he has a right to his proportion. Otherwise the majority could deprive the minority of their proportionate power in the election of directors and their proportionate right to share in the surplus, each of which is an inherent, pre-emptive, and vested right of property. It is inviolable, and can neither be taken away nor lessened without consent, or a waiver implying consent. The plaintiff had power, before the increase of stock, to vote on 221

shares of stock, out of a total of 5,000, at any meeting held by the stockholders for any purpose. By the action of the majority, taken against his will and protest, he now has only one-half the voting power that he had before, because the number of shares has been doubled while he still owns but 221. This touches him as a stockholder in such a way as to deprive him of a right of property. Blair & Co. acquired virtual control, while he and the other stockholders lost it.

We are not discussing equities, but legal rights, for this is an action at law, and the plaintiff was deprived of a strictly legal right. If the result gives him an advantage over other stockholders, it is because he stood upon his legal rights, while they did not. The question is what were his legal rights, not what his profit may be under the sale to Blair & Co., but what it might have been if the new stock had been issued to him in proportion to his holding of the old. The other stockholders could give their property to Blair & Co., but they could not give his. A share of stock is a share in the power to increase the stock, and belongs to the stockholders the same as the stock itself. When that power is exercised, the new stock belongs to the old stockholders in proportion to their holding of old stock, subject to compliance with the lawful terms upon which it is issued. When the new stock is issued in payment for property purchased by the corporation, the stockholders' right is merged in the purchase, and they have an advantage in the increase of the property of the corporation in proportion to the increase of stock. When the new stock is issued for money, while the stockholders may provide that it be sold at auction or fix the price at which it is to be sold, each stockholder is entitled to his proportion of the proceeds of the sale at auction, after he has had a right to bid at the sale, or to his proportion of the new stock at the price fixed by the stockholders.

We are thus led to lay down the rule that a stockholder has an inherent right to a proportionate share of new stock issued for money only and not to purchase property for the purposes of the corporation or to effect a consolidation, and while he can waive that right, he cannot be deprived of it without his consent except when the stock is issued at a fixed price not less than par, and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. This rule is just to all and tends to prevent the tyranny of majorities which needs restraint, as well as virtual attempts to blackmail by small minorities which should be prevented. * * *

The learned trial court, however, did not measure the damages according to law. The plaintiff was not entitled to the difference between the par value of the new stock and the market value thereof, for the stockholders had the right to fix the price at which the stock should be sold. They fixed the price at $450 a share, and for the failure of the defendant to offer the plaintiff his share at that price we hold it liable in damages. His actual loss, therefore, is $100 per share, or the difference between $450, the price that he would have been obliged to pay had he been permitted to purchase, and the market value on the day of sale, which was $550. This conclusion requires a reversal of the judgment rendered by the Appellate Division and a modification of that rendered by the trial court.

The order appealed from should be reversed and the judgment of

the trial court modified by reducing the damages from the sum of $99,450, with interest from January 30, 1902, to the sum of $22,100, with interest from that date, and by striking out the extra allowance of costs, and as thus modified the judgment of the trial court is affirmed.
* * *

SECTION 5.—STOCKHOLDERS' MEETINGS

PEOPLE ex rel. CARUS v. MATTHIESSEN.

(Supreme Court of Illinois, 1915. 269 Ill. 499, 109 N. E. 1056, Ann. Cas. 1916E, 1035.)

COOKE, J. The people, on the relation of Mary Hegeler Carus, individually, and as trustee under the will of Edward C. Hegeler, deceased, appellee, filed an information in the nature of a quo warranto in the circuit court of La Salle county against the appellant, F. W. Matthiessen, calling upon him to show by what authority he was exercising the office of director of the Matthiessen & Hegeler Zinc Company, an Illinois corporation. The plea of appellant set forth his election as a director on December 18, 1913, and averred title to the office by virtue of such election. The circuit court found that the appellant had been duly and regularly elected a director of the company at a stockholders' meeting held December 18, 1913, and a judgment of not guilty was entered. This judgment, on appeal, was reversed by the Appellate Court for the Second District, and a judgment of ouster was entered. The cause is brought here by appeal on a certificate of importance.

The sole question involved is whether the meeting of December 18, 1913, was a legal meeting of the stockholders of the corporation. It is the claim of appellee that, as the notice of the meeting required by law was not given, any action taken was invalid, while appellant contends that sufficient notice was given, and, if not, that all the stockholders were present, and it was therefore immaterial whether notice was given. * * * Section 6 of the act of 1857, under which the company was organized, and which became a part of the charter of the corporation, provides that an annual election of directors shall be held at such time and place as the board may designate, and a written or printed notice of such election shall be given to each stockholder personally or sent to him through the mail at least fifteen days before the day of the election, and the election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy. It is conceded that the notice required by this section of the statute was not given of the meeting of December 18, 1913. The by-laws of the company provide that the annual meeting of the stockholders for the election of a board of four directors shall be held at the office of the company, in the city of La Salle, on December 18th of each year, excepting when that day shall fall on Sunday, in which case the meeting shall be held on the following day. The hour for holding the meeting is not fixed in the by-laws.

There was no material controversy as to the facts. It appears that the notice of the annual meeting required by the statute had never

been given, but ever since the organization of the company the stockholders met by common consent some time during December 18th of each year, usually about the hour of 10 o'clock a. m., for the annual election of the board of directors. If for any reason it did not suit the convenience of either appellant or Hegeler to meet at the office of the company, the meeting, by consent of all the stockholders, was held elsewhere. The stock was held by a very limited number of persons, and the business was transacted harmoniously; two members of the Matthiessen family and two members of the Hegeler family being elected to the board of directors each year. After the death of Edward C. Hegeler 211 shares of the Hegeler stock were held by Mrs. Carus as trustee under the will of her father, one share was held by Mrs. Carus in her own right, and one share by C. B. Lihme, a son-in-law of Edward C. Hegeler. Mrs. Carus was a director and president of the company, and Lihme was the other director representing the Hegeler interests. This was the situation on December 18, 1913.

On December 17, 1913, appellant and others instituted quo warranto proceedings against Lihme to contest his right to hold the office of director in the company, and summons in that case was served on him either that evening or the next morning. Mrs. Carus and Lihme went to the office of the company in La Salle about 10 o'clock the morning of December 18, 1913. They found there present all the Matthiessen stockholders, either in person or by proxy. Lihme was much excited over the action which had been instituted against him, and he at once demanded of appellant that no election be held and no business be transacted at that time. Some of the witnesses testify that he demanded that the meeting adjourn until some time in the future, but all the testimony is to the effect that he demanded that no action be taken that day. While Lihme was engaged in making his demands a member of the Matthiessen family moved that appellant be made the chairman of the meeting, and this motion was put and declared carried. Mrs. Carus was in the same way selected as secretary of the meeting. About the time the vote was being taken on Mrs. Carus as secretary she and Lihme withdrew from the room. Mrs. Carus said nothing whatever while she was in the room, and neither she nor Lihme voted on the two motions put while they were present.

It is contended that, as Lihme continued to demand that the meeting adjourn after appellant had been selected as chairman and had taken charge of the meeting, he thus participated to the extent that he is bound by the action of the meeting. Lihme did nothing but protest against the taking of any action or the transaction of any business at that time; but, be the effect of his actions what it may, Mrs. Carus said nothing and did nothing that could be construed as consenting to the holding of the meeting. Unless the provisions of the by-laws constituted sufficient notice of the annual meeting or the physical presence alone of Mrs. Carus constituted a waiver of the statutory notice, the meeting was not a legal one, and any election held thereat would be invalid. After Mrs. Carus and Lihme had departed, the election was held, and appellant was elected as one of the directors for the ensuing year.

While the trial court held, as a proposition of law, that a by-law of a corporation which names a day, but not the hour, for the holding of the annual meeting, is insufficient notice to the stockholders of the

time of holding the meeting, it took the view that no stockholder can urge the invalidity of such meeting for want of notice, unless he has been injured or deprived of some substantial right by lack of notice; that, where all the stockholders are present on the day and at the place fixed in the by-laws and at an hour at which for over 20 years it was customary to hold the annual meeting, and where each stockholder knew that the annual election for director was then about to take place, in law each stockholder had the right and opportunity to participate in the meeting, and was not injured by lack of notice or deprived of any substantial right, and cannot urge the invalidity of the meeting on the ground of lack of notice. The court properly held that the by-laws did not constitute notice to the stockholders of the holding of the annual meeting for the election of directors. Section 6 of the act under which this company was incorporated provides that this meeting shall be held at such time and place as the board of directors may designate, and expressly requires written notice to be given the stockholders each year. Had the by-laws provided the hour at which the annual meeting should be held on each December 18th, it would have amounted to no more than the designation of the time and place of the meeting by the board, and would not take the place of the notice required by the statute. That notice is indispensable unless it is waived by all the stockholders, either expressly or by consenting to or participating in the meeting.

Did Lihme waive notice by demanding that no business be transacted, and by demanding a pledge of the chairman, after he had been selected, that the meeting do nothing but adjourn, or did Lihme and Mrs. Carus waive notice by their mere presence at the meeting? By nothing which he did or said did Lihme recognize the right of the meeting to organize or to transact business. His effort to secure a pledge from appellant, even after he had been selected by his faction as chairman, that the meeting do nothing but adjourn, amounted to no more than an offer to submit to the jurisdiction of the meeting, provided no business whatever should be transacted. His offer was not accepted, and he withdrew, protesting against the holding of the meeting.

This court has never been called upon to decide whether the mere presence of a stockholder at an annual meeting for the election of directors, with full opportunity to participate, is alone sufficient to constitute a waiver of notice and deprive him of the right to reply upon lack of notice. The text in 10 Cyc. 326, that where notice is required by statute, the meeting cannot be legally held unless the notice be explicitly given in respect of the day, hour, and place or the stockholders are all present and consenting, but if a single member having the right to be present and vote is not duly notified and is absent, or being present, refuses to consent to the holding of the meeting, its proceedings will be void, states the correct rule and is supported by authority. * * * Neither Mrs. Carus nor Lihme having consented to the holding of the meeting or participated in it in any way, the meeting of December 18, 1913, was not legally held, and appellant has no valid title to the office of director of the company by virtue of any action taken at that meeting.

The judgment of the Appellate Court is affirmed.

SECTION 6.—VOTING TRUSTS

LUTHY et al. v. REAM et al.

(Supreme Court of Illinois, 1915. 270 Ill. 170, 110 N. E. 373, Ann. Cas. 1917B, 368.)

DUNN, J. Ferd. Luthy, Daniel W. Voorhees, George T. Page, and Thomas Cahill filed a bill in chancery in the circuit court of Peoria county against Henry Ream, Benjamin D. Brewster, William Holly, the Peru Plow & Wheel Company (a corporation), and other persons, stockholders in the corporation, the object of which was to procure the cancellation of a certain voting trust agreement of stockholders of the corporation as to Thomas Cahill, the setting aside of the action of the directors of the corporation fixing salaries of Henry Ream, Benjamin D. Brewster, and William Holly, as president, vice president, and treasurer, respectively, of the corporation, a return of the amount of the salaries received by them, and the issue of a certificate of 70 shares of the capital stock of the corporation to Thomas Cahill. Answers were filed, and after a hearing the court rendered a decree granting the relief prayed for. Upon an appeal by some of the defendants, the Appellate Court for the Second District reversed the decree, except so far as it held the fixing of the salaries of the officers illegal, and required the amount received by them to be refunded. Complainants have appealed from this judgment; the court having certified that the case involves questions of law of such importance that it should be passed upon by the Supreme Court.

The Peru Plow & Wheel Company is a corporation organized under the laws of Illinois, having a capital stock of $400,000, engaged in the manufacture of plows, metal wheels, and farm implements. The complainants are the owners of 2,027 of the 4,000 shares of its stock; Thomas Cahill being the owner of 70 shares purchased in November, 1912. In September, 1912, 41 of the stockholders, owning 2,001 shares of the stock, entered into the trust agreement in controversy. After reciting that the stockholders deemed it to their interest that all of their stock should be voted as a unit upon all questions affecting the business and management of the company, and that Henry Ream had consented to hold and vote such stock on behalf of the stockholders, the agreement provided: * * *

"(1) The said trustee shall hold, control, and vote said stock as if he was the owner of all of said stock.

"(2) Said trustee shall determine how said stock shall be voted upon any question, at any time and every meeting of the stockholders.

"(3) All of said stock so held by the trustees shall be voted as a unit. * * *

"(9) The rights, duties, and powers hereby conferred upon said trustee shall expire and wholly cease on the 1st day of September, A. D. 1922, and the trustee shall at said time assign and transfer to the persons who then hold trustee's certificates evidencing their ownership of shares of stock the amount of stock to which each holder thereof is shown by his trustee's certificate to be entitled. * * *"

The certificates of stock of the stockholders signing the agreement were canceled, and two certificates, for 2,001 shares in the aggregate, were issued to Ream as trustee. He issued to each stockholder a trus-

tee's certificate stating that the stockholder to whom it was issued was the owner of a certain number of shares of the capital stock of the Peru Plow & Wheel Company held by him as trustee, subject and pursuant to the terms, conditions, and stipulations of a certain agreement between him, as trustee, and certain stockholders of the said Peru Plow & Wheel Company joining in the said agreement of date September 4, 1912, a copy of which agreement was on file with the trustee, and reference was had to it as to all the terms, conditions, and requirements of the trust. The certificates were stated to be transferable only on the books of the trustee by the owner thereof in person or by attorney, upon its surrender properly indorsed, when like new certificates would be issued to the proper owner of record. On the back of each certificate was a form for its assignment.

Among the stockholders signing the agreement were Kate Cahill, John D. Cahill, and Cornelius J. Cahill, who together owned 70 shares of the stock. They sold their shares to the appellant Thomas Cahill, and assigned to him their trust certificate. He presented the certificate so assigned to him to Henry Ream, who was president of the corporation, and demanded that a certificate should be issued to him by the president and secretary of the corporation for 70 shares of its capital stock; but the said Henry Ream refused to issue such certificate, and stated that said 70 shares of stock were included in the trust agreement, and that he could not and would not issue a certificate for them to Thomas Cahill for that reason. Thomas Cahill thereupon notified him that as the owner of 70 shares he withdrew the same from the said trust agreement and would no longer be bound thereby, and demanded that a certificate be issued to him free from any restraint, obligation, or condition under said trust agreement; but said Henry Ream refused to issue such certificate. * * *

The effect of the agreement was to place the legal title of the majority of the stock in Henry Ream, who was given the power to vote the stock for 10 years upon all questions and at every meeting of the stockholders according to his own discretion, uncontrolled by the stockholders in any way. He then owned 37 shares of stock, and thus the entire control of the corporation was conferred upon the owner of less than 1 per cent. of the stock, with no power in the owners of the remaining 99 per cent. to interfere in any way. We have held that it is legitimate for the owners of a majority of the stock of a corporation to combine for the purpose of controlling the corporation. * * * Venner v. Chicago City Railway Co., 258 Ill. 523, 101 N. E. 949. In this case, however, the agreement goes much farther than any case which has heretofore arisen in this court. The voting power of the stock is absolutely separated from its ownership for a term of years, so that the real owners of the property are during that time entirely divested of its management and control, or of any participation therein.

Our law contemplates that corporations shall be controlled by a majority of the stockholders, acting through directors elected by them in person or by proxy, and it has been held that a by-law of a corporation which authorizes bondholders to vote for directors at stockholders' meetings is in violation of both the constitutional and statutory provisions requiring directors to be elected by a majority of the shares of stock of the corporation. * * * It was said in Shepaug Voting Trust Cases, 60 Conn. 579, 24 Atl. 41: "It is the policy of our law that an untrammeled power to vote shall be incident to the ownership

of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs, saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation: and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will, in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent, who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow stockholder to so use such power and means as the law and his ownership of stock give him that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers, and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as is possible. This, I take it, is the duty that one stockholder in a corporation owes to his fellow stockholder; and he cannot be allowed to disburden himself of it in this way. He may shirk it, perhaps, by refusing to attend stockholders' meetings, or by declining to vote when called upon; but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in fiduciary relation to his fellow stockholders."

"The theory upon which the capital of numerous persons is associated in various proportions in the shape of a trading corporation, to be managed by a committee of the stockholders, is that such committee shall truly represent and be subject to the will of the majority in interest of the stockholders. The security of the small stockholders is found in the natural disposition of each stockholder to promote the best interests of all, in order to promote his individual interests. A member of an ordinary partnership has an additional security in the personal character of each of his partners, and may decline to be associated with any whom he does not know and approve. But a stockholder in a corporation cannot control the personnel of his associates and must rely upon their self-interest alone. Upon the foundation of the natural disposition of persons to promote their own interests rests the rule, established in this state in the famous case of Taylor v. Griswold, 14 N. J. Law, 222 [27 Am. Dec. 33], that a trading corporation could not, wihout special legislative authority, make a by-law authorizing a stockholder to vote by proxy. * * *" Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847.

While the pooling of stock for the purpose of electing directors and officers and controlling the management and business of the corpora-

tion is not necessarily illegal, an agreement the purpose and effect of which are to permit the affairs of the corporation to be managed by the determination of persons other than its stockholders or by a minority of its own stockholders is invalid. * * * The principle to be deduced from the cases is that the holders of the majority of the shares of stock in a corporation may control its management, and every person who becomes an owner of stock has a right to believe that the corporation will, and to insist that it shall, be managed by the majority; that the power to vote is inherenty attached to and inseparable from the real ownership of each share, and can only be delegated by proxy, with power of revocation; that each stockholder must be free to cast his vote, whether by himself or by proxy, for the best interest of the corporation; and that each stockholder has the right to demand that every other stockholder, if he desires to do so, shall have the right to exercise at each annual meeting his own judgment as to the best interest of all the stockholders, untrammeled by dictation, and unfettered by the obligation of any contract.

There is no such thing as an irrevocable proxy to vote stock not coupled with any interest in the stock itself other than the right to vote it. A proxy, though stated to be irrevocable, may be revoked at any time. * * * This contract gave to Henry Ream alone the power for ten years to elect three of the five directors of the corporation and to formulate and determine its policy, unrestrained and uninfluenced by all the other stockholders or any of them. The surrender of their duties by the stockholders is complete, and the majority have no power to direct the trustee; for he alone is to determine how the stock shall be voted, and to vote it, upon any question, at any time and every meeting of the stockholders. He no longer represents the majority of the stock, for 70 shares have been sold to the complainant Cahill, who has the entire beneficial interest therein. Other shares may be sold, so that before the expiration of the trust the trustee, who originally represented a majority of the stock, but now represents only a minority, may represent only his own 37 shares, and yet, if the trust agreement is to be enforced, have absolute management and control of the corporation.

In Smith v. San Francisco & North Pacific Railroad Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119, it was held than an agreement by several purchasers of stock in a corporation to vote it as a unit for five years, in accordance with the decision of the majority, is binding upon the parties and irrevocable. In Carnegie Trust Co. v. Security Life Ins. Co. of America, 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, the Supreme Court of Virginia held that an agreement among stockholders to place their stock in the hands of trustees for 25 years, to enable the trustees to manage the corporation, constitutes a valid trust. These cases are inconsistent with the views which we have expressed and the cases cited in support of them, but in our judgment the latter cases state the true rule.

Although Thomas Cahill purchased his stock with notice of the agreement, that agreement was not binding upon him or his vendors if he or they wished to withdraw from it, and upon his demand for a certificate of stock he was entitled to receive it. The other complainants have a right, also, as stockholders, to prevent the trustee from voting stock which he has no right to vote.

The Appellate Court erred in reversing the decree of the circuit court in part, and its judgment will be reversed, and the decree of the circuit court will be affirmed.

Judgment reversed.

BOWDITCH et al. v. JACKSON CO. et al.

(Supreme Court of New Hampshire, 1912. 76 N. H. 351, 82 Atl. 1015, L. R. A. 1917A, 1174, Ann. Cas. 1913A, 366.)

PEASLEE, J. * * * The legality of the votes passed at the meeting of the Jackson stockholders is questioned on account of the nature of the trust agreement under which the majority of the stock was then held, and because the trustees voted more than one-eighth of the entire stock. While the decisions upon the first question are not entirely in accord, yet substantially all of them recognize that an agreement to vote stock in a certain way may be valid. The rule is well stated in the case chiefly relied upon by the plaintiffs. "If the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to direct the trustee, and all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their costockholders, must be dependent upon the purposes for which the trust was created and the powers that were conferred. If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to intrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves, by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan to the exclusion of other stockholders who do not come into the combination, then in my judgment such combination and the acts done to effectuate it are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation." Kreissl v. Distilling Co., 61 N. J. Eq. 5, 14, 47 Atl. 471, 475.

An examination of the cases generally will disclose that in nearly all of them where the agreement was held invalid there were stipulations or covenants which infringed this rule. The propositions that "it is as legitimate for a majority of stockholders to combine as for other people," and that the combination is unlawful only if "the gain was to be at the expense of the corporation, or in some way was to work a wrong to the other stockholders" (Brightman v. Bates, 175 Mass. 105, 110, 55 N. E. 809, 810), are generally recognized as sound law. * * * Even the cases holding the particular agreements then under consideration to be invalid usually recognize the proposition that there may be a valid voting trust. Shepaug Voting Trust Cases, 60 Conn. 579, 24 Atl. 32. * * *

Judged by these standards, the agreement in the present case seems unobjectionable. The trust is to terminate at the end of a year in any event. It contemplates the winding up of the corporation within that time, and sets out in detail the plan of sale and dissolution for which the trustees were authorized to vote. It further provides that the trustees shall not vote so as to substantially change the company's business, except as specifically authorized. There is nothing here which seeks to work a wrong to the corporation, to confer a benefit upon those joining in the trust, or to turn the management of the stockholders' affairs over to strangers. Judged by the strictest rule of a stockholder's right to the free and honest judgment of his costockholders, the agreement here made by more than three-fourths of the stockholders is a legitimate arrangement for carrying out their purpose to close out the affairs of the company.

The argument that each stockholder is entitled to the presence of his associates to the end that they shall reason and be reasoned with is not of weight here. The rule of the common law was that no member of a corporation could vote by proxy. * * * But the charter of this company introduces a different doctrine. * * * It is not necessary to now consider the effect of the act of 1842, forbidding all proxy voting. * * * The act of 1842 was repealed four years later, and the principle of general proxy voting was adopted. * * * The limitation of the right, incorporated in the revision of 1867 was removed in 1901; so that now a proxy can represent more than one stockholder, and one stockholder can be proxy for another. * * * Whether the charter or the general law applies here, the rule is that one or many stockholders may be represented at the stockholders' meeting by an agent. * * *

Case discharged. All concurred.

SECTION 7.—RIGHTS OF THE MINORITY

BOWDITCH et al. v. JACKSON CO. et al.

(Supreme Court of New Hampshire, 1912. 76 N. H. 351, 82 Atl. 1014, L. R. A. 1917A, 1174, Ann. Cas. 1913A, 366.)

PEASLEE, J. The main question in this case is whether a going business corporation can be closed out and dissolved upon the motion of the majority of its stockholders and against the protest of the minority. The question is a new one in this state, although it has frequently been considered (both in cases where it was necessarily involved and those where it was not) by the courts in other states. The decisions and dicta are conflicting and are quite evenly divided. * * * The only case in this state having a direct bearing upon the subject is Dow v. Railroad, 67 N. H. 1, 36 Atl. 510. In that case there was an attempt to change the business of the corporation; and while any expression of opinion on the question here involved was carefully avoided, yet the opinion of Chief Justice Doe contains an exhaustive and illuminating discussion of the nature of a corporation and the source of the power of the majority to act for it. The majority have the

agency which in a partnership each partner possesses. Do they, in addition thereto, have the power each partner has to compel a dissolution? The corporation being an outgrowth of the law of partnership, it would be reasonable to expect that so important an incident to the joint undertaking as the right to terminate the enterprise would not be lost by the change in the form of the association.

The fiction that the corporation is a being independent of those who are associated as its stockholders is not favored in this state. * * * Decisions based upon the idea that there is something sacred in the life of an ordinary business corporation, so that action looking to its extermination is in the nature of a fraud upon the state, * * * are not authority in a jurisdiction where a different view of the nature of the association is entertained. The question is not one of power granted by the state. It relates solely to the agreement of individuals with each other.

Did the stockholders who united to form the Jackson Company in 1830 understand that the business must be continued perpetually, provided a profit could be made and some stockholder objected to closing it out, or did they understand that the enterprise could be brought to an end at such time as the majority believed to be for the best interest of all concerned? The latter seems the more reasonable and probable conclusion.

Much has been said in the cases upholding the right of the minority to prevent a sale and dissolution, concerning the protection of their rights and saving their property from pillage by the majority. Just how the majority, which sells its own property at the same time and for the same price it sells that of the minority, gains an advantage over the latter is not readily apparent. Cases might be supposed, and undoubtedly occur, where the majority do obtain some undue advantage from the sale. No one contends that such a sale is valid. But because the power of the majority may be abused, it does not follow that it does not exist. If such a conclusion were to be drawn, minorities would always rule. The plain common sense of the matter is that this is a business venture, to be carried on as such so long as it appears to be good business judgment to do so. When the time comes that a majority in interest believe that their affairs should be wound up and the proceeds distributed, the rational rule is that this should be done. And since the question here is of a business nature, and the limitations of the power of the majority are fixed by the understanding of the business men who made the original compact, business considerations have more than ordinary weight in determining what the contract was.

It is admitted on all sides that the majority may sell out if the corporation is insolvent. And when brought face to face with the question whether they must wait until the stockholders' investment is all lost before taking action, the conclusion has been that if insolvency is imminent action may be taken. And the same is true if it is imprudent to continue. * * * One reason only is given why the power exists in these cases: It is reasonable to suppose that such authority was contemplated, because this is what sound business judgment dictates should be done. The difference between these cases and the present one is of degree only, not of kind. The majority are not obliged to wait until all possibility that the corporation can go on longer has been negatived. Some of the cases have stated that such is the rule; but the result of

this would be to compel the majority to continue a losing business until their investment was entirely wiped out. To avoid so absurd a result, it has been said they could close out when insolvency seemed to be approaching. And so various forms of expression have been used to indicate the time when the majority could take action.

All these are fairly summed up in the statement that the majority may close out the affairs of the company when it can no longer make a reasonable profit. It is believed no court would now hold that the rights of the minority were more extensive than this rule implies.

If the majority may sell to prevent greater losses, why may they not also sell to make greater gains? * * * In a limited sense, the majority act as trustees for all the stockholders. When their acts are impugned by the minority, it is not the function of the court to set its judgment against theirs in settling the wisdom or policy of proposed action. By the contract of association, all questions of this nature were committed to the majority for final decision. * * *

The whole difficulty is probably an outgrowth of the early idea that a corporation possessed peculiar attributes of longevity and sanctity. But as pointed out in Dow v. Railroad, 67 N. H. 1, 8, 26, 36 Atl. 510, no such theory prevails here. The business corporation is brought into being solely for the purpose of more conveniently carrying out the joint undertaking of the part owners. The line of distinction between this form of association and certain partnerships is but a shadowy one. It is not reasonable or natural to expect that when this boundary is passed great changes in the relation of the parties will result. A more radical change than that here claimed could not easily be imagined. In the partnership, one partner may compel a winding up from mere whim. In the absence of an agreement to go on for a fixed period of time, nothing short of a fraudulent purpose will prevent his taking valid action to close out the firm at will. * * * By the rule here contended for, the change of the association into a corporation has carried the rule to the opposite extreme. The authority to wind up is lost, and the owner of the smallest share may prevent such action, though it is desired by all his associates. The practical reasons against such a proposition are apparent. The probabilities are opposed to the idea that the associates intended to enter into such a compact. * * *

The action taken by a majority of the stockholders of the Jackson Company whereby, as a part of the process of winding up the company, they voted to sell all its property to the Nashua Company, was within the power impliedly given to them when the company was formed. The charges that there was fraud in the sale and that it was for an inadequate price have been disproved.

Case discharged. All concurred.

CHICAGO HANSOM CAB CO. et. al. v. YERKES.

(Supreme Court of Illinois, 1892. 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315.)

Bill by Charles T. Yerkes against the Chicago Hansom Cab Company, Warren Springer, Rose Abernethy, and others, to set aside a conveyance, and for an injunction and the appointment of a receiver. Complainant filed a supplemental bill to wind up the affairs of the

cab company. Complainant obtained a decree, and Springer and Abernethy appeal.

The secretary and one of the stockholders of a corporation whose business was unprofitable secretly agreed to purchase all the stock and the property of the corporation. Accordingly they purchased, in the names of third parties, all the stock, except that of complainant, who held a little more than one-third of the stock. A resolution was passed, against complainant's vote, authorizing the president and secretary to sell all the corporate property, which they accordingly sold to a nominal purchaser for the benefit of the secretary and said stockholder.

SCHOLFIELD, J. * * * From the foregoing statement it is clear that when Needham entered into the contract with Springer the former was a director in the Chicago Hansom Cab Company, and its secretary. As director, he owed the duty to the company to preserve its property and protect the company against loss, so far as that could be done by the exercise of ordinary care and diligence; and he could not himself become the purchaser of any property of the corporation which it was his duty to sell. * * * The contract between Needham and Springer requires the purchase of all the property of the cab company, and the subsequent transfer of the personal property to Needham. It is an entire and indivisible contract, and Needham is therefore directly interested in every part of the claimed contract of sale by the company to Springer. But it is claimed the authority to make this sale is derived from a vote of a majority of the stockholders. * * *

The question is therefore presented whether, after it is determined to wind up a corporation and settle its business, it is competent for a holder of a majority of its shares of stock to make or ratify a sale of all its property to himself, against the protest of a holder of a minority of its shares, and in disregard of his rights. That a holder of a majority of the shares of stock in a corporation may, where the law authorizes a vote of stockholders, so vote upon any matter of policy in the conduct of the corporation as to best subserve his own interests, and that this may relate to the ceasing to do corporate business, the winding up of its affairs, and the sale of its property, we do not question. But the authorities cited by counsel for appellant * * * concede that even in such cases the action resulting from such vote must not be so detrimental to the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of, and in opposition to, the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority. In the cases cited, and, so far as we are informed, in all other cases where the majority of the stockholders may by their votes lawfully affect the interests of the minority of the stockholders, the interests of the minority are, theoretically at least, protected, either by directors or trustees of the corporation, who it will not be presumed will betray their trust by acting in the interest of one stockholder to the prejudice of another, or by reason of the transaction being such as is presumed to be alike beneficial to all stockholders, as where the corporate property is in good faith appropriated to the payment of the corporate debts, or is sold at a fair sale; and no case cited or within our knowledge goes to the extent of holding that a majority of the

stockholders may take the property of the corporation, and retain it, if the minority shall elect to deny its right to acquire title to it in that way.

Undoubtedly, if in such case the minority of the stockholders shall elect to treat the majority as purchasers, they may do so, and require them to account for the value of the property. Here Springer, who, through Pullman, Himrod, Hagerty, Cotton, and Cutler, assumes to ratify this sale, is the same Springer who, with Needham, is the purchaser of the property. In other words, he assumes to ratify a sale to himself. But a man cannot be both buyer and seller in the same transaction; and, where he assumes to be such, his action simply amounts to a taking of the property, and would be quite as valid without as with the circumlocution of the form of a sale through dummies. The right of a majority of the stockholders to sell the corporate property can by no reasonable construction be held to involve the right to seize the property to their own use. A sale conducted, as it must be, fairly and openly, cannot, theoretically, operate to the prejudice of one stockholder more than to another. There is in such case no presumptive antagonism between the different stockholders. But where, under pretense of a sale to themselves, the majority seize the property, and undertake to invest themselves with title, their interests are wholly hostile; for the gain of the one is the loss of the other. It is a general rule administered by courts of equity that where one person has the power of disposition of the property of another, without the consent of that other, he shall not be allowed to become personally interested in it himself; and this without regard to any question of fairness in the immediate transaction, for he shall not be allowed to occupy a position where self-interest would tempt a betrayal of duty. This rule is plainly applicable here, and it has been so applied in adjudicated cases. It is said in Cook, Stocks, § 656: "It is illegal and fraudulent for the majority of the stockholders to purchase the property of the company at a sale authorized by themselves. Such a purchase by the majority may be set aside in the same way and to the same extent that a purchase of corporate property by a director may be set aside." * * *

It appears from the evidence that the directors of the corporation were in the interest and under the control of Springer, so that a demand upon the corporation to bring suit against him would have been unavailing; and the suit is therefore properly brought by Yerkes. * * *

We are unable to perceive any sufficient reason for reversing the decree below. It is therefore affirmed.

SECTION 8.—RIGHT TO MAINTAIN ACTIONS UPON CORPORATE CAUSES OF ACTION

KESSLER et al. v. ENSLEY CO. et al.

(United States Circuit Court, N. D. Alabama, S. D., 1903. 123 Fed. 546.)

All of the property of a land company which owned a town site and surrounding lands was sold under two judgments against it for a price of about $16,000, but leaving the company the right to redeem

within two years. The company owed in all about $120,000, and by a subsequent arrangement, assented to by its stockholders, the property, together with the right of redemption, was vested in trustees with power to make sales, to pay all debts, and to hold or pay over the surplus, if any, to the company. Four years afterward certain stockholders applied to two successive boards of directors, and also to a meeting of the stockholders, asking that proceedings be instituted to set aside the conveyances and to recover the property. Such action having been refused by the directors and also by the stockholders by a very large majority vote, minority stockholders brought suit for such relief in behalf of the corporation, alleging that the sale under the judgments was brought about through the fraud of a majority of the directors, who controlled the judgments, and who formed another company which purchased certain of the lands from the trustees; that by concealing such facts they obtained the approval of all such transactions by the stockholders. It further appeared from the bill that at the time complainants requested the corporation to bring the suit such directors were out of office, and did not own or control a majority of the stock, and it was not charged that they then exercised any influence over the other stockholders. On demurrer to bill.

JONES, District Judge. This case has been ably and elaborately argued. It is unnecessary, however, to decide all the interesting questions discussed. The right to maintain the bill depends upon a few controlling issues, which will now be considered.

Equity permits a stockholder to maintain a bill to enforce the rights of his corporation, solely to prevent a failure of justice. * * * To entitle the stockholder to relief, it is not enough that the governing body has refused to act, or that the refusal evinces mistaken judgment. The stockholder who seeks redress as to any corporate act which the charter permits the corporation to perform must show either that the governing body is so disorganized that it cannot act; or that it is interested adversely to the corporation, or under the dominion of those who are; or will be required to disapprove its own breaches of trust, as distinguished from mistakes or errors of judgment; or that its refusal will endanger the rights and franchises of the corporation, or result in irreparable loss and injury; or that its attitude, under the situation presented by the bill, discloses negligence or indifference to the interest of the corporation, in such degree as amounts to the practical equivalent of bad faith; or else bring forward other pertinent facts which challenge and impeach the fitness of the governing body to properly decide the question at issue. Even then, if the case will admit of delay, the complaining stockholder must appeal from the decision of the directors to the body of the stockholders at large, and the facts averred in the bill must plainly put them in the wrong, before the court will feel authorized to entertain the complaint of the stockholder. Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827. * * *

It not being charged in this case that either of the two boards, or the body of the stockholders, who declined to bring or authorize the bringing of this suit, were themselves guilty participants in any of the frauds complained of, or in any wise interested adversely to the corporation, or under the dominion or control of those who were instrumental in bringing about the sales sought to be avoided, or that

they acted otherwise than in the exercise of honest judgment as to the interest of the Land Company, their decision not to litigate is binding upon the court, unless that refusal will result in enforcing some ultra vires or illegal act of the corporation, or evinces such recklessness and indifference to the rights of the corporation as amounts to bad faith or fraud, or will needlessly work the practical destruction of the corporate enterprise. To properly determine these questions the court must look to the status and condition of affairs as they reasonably appeared to the stockholders, under the facts set forth in the bill, at the time of entering into the transactions now sought to be set aside, and then weigh their decision not to disturb them in the light of existing conditions at the time that decision was made. * * *

Making due allowance for the charges on "information and belief," and for facts so stated as to amount to no more than the opinion of the pleader, the bill charges actual fraud of a grave nature, not merely constructive fraud, upon all the defendants except Barker. On the facts stated, a court of equity would unquestionably have set aside the sale on seasonable application. Nevertheless, under decisions which are controlling here, the transactions complained of were not void as to the corporation, but merely voidable. * * * The title conveyed by the proceedings complained of was not bad until the Land Company made it good, but remained good until it was made bad. It was a defeasible title which would ripen into a good title if not seasonably avoided. The conveyances were not ultra vires the corporation. The Land Company was formed for the purpose of selling this very land, and the sales were made in the exercise of the corporate power of providing for the debts of the company. The power must reside somewhere in every corporation, when it has been defrauded, whether by its own officers or third persons, to determine what course it will pursue with reference to the fraud. The fact that the corporation has been defrauded does not strip it of power to elect to stand upon the transaction as made. Every wronged person, who is sui juris, has that right against the wrongdoer. If the corporate tribunal exercises its judgment upon the question honestly, and is not adversely interested, or under the control of other influences which sway it from a fair and impartial judgment, from the standpoint of the interest of the corporation itself, a decision not to disturb the fraud, unless it evinces such recklessness and negligence as amounts to bad faith, is not a fraud upon the objecting stockholders, though it results in a refusal to redress a fraud upon the corporation. The duty which the corporation, or its governing body, owes its stockholders in such cases, is to fairly and impartially consider the question of redressing the wrong, and not to commit a corporate fraud upon its stockholders by refusing to set aside the fraud upon the corporation from selfish interest or other bad motives, or from such negligence and indifference as is equivalent to bad faith, and amounts to a clear breach of trust, as distinguished from mere bad judgment.

Complainants cite Mason v. Harris, L. R. 11 Chan. Div. 97, in support of their contention that the grievances complained of were either incapable of ratification, or that the refusal to redress them, under the circumstances here disclosed, amounts to a fraud upon the minority. They quote the following paragraph from the opinion in

that case: "Whenever a fraud is committed by persons who command the majority vote, the minority can sue. The reason is plain, as, unless such suit were allowed, it would put it in the power of the majority to defraud the minority with impunity. If the majority were to make a fraudulent sale and put the money in their own pockets, would it be reasonable to say that the majority could affirm the sale?" The court was there speaking of the injustice of compelling a stockholder to abide the judgment of those who were interested in upholding the fraud. It was referring to the fitness of the governing body at the time the individual stockholder seeks redress. Although the defendants here had "command of the majority vote" at the time of the grievance complained of, by reason of the deceit charged in the bill, whereby the majority was overreached and deceived, just as the complaining stockholders charge they were, the fact that the majority had been thus deceived into voting for the proposition does not disqualify it from passing on the matter when discovery is made. It is not to be driven from the judgment seat merely because it has been the victim of fraud. It must be shown to have some adverse interest, or to be under ulterior influences which prevent it from fairly determining what is to the best interest of the corporation, under all the circumstances, in view of the nature and result of the fraud practiced upon it.

To bring this case within the rule of Mason's Case, supra, the defendants must "command the majority vote" at the time redress is sought. Other cases cited in behalf of complainants on this point relate either to ultra vires or illegal acts of the corporation, as where the governing body to which application for redress must be made has itself either defrauded the corporation, or is under the control of those who overreached it, or is otherwise shown to be an unfit tribunal to determine the policy of the corporation; or, where the act complained of not only affects the rights of the corporation against the person sought to be sued, but also involves some wrong by the corporation to separate and individual rights of the stockholders against their corporation. The principle which forbids the majority of the corporation to profit at the expense of the minority, by condoning a fraud against their corporation, is wholesome, and not in any wise questioned. We have no such case here. The great body of the stockholders who agreed to the transactions complained of in the first instance, and afterwards refused to set them aside, are shown to have been ignorant of the fraud at the time it was committed, and are not shown then, or at any subsequent period, to have been influenced by any interest adverse to the corporation, or by any motive which unfits them to pass upon the matter. Their vote refusing to disturb the transaction could not put any fruits of the wrong in their pockets. They gained nothing which the minority lost. They applied the identical measure of justice to themselves and the dissenting stockholders. As they constituted almost the entire body of stockholders, almost the entire burden of any loss entailed by their decision would fall upon them. On the face of the bill, there was unselfish determination.

The recovery sought by this bill is for the benefit of the corporation. The bill is filed solely in right of the corporation, and does not seek to enforce any separate or individual right of the stockholders. The corporation is only a nominal defendant. It is the real plaintiff.

It is clear upon principle, in such a case, that the stockholders cannot maintain the suit, if the corporation itself is not in position to do so. It is an elementary principle of law that one claiming through and in subordination to a party estopped is himself estopped. The cases which permit a recovery in behalf of the corporation, in avoidance of transactions which it is estopped to rescind, because it has consummated them and retained the benefit, are those in which the corporation has entered into some ultra vires or illegal transaction, done something involving infraction of some direct right of the shareholder against the corporation—as where, without the authority of law, it subordinates the exercise of its corporate powers and control of its property to the dominion of a rival, or embarks in enterprises not authorized by the charter, or takes some action impairing the rights of the stockholders as among themselves, as by unlawfully issuing preferred stock, and the like. In such cases the illegal transaction is a distinct wrong of the corporation, against the rights of the stockholders separately and individually. It gives each stockholder a right to restrain its action and to compel it to retrace its steps. In such cases, justice can generally be done only by returning the corporation to its original status, and restoring the stockholder's rightful legal status towards it, by ripping up the whole transaction, although the corporation itself, as such, may be estopped to complain. The stockholders in this case are seeking to enforce no such right. They demand the enforcement of a right which belongs to the corporation solely, as such. The sales complained of are not ultra vires the corporation, and were not forbidden by statute. The grievances relate to transactions wholly intra vires. The corporation has deliberately refused to disturb them. This solemn corporate decision puts an end to any right of the dissenting stockholder to disaffirm or to compel the corporation to avoid the transaction.

An analysis of the premises of the argument in support of the contrary conclusion shows that it is unsound. The transactions here complained of not being void, but merely voidable, who can avoid them? Certainly, only the parties to the transaction, no rights of creditors being involved. There are only two parties—the corporation and the fraudulent grantees. The latter cannot set up their own misconduct to avoid the transaction. The former can act only by its governing body or by the stockholders collectively. There is but one subject-matter, and that is the sale and purchase of the land. The transactions must either be good as to the Land Company or bad as to the Land Company. They must either be avoided in toto or must stand in toto. If one stockholder, acting for himself, can affirm, another, acting for himself, can disaffirm. There is but one thing to affirm, and it must either be binding upon all the stockholders or not binding on any of them. The power to affirm or to disaffirm in a case of this kind is not an individual prerogative, but the right and power of the whole body of stockholders collectively. This collective body must act and decide according to the vote of the majority. "The rule is that the majority governs, and every stockholder contracts that such shall be the rule." Morawetz on Corporations, § 474. When, therefore, the majority, in such a case as this, refuses to disaffirm, all right of the majority to disaffirm is gone. There can be but one disaffirmance, and that must be the disaffirmance of the

governing body of the corporation. A majority of the stockholders, in a case of this kind, represent the ultimate corporate sovereignty, within the limits of its charter, and can bind the minority by its refusal to disaffirm as to a matter intra vires. The only remedy of the minority is to appeal to a court of equity to enforce the rights of the corporation, if the majority has acted fraudulently, or in bad faith to the minority, in refusing to redress a fraud upon the corporation. * * * That charge is not made here. * * *

It may or may not be, as argued for complainants, that the Land Company, though not now in a position which entitles it to the aid of a court of equity to compel a reconveyance of the land or to disturb the purchaser's possession, is nevertheless entitled to personal recourse against the defendants "for the damage and loss which the Ensley Land Company and stockholders have suffered by reason of the transactions complained of," etc. Such relief, however, is merely incidental to the equitable cause of action, and when that fails the bill should not be retained to administer relief which is merely incidental, and ordinarily a matter purely of legal cognizance.

The demurrers are sustained, and the cost decreed against complainants. If the complainants desire to amend, they may apply for leave.

SECTION 9.—RIGHTS WITH RESPECT TO DECLARED DIVIDENDS AND SURPLUS

SEARLES v. GEBBIE et al.

(Supreme Court of New York, Appellate Division, 1906. 115 App. Div. 778, 101 N. Y. Supp. 199.)

SPRING, J. The defendant Mohawk Condensed Milk Company is a domestic corporation with a paid-up capital stock of $60,000, and the plaintiff is a stockholder thereof, owning stock of the par value of $1,000, and until January, 1905, was one of the directors of the corporation. The other defendants are its present officers and directors.

A brief summary of the salient allegations of the complaint is necessary for a comprehension of the questions at issue on this appeal. On the 14th day of July, 1902, the directors of said corporation at a regular meeting declared a dividend of 50 per cent. on its capital stock, payable on the 1st of August thereafter. At the time of the declaration of the dividend there was on hand a surplus of net earnings of more than $100,000, and in February, 1905, these earnings aggregated $108,000. The plaintiff has not been paid his dividend of $500 although he has demanded it and he seeks to recover that sum of the corporation in this action. The complaint further alleges: That in 1905 the stockholders by resolution voted to increase the capital stock of said company to $240,000, and the directors were ordered to take the legal proceedings essential to make effective this increase. The directors thereupon proceeded to provide for such increase by allowing those taking the new stock to do so at par, thus ignoring the "more than twice par" value of the present stock by reason of the existing surplus and which had been earned by the present capital. The directors in their plan of increase expect to allow each of the present stockholders to subscribe

for three times his present holding of stock, paying therefor in cash, and the plaintiff was so advised and permitted to so subscribe for the $3,000 of stock, which would represent his aliquot share of the increased capital. That the defendant directors have each subscribed for their shares of said increase and they control said corporation and own a majority of its stock. In January, 1905, the plaintiff was dropped from the directorship and there were other changes in that body, and the plaintiff charges that the election of new officers "was pursuant to a fraudulent agreement or understanding" among these majority stockholders to refuse to pay the said dividend, "and thereby to reappropriate said dividend to the company, and to share in said dividends and receive the benefits thereof, under their new subscription to increase the capital stock of the said company, their said new subscriptions being at par, whereas the old stock of said company is fully worth considerable more than $200 on a share." That the plaintiff has "protested" against this proposed issue of new stock, and has requested the corporation to commence an action in equity to restrain its issue and also to require the corporation to pay the dividend declared, and upon refusal this action was commenced on his own behalf as a minority stockholder, and for the benefit of all other stockholders similarly situated who desire to participate therein. The relief asked for is the payment of the dividend to the plaintiff and to restrain the proposed increase of the capital stock. * * *

There is a clean-cut cause of action at law set forth against the corporation. Upon the declaration of the dividend the sum of $500 became due the plaintiff from the corporation. It became the debtor of the plaintiff. * * * The directors were not personally chargeable with the payment of this dividend unless they converted it to their own use, or by some act changed their relation to it. At any time after the date fixed for the payment of the dividend the plaintiff could have maintained an action at law against the corporation to recover this sum. Nor was a suit in equity proper for an adequate remedy at law existed, and the directors would not be proper parties defendant in an action to recover this sum. They are not the debtor, but the corporation is the party liable. Now, where the amount of the dividend has been segregated or set apart into a distinct fund for the purpose of paying the dividend and is within the dominion of the directors, who refuse to use it for the purpose intended, they become trustees of the fund, and an action in equity may be maintained to reach the fund and to charge the directors with official misconduct. * * * The complaint contains every allegation essential to constitute a perfect cause of action to recover this dividend of the corporation, and the facts alleged are supplemented in the demand for judgment that the corporation be required to pay the dividend with interest. * * *

DODGE et al. v. FORD MOTOR CO. et al.

(Supreme Court of Michigan, 1919. 204 Mich. 459, 170 N. W. 668, 3 A. L. R. 413.)

Action by John F. Dodge and Horace E. Dodge against the Ford Motor Company and others. Decree for plaintiffs, and defendants appeal.

The Ford Motor Company is a corporation, organized and existing under Act No. 232 of the Public Acts of 1903. The articles of as-

sociation were executed June 16, 1903, and acknowledged on that day by the parties associating. In the articles the capital stock is fixed at the sum of $150,000, with 1,500 shares of the par value of $100 each. It is recited therein that the amount of capital stock subscribed is $100,000, and that said sum is actually paid in, $49,000 in cash and $51,000 in other property. The other property described is: Letters patent, issued and applied for, valued at $40,000; machinery and stock, $10,000; contracts for supplies, $1,000.

The parties in the first instance associating, who signed the articles, included Henry Ford, whose subscription was for 255 shares, John F. Dodge, Horace E. Dodge, the plaintiffs, Horace H. Rackham and James Couzens, who each subscribed for 50 shares, and several other persons. The company began business in the month of June, 1903. In the year 1908, its articles were amended and the capital stock increased from $150,000 to $2,000,000, the number of shares being increased to 20,000; and in the certificate, made in November, 1908, evidencing the increase of capital stock, it was recited: "The amount of capital stock subscribed is the sum of two million ($2,000,000) dollars; the amount of said stock actually paid in at the date thereof is the sum of two million ($2,000,000) dollars, of which one hundred thousand ($100,000) dollars represents the capital stock originally subscribed and paid in, and one million nine hundred thousand ($1,900,000) dollars by surrender to the corporation by all stockholders of their claim to dividends duly declared by the board of directors payable out of surplus."

The business of the company continued to expand. The cars it manufactured met a public demand, and were profitably marketed, so that, in addition to regular quarterly dividends equal to 5 per cent. monthly on the capital stock of $2,000,000, its board of directors declared and the company paid special dividends: December 13, 1911, $1,000,000; May 15, 1912, $2,000,000; July 11, 1912, $2,000,000; June 16, 1913, $10,000,000; May 14, 1914, $2,000,000; June 12, 1914, $2,000,000; July 6, 1914, $2,000,000; July 23, 1914, $2,000,000; August 23, 1914, $3,000,000; May 28, 1915, $10,000,000; October 13, 1915, $5,000,000, a total of $41,000,000 in special dividends. Sales and profits for several years were: Year ending Sept. 30, 1910, 18,664 cars, $4,521,509.51. Year ending Sept. 30, 1911, 34,446 cars, $6,275,031.07. Year ending Sept. 30, 1912, 68,544 cars, $13,057,312.24. Year ending Sept. 30, 1913, 168,304 cars, $25,046,767.43. Year ending Sept. 30, 1914, 248,307 cars, $30,338,454.63. Ten months ending July 31, 1915, 264,351 cars, $24,641,423.17. Three years ending July 31, 1916, 472,350 cars, $59,994,918.01.

The surplus above capital stock was, September 30, 1912, $14,745,095.67, and was increased year by year to $28,124,173.68, $48,827,032.07, $59,135,770.66. July 31, 1916, it was $111,960,907.53. Originally, the car made by the Ford Motor Company sold for more than $900. From time to time, the selling price was lowered and the car itself improved until in the year ending July 31, 1916, it sold for $440. Up to July 31, 1916, it had sold 1,272,986 cars at a profit of $173,895,416.06. As the cars in use multiplied, sales of parts and of repairs increased, so that, in the year ending July 31, 1916, the gross profits from repairs and parts was $3,915,778.94; sales being more than $600,000 for each of the months of May, June, and July. For the year beginning August 1, 1916, the price of the car was reduced $80 to $360.

The following is admitted to be a substantially correct statement of the financial affairs of the company on July 31, 1916:

Assets.

Working—	
Cash on hand and in bank	$ 52,550,771 92
Michigan municipal bonds	1,259,029 01
Accounts receivable	8,292,778 41
Merchandise and supplies	31,895,434 69
Investments—outside	9,200 00
Expense inventories	434,055 19
Plant—	
Land	5,232,156 10
Buildings and fixtures	17,296,293 40
Machinery and power plant	8,896,342 31
Factory equipment	3,868,261 02
Tools	1,690,688 54
Patterns	170,619 77
Patents	64,339 85
Office equipment	431,249 37
Total assets	$132,088,219 58

Liabilities.

Working—	
Accounts payable	$ 7,680,866 17
Contract deposits	1,519,296 40
Accrued pay rolls	847,953 68
Accrued salaries	338,268 86
Accrued expenses	1,175,070 72
Contract rebates	2,199,986 00
Buyers' P. S. rebate	48,099 00
Reserves—	
For fire insurance	57,493 89
For depreciation of plant	4,260,275 33
Total liabilities	$ 18,127,312 05
Surplus	111,960,907 53
Capital stock	2,000,000 00
Total	$132,088,219 58

The following statement gives details of the business of the Ford Motor Company for the fiscal year July 31, 1915, to July 31, 1916:

Number of cars made in year	508,000
Total business done	$206,867,347 46
Profit for the year	59,994,118 01
Cash in hand and in banks	52,550,771 92
Materials on hand	31,895,434 69
Cars in transit and at branch assembling plants (about 2½ weeks' output)	35,650
Cars sold during year	472,350
Employed at home plant	34,489
Employed at home offices	1,023
Total employés in Detroit plant getting $5 a day or more	27,002
Employed at 84 branch plants	14,355
Total employés (all plants)	49,872
Total employés getting $5 a day or more	36,626

From a mere assembling plant, the plant of the Ford Motor Company came to be a manufacturing plant, in which it made many of the parts of the car which in the beginning it had purchased from others. At no time has it been able to meet the demand for its cars or in a large way to enter upon the manufacture of motor trucks.

No special dividend having been paid after October, 1915 (a special dividend of $2,000,000 was declared in November, 1916, before the

filing of the answers), the plaintiffs, who together own 2,000 shares, or one-tenth of the entire capital stock of the Ford Motor Company, on the 2d of November, 1916, filed in the circuit court for the county of Wayne, in chancery, their bill of complaint, which bill was later, upon leave granted, on April, 26, 1917, amended, in which bill they charge that since 1914 they have not been represented on the board of directors of the Ford Motor Company, and that since that time the policy of the board of directors has been dominated and controlled absolutely by Henry Ford, the president of the company, who owns and for several years has owned 58 per cent. of the entire capital stock of the company; that the directors of the company are Henry Ford, David H. Gray, Horace H. Rackham, F. L. Klingensmith, and James Couzens, and the executive officers Henry Ford, president, F. L. Klingensmith, treasurer, and Edsel B. Ford, son of Henry Ford, secretary; that after the filing of the original, and before the filing of the amended, bill, at the annual meeting of the stockholders, David H. Gray retired from the board of directors and Edsel B. Ford was elected and is acting as a director.

Setting up that on the 31st of July, 1916, the end of its last fiscal year, the said Henry Ford gave out for publication a statement of the financial condition of the company (the same as hereinabove set out), that for a number of years a regular dividend, payable quarterly, equal to 5 per cent. monthly upon the authorized capital stock, and the special dividends hereinbefore referred to, had been paid, it is charged that notwithstanding the earnings for the fiscal year ending July 31, 1916, the Ford Motor Company has not since that date declared any special dividends: "And the said Henry Ford, president of the company, has declared it to be the settled policy of the company not to pay in the future any special dividends, but to put back into the business for the future all of the earnings of the company, other than the regular dividend of five per cent. (5%) monthly upon the authorized capital stock of the company—two million dollars ($2,000,000)."

This declaration of the future policy, it is charged in the bill, was published in the public press in the city of Detroit and throughout the United States in substantially the following language: " 'My ambition,' declared Mr. Ford, 'is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.' "

It is charged further that the said Henry Ford stated to plaintiffs personally, in substance, that as all the stockholders had received back in dividends more than they had invested they were not entitled to receive anything additional to the regular dividend of 5 per cent. a month, and that it was not his policy to have larger dividends declared in the future, and that the profits and earnings of the company would be put back into the business for the purpose of extending its operations and increasing the number of its employés, and that, inasmuch as the profits were to be represented by investment in plants and capital investment, the stockholders would have no right to complain. It is charged (paragraph 16) that the said Henry Ford, "dominating and controlling the policy of said company, has declared it to be his purpose—and he has actually engaged in negotiations looking to carrying such purposes into effect—to invest millions of dollars of the company's money in the purchase of iron ore mines in the Northern Peninsula

of Michigan or state of Minnesota; to acquire by purchase or have built ships for the purpose of transporting such ore to smelters to be erected on the River Rouge adjacent to Detroit in the county of Wayne and state of Michigan; and to construct and install steel manufacturing plants to produce steel products to be used in the manufacture of cars at the factory of said company; and by this means to deprive the stockholders of the company of the fair and reasonable returns upon their investment by way of dividends to be declared upon their stockholding interest in said company."

Plaintiffs ask for an injunction to restrain the carrying out of the alleged declared policy of Mr. Ford and the company, for a decree requiring the distribution to stockholders of at least 75 per cent. of the accumulated cash surplus, and for the future that they be required to distribute all of the earnings of the company except such as may be reasonably required for emergency purposes in the conduct of the business.

The cause came on for hearing in open court on the 21st of May, 1917. A large volume of testimony was taken, with the result that a decree was entered December 5, 1917, in and by which it is decreed that within 30 days from the entry thereof the directors of the Ford Motor Company declare a dividend upon all of the shares of stock in an amount equivalent to one-half of, and payable out of, the accumulated cash surplus of said Ford Motor Company, on hand at the close of the fiscal year ending July 31, 1916, less the aggregate amount of the special dividends declared and paid after the filing of the bill and during the year ending July 31, 1917; the amount to be declared being $19,275,385.96.

OSTRANDER, C. J. * * * The case for plaintiffs must rest upon the claim, and the proof in support of it, that the proposed expansion of the business of the corporation, involving the further use of profits as capital, ought to be enjoined because inimical to the best interests of the company and its shareholders, and upon the further claim that in any event the withholding of the special dividend asked for by plaintiffs is arbitrary action of the directors requiring judicial interference.

The rule which will govern courts in deciding these questions is not in dispute. It is, of course, differently phrased by judges and by authors, and, as the phrasing in a particular instance may seem to lean for or against the exercise of the right of judicial interference with the actions of corporate directors, the context, or the facts before the court, must be considered. This court, in Hunter v. Roberts, Throp & Co., 83 Mich. 63, 71, 47 N. W. 131, 134, recognized the rule in the following language: "It is a well-recognized principle of law that the directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation, and to determine its amount. * * * Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders."

In Cook on Corporations (7th Ed.) § 545, it is expressed as follows: "The board of directors declare the dividends, and it is for the direc-

tors, and not the stockholders, to determine whether or not a dividend shall be declared. When, therefore, the directors have exercised this discretion and refused to declare a dividend, there will be no interference by the courts with their decision, unless they are guilty of a willful abuse of their discretionary powers, or of bad faith or of a neglect of duty. It requires a very strong case to induce a court of equity to order the directors to declare a dividend, inasmuch as equity has no jurisdiction, unless fraud or a breach of trust is involved. There have been many attempts to sustain such a suit, yet, although the courts do not disclaim jurisdiction, they have quite uniformly refused to interfere. The discretion of the directors will not be interfered with by the courts, unless there has been bad faith, willful neglect, or abuse of discretion. Accordingly, the directors may, in the fair exercise of their discretion, invest profits to extend and develop the business, and a reasonable use of the profits to provide additional facilities for the business cannot be objected to or enjoined by the stockholders."

In Morawetz on Corporations (2d Ed.) § 447, it is stated: "Profits earned by a corporation may be divided among its shareholders, but it is not a violation of the charter if they are allowed to accumulate and remain invested in the company's business. The managing agents of a corporation are impliedly invested with a discretionary power with regard to the time and manner of distributing its profits. They may apply profits in payment of floating or funded debts, or in development of the company's business; and so long as they do not abuse their discretionary powers, or violate the company's charter, the courts cannot interfere. But it is clear that the agents of a corporation, and even the majority, cannot arbitrarily withhold profits earned by the company, or apply them to any use which is not authorized by the company's charter. The nominal capital of a company does not necessarily limit the scope of its operations; a corporation may borrow money for the purpose of enlarging its business, and in many instances it may use profits for the same purpose. But the amount of the capital contributed by the shareholders is an important element in determining the limit beyond which the company's business cannot be extended by the investment of profits. If a corporation is formed with a capital of $100,000, in order to carry on a certain business, no one would hesitate to say that it would be a departure from the intention of the founders to withhold profits, in order to develop the company's business, until the sum of $500,000 had been amassed, unless the company was formed mainly for the purpose of accumulating the profits from year to year. The question in each case depends upon the use to which the capital is put and the meaning of the company's charter. If a majority of the shareholders or the directors of a corporation wrongfully refuse to declare a dividend and distribute profits earned by the company, any shareholder feeling aggrieved may obtain relief in a court of equity. It may often be reasonable to withhold part of the earnings of a corporation in order to increase its surplus fund, when it would not be reasonable to withhold all the earnings for that purpose. The shareholders forming an ordinary business corporation expect to obtain the profits of their investment in the form of regular dividends. To withhold the entire profits merely to enlarge the capacity of the company's business would defeat their just expectations. After the business of a corporation has been brought to a prosperous condition, and necessary provision has been made for future prosperity, a reasonable

share of the profits should be applied in the payment of regular dividends, though a part may be reserved to increase the surplus and enlarge the business itself." * * *

It is not necessary to multiply statements of the rule. To develop the points now discussed, and to a considerable extent they may be developed together as a single point, it is necessary to refer with some particularity to the facts.

When plaintiffs made their complaint and demand for further dividends, the Ford Motor Company had concluded its most prosperous year of business. The demand for its cars at the price of the preceding year continued. It could make and could market in the year beginning August 1, 1916, more than 500,000 cars. Sales of parts and repairs would necessarily increase. The cost of materials was likely to advance, and perhaps the price of labor; but it reasonably might have expected a profit for the year of upwards of $60,000,000. It had assets of more than $132,000,000, a surplus of almost $112,000,000, and its cash on hand and municipal bonds were nearly $54,000,000. Its total liabilities, including capital stock, was a little over $20,000,000. It had declared no special dividend during the business year except the October, 1915, dividend. It had been the practice, under similar circumstances, to declare larger dividends. Considering only these facts, a refusal to declare and pay further dividends appears to be not an exercise of discretion on the part of the directors, but an arbitrary refusal to do what the circumstances required to be done. These facts and others call upon the directors to justify their action, or failure or refusal to act.

In justification, the defendants have offered testimony tending to prove, and which does prove, the following facts: It had been the policy of the corporation for a considerable time to annually reduce the selling price of cars, while keeping up, or improving, their quality. As early as in June, 1915, a general plan for the expansion of the productive capacity of the concern by a practical duplication of its plant had been talked over by the executive officers and directors and agreed upon; not all of the details having been settled, and no formal action of directors having been taken. The erection of a smelter was considered, and engineering and other data in connection therewith secured. In consequence, it was determined not to reduce the selling price of cars for the year beginning August 1, 1915, but to maintain the price and to accumulate a large surplus to pay for the proposed expansion of plant and equipment, and perhaps to build a plant for smelting ore. It is hoped, by Mr. Ford, that eventually 1,000,000 cars will be annually produced. The contemplated changes will permit the increased output.

The plan, as affecting the profits of the business for the year beginning August 1, 1916, and thereafter, calls for a reduction in the selling price of the cars. It is true that this price might be at any time increased, but the plan called for the reduction in price of $80 a car. The capacity of the plant, without the additions thereto voted to be made (without a part of them at least), would produce more than 600,000 cars annually. This number, and more, could have been sold for $440 instead of $360, a difference in the return for capital, labor, and materials employed of at least $48,000,000. In short, the plan does not call for and is not intended to produce immediately a more profitable business, but a less profitable one; not only less profitable than for-

merly, but less profitable than it is admitted it might be made. The apparent immediate effect will be to diminish the value of shares and the returns to shareholders.

It is the contention of plaintiffs that the apparent effect of the plan is intended to be the continued and continuing effect of it, and that it is deliberately proposed, not of record and not by official corporate declaration, but nevertheless proposed, to continue the corporation henceforth as a semi-eleemosynary institution and not as a business institution. In support of this contention, they point to the attitude and to the expressions of Mr. Henry Ford.

Mr. Henry Ford is the dominant force in the business of the Ford Motor Company. No plan of operations could be adopted unless he consented, and no board of directors can be elected whom he does not favor. One of the directors of the company has no stock. One share was assigned to him to qualify him for the position, but it is not claimed that he owns it. A business, one of the largest in the world, and one of the most profitable, has been built up. It employs many men, at good pay. "My ambition," said Mr. Ford, "is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business." "With regard to dividends, the company paid sixty per cent. on its capitalization of two million dollars, or $1,200,000, leaving $58,000,000 to reinvest for the growth of the company. This is Mr. Ford's policy at present, and it is understood that the other stockholders cheerfully accede to this plan." He had made up his mind in the summer of 1916 that no dividends other than the regular dividends should be paid, "for the present." * * *

The record, and especially the testimony of Mr. Ford, convinces that he has to some extent the attitude towards the shareholders of one who has dispensed and distributed to them large gains and that they should be content to take what he chooses to give. His testimony creates the impression, also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken. We have no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company—the policy which has been herein referred to.

It is said by his counsel that "although a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation." * * *

In discussing this proposition, counsel have referred to decisions such as Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827. * * * These cases, after all, like all others in which the subject is treated, turn finally upon the point, the question, whether it appears that the directors were not acting for the best interests of the corporation. We do not draw in question, nor do counsel for the plaintiffs do so, the validity of the general proposition stated by counsel nor the soundness of the opinions delivered in the cases cited. The case presented here

is not like any of them. The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employés, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his co-directors owe to protesting, minority stockolders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.

There is committed to the discretion of directors, a discretion to be exercised in good faith, the infinite details of business, including the wages which shall be paid to employés, the number of hours they shall work, the conditions under which labor shall be carried on, and the price for which products shall be offered to the public.

It is said by appellants that the motives of the board members are not material and will not be inquired into by the court so long as their acts are within their lawful powers. As we have pointed out, and the proposition does not require argument to sustain it, it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.

We are not, however, persuaded that we should interfere with the proposed expansion of the business of the Ford Motor Company. In view of the fact that the selling price of products may be increased at any time, the ultimate results of the larger business cannot be certainly estimated. The judges are not business experts. It is recognized that plans must often be made for a long future, for expected competition, for a continuing as well as an immediately profitable venture. The experience of the Ford Motor Company is evidence of capable management of its affairs. It may be noticed, incidentally, that it took from the public the money required for the execution of its plan, and that the very considerable salaries paid to Mr. Ford and to certain executive officers and employés were not diminished. We are not satisfied that the alleged motives of the directors, in so far as they are reflected in the conduct of the business, menace the interests of shareholders. It is enough to say, perhaps, that the court of equity is at all times open to complaining shareholders having a just grievance.

Assuming the general plan and policy of expansion, and the details of it to have been sufficiently, formally, approved at the October and November, 1917, meetings of directors, and assuming further that the plan and policy and the details agreed upon were for the best ultimate interest of the company and therefore of its shareholders, what does it amount to in justification of a refusal to declare and pay a special dividend or dividends? The Ford Motor Company was able to estimate with nicety its income and profit. It could sell more cars than

it could make. Having ascertained what it would cost to produce a car and to sell it, the profit upon each car depended upon the selling price. That being fixed, the yearly income and profit was determinable, and, within slight variations, was certain.

There was appropriated—voted—for the smelter $11,325,000. As to the remainder voted, there is no available way for determining how much had been paid before the action of directors was taken and how much was paid thereafter; but assuming that the plans required an expenditure sooner or later of $9,895,000 for duplication of the plant, and for land and other expenditures $3,000,000, the total is $24,220,000. The company was continuing business, at a profit—a cash business. If the total cost of proposed expenditures had been immediately withdrawn in cash from the cash surplus (money and bonds) on hand August 1, 1916, there would have remained nearly $30,000,000.

Defendants say, and it is true, that a considerable cash balance must be at all times carried by such a concern. But, as has been stated, there was a large daily, weekly, monthly, receipt of cash. The output was practically continuous and was continuously, and within a few days, turned into cash. Moreover, the contemplated expenditures were not to be immediately made. The large sum appropriated for the smelter plant was payable over a considerable period of time. So that, without going further, it would appear that, accepting and approving the plan of the directors, it was their duty to distribute on or near the 1st of August, 1916, a very large sum of money to stockholders.

In reaching this conclusion, we do not ignore, but recognize, the validity of the proposition that plaintiffs have from the beginning profited by, if they have not lately, officially, participated in, the general policy of expansion pursued by this corporation. We do not lose sight of the fact that it had been, upon an occasion, agreeable to the plaintiffs to increase the capital stock to $100,000,000 by a stock dividend of $98,000,000. These things go only to answer other contentions now made by plaintiffs, and do not and cannot operate to estop them to demand proper dividends upon the stock they own. It is obvious that an annual dividend of 60 per cent. upon $2,000,000, or $1,200,000, is the equivalent of a very small dividend upon $100,000,000, or more.

The decree of the court below fixing and determining the specific amount to be distributed to stockholders is affirmed. In other respects, except as to the allowance of costs, the said decree is reversed.

* * *

SECTION 10.—APPORTIONMENT OF INTEREST BETWEEN LIFE TENANT AND REMAINDERMAN

EISNER v. MACOMBER.

(Supreme Court of the United States, 1919. 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570.)

Mr. Justice BRANDEIS (dissenting). * * * In Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, the court was required to determine how, in the administration of an estate in the District of Columbia, a stock dividend, representing profits, received after the decedent's death, should be disposed of as between life

tenant and remainderman. The question was in essence: What shall the intention of the testator be presumed to have been? On this question there was great diversity of opinion and practice in the courts of English-speaking countries. Three well-defined rules were then competing for acceptance; two of these involve an arbitrary rule of distribution, the third equitable apportionment. * * *

1. The so-called English rule, declared in 1799, by Brander v. Brander, 4 Ves. Jr. 800, that a dividend representing profits, whether in cash, stock or other property, belongs to the life tenant if it was a regular or ordinary dividend, and belongs to the remainderman if it was an extraordinary dividend.

2. The so-called Massachusetts rule, declared in 1868 by Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705, that a dividend representing profits, whether regular, ordinary or extraordinary, if in cash belongs to the life tenant, and if in stock belongs to the remainderman.

3. The so-called Pennsylvania rule declared in 1857 by Earp's Appeal, 28 Pa. 368, that where a stock dividend is paid, the court shall inquire into the circumstances under which the fund had been earned and accumulated out of which the dividend, whether a regular, an ordinary or an extraordinary one, was paid. If it finds that the stock dividend was paid out of profits earned since the decedent's death, the stock dividend belongs to the life tenant; if the court finds that the stock dividend was paid from capital or from profits earned before the decedent's death, the stock dividend belongs to the remainderman.

This court adopted in Gibbons v. Mahon as the rule of administration for the District of Columbia the so-called Massachusetts rule, the opinion being delivered in 1890 by Mr. Justice Gray. Since then the same question has come up for decision in many of the states. The so-called Massachusetts rule, although approved by this court, has found favor in only a few states. The so-called Pennsylvania rule, on the other hand, has been adopted since by so many of the states (including New York and California), that it has come to be known as the "American rule." Whether, in view of these facts and the practical results of the operation of the two rules as shown by the experience of the 30 years which have elapsed since the decision in Gibbons v. Mahon, it might be desirable for this court to reconsider the question there decided, as some other courts have done (see 29 Harvard Law Review, 551), we have no occasion to consider in this case. For, as this court there pointed out (136 U. S. 560, 10 Sup. Ct. 1059 [34 L. Ed. 525]), the question involved was one "between the owners of successive interests in particular shares," and not * * * a question "between the corporation and the government, and [which] depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings." * * *

In re OSBORNE.

(Court of Appeals of New York, 1913. 209 N. Y. 450, 103 N. E. 728. 50 L. R. A. [N. S.] 510, Ann. Cas. 1915A, 298.)

CHASE, J. Eugene La Grove died a resident of this state October 4, 1908, leaving a will which was duly probated and by the fourth paragraph of which a trust was created as follows: "All the rest, residue and remainder of my property and estate, real, personal and

mixed of every description and wheresoever situated of which I may die seized or possessed * * * I give, devise, and bequeath to my executor and trustee hereinafter named in trust, to hold said property and estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom, and to pay the net rents, issues, income and profits therefrom quarterly to my wife, Ivy Lee La Grove from the time of my death during the term of her natural life, and, upon her death, to divide the principal into as many shares as my wife shall leave children by our marriage her surviving * * * but in the event that my said wife shall die leaving no issue her surviving, then at her death the principal so set apart for her benefit shall be paid to such person or persons as would be entitled to share in her estate were she to die intestate under the statute of distribution in force at the time of her death in the state of New York." The testator did not leave any descendants. Ivy Lee La Grove, who was his wife, is living. The rest, residue, and remainder of the property, as provided by the fourth paragraph of the will, is held in trust by James W. Osborne as trustee pursuant to the provisions of such paragraph. * * *

The principal part of the estate of the testator consisted of 3,000 shares of the stock of the Singer Manufacturing Company, a corporation organized and existing under the laws of the state of New Jersey. The capital stock of the Singer Manufacturing Company at the time of the death of the testator was $30,000,000. On that day it had a surplus of accumulated earnings arising exclusively from the business of the company amounting to $37,604,206. On June 17, 1910, such surplus had increased to $51,560,757. On March 31, 1910, the executor sold 80 shares of the stock of said company. * * *

On June 17, 1910, the board of directors of said company adopted a further resolution as follows: "Resolved that the directors declare and they do now declare a stock dividend of thirty millions of dollars, or one hundred per cent on the present issued capital stock of this company payable forthwith to the stockholders of record on the 16th day of June instant out of said increase of stock, and that the president and treasurer be and they hereby are authorized and directed to issue forthwith to the several stockholders of record on the said 16th day of June instant, certificates for so many shares of fully paid and nonassessable stock as said shareholders shall severally be entitled to in payment of said dividends." Thereupon, and on the same day, June 17, 1910, said company paid over and delivered to James W. Osborne as such executor a stock dividend of 2,920 shares of the par value of $100 each, being one share of increased capital stock of said company for each share of old stock theretofore held by said Osborne as executor, and said stock remains in the possession of said Osborne as such executor and trustee.

After the death of La Grove, and prior to the payment to Osborne as such executor of the stock dividend, regular cash dividends had been paid on said stock amounting in the aggregate to $242,564.18, which has been paid from time to time by said executor to said Ivy Lee La Grove, the beneficiary under the trust, as provided by said will.

The troublesome question as to who is entitled to extraordinary dividends declared upon stock held in trust as between life beneficiaries under the trust and the remaindermen is again presented to us for our consideration.

The question has been considered by the courts in this and other states and countries in many and various forms from time to time since the decisions and opinions of the courts have been published. It has been said that no question before the courts has been more troublesome. Certainly none has resulted in greater contrariety of views. Decisions that are apparently contradictory either in the same court or in the courts of different states and countries have, however, been caused in part by different facts and circumstances existing in the cases decided, and the effect necessarily given to the language of the will or instrument creating the trust in the particular cases in which the decisions have been rendered.

In determining who is entitled to a dividend upon stock held in trust, the intention of the testator or the maker of the trust must be carried out when such intent is clear, so far as such intent does not result in an unlawful accumulation of income. Very many cases arise, however, where the testator or maker of the trust had not considered the possibility of enormous dividends being declared by corporations to effectuate their reorganization or in the division of accumulated profits, made necessary by new statutes, changed circumstances, and modern rules and conditions, or, if such testator or maker of the trust had considered such possibility, he failed to express himself in the instrument creating the trust so as to show any clear intention regarding the same.

In England, as far back as 1799, it was established as a rule that all extraordinary or unusual dividends declared during the continuation of a life estate, whether payable in cash or in stock, belong to the corpus of the fund and not to the income. Brander v. Brander, 4 Ves. Jr. 800. The decision in the case cited was repeatedly followed and the rule restated. The rule in England as stated in the earlier cases has been materially modified, and dividends of cash are now held to belong to the life tenant and stock dividends to the remainderman, subject, perhaps, to an examination of the facts and circumstances in each case in applying the rule as stated. Bouche v. Sproule, L. R. 12 App. Cas. 385.

In Massachusetts, in Minot v. Payne, reported in 99 Mass. 108, 96 Am. Dec. 705, it is said: "A simple rule is to regard cash dividends, however large, as income; and stock dividends, however made, as capital." The courts of that state have followed such rule, taking unto themselves, however, the right to determine whether a stock dividend is in effect a distribution of cash to be treated the same as a cash dividend.

In Pennsylvania it was held in Earp's Appeal, reported in 28 Pa. 368, that ordinary dividends on stock held in trust belong to the person entitled to the income of the trust fund, but that extraordinary dividends should be apportioned between the life estate man and the remainderman in accordance with the amount thereof accumulated before and after the creation of the trust.

The question has been considered by the courts of nearly every state in the Union and by the federal courts. It would be quite impossible to reconcile the many reported decisions. An effort to determine the weight of authority would be difficult, and extend this opinion to unjustifiable length. It is not our purpose, therefore, to analyze or attempt to state the decisions of other jurisdictions or to

refer to them except as we have herein to illustrate the extent of the conflict regarding the question now considered.

In this state the question was considered in Clarkson v. Clarkson, 18 Barb. 646 (1855). In that case one Clarkson died in September, 1845, leaving a will by which he left parts of his estate in trust for two of his children respectively. The trustees were directed to invest the same and pay the "interest, dividends and proceeds arising from the two said respective shares and portions from time to time, as they shall be received, to my said daughters * * * for and during the term of their natural lives respectively; and upon the decease of either of said daughters, * * * to assign, transfer and pay over the share" as therein provided. * * *

The earlier and also the latest decisions in this state clearly recognize and assert that where extraordinary dividends intrench upon the capital of the trust fund they should be returned to such trust fund so far as necessary to preserve the same. Recognizing as we must that a testator or maker of a trust may, if he chooses, provide that a part of the principal of a trust fund be paid to a life beneficiary of the trust, and that the courts must carry out such intention, all of the decisions in this state can be sustained without violating the right when it is not so controlled by the instrument creating the trust, to have the principal of the trust fund kept unimpaired by the division of accumulated surplus among life beneficiaries.

It is conceded that the capital of a corporation cannot be divided among the life beneficiaries. It is not alone the capital of the corporation that should be preserved, but the capital of the trust fund, whether invested by the trustees in stocks of corporations at a premium, or acquired from the testator or maker of the trust. The surplus of the corporation existing at the formation of the trust or when the stock is purchased represents a part of the capital of the estate as fully as does the capital of the corporation. The division by corporations of their surplus, accumulated through a long period of years in very large amounts, is now comparatively common, when until within a very recent time such division of enormous amounts was seldom, if ever, made.

Recently a well-known bank in this state with a capital of $300,000 and a large surplus divided its surplus by declaring an extra dividend of $2,700,000, or 900 per cent, and increased its capital stock to $3,000,000, allowing its stockholders to subscribe for the increase and pay for the same by the dividend thus declared.

Another well-known bank in this state with a capital of $500,000 and a very large surplus divided its surplus by declaring an extra dividend of $9,500,000, or 1900 per cent., and increased its capital stock to $10,000,000 allowing its stockholders to subscribe for the increase and to pay for the same by the dividend thus declared. Instances of the declaration of very large extraordinary dividends by corporations within the last few years could be multiplied in great numbers.

We refer to these cases simply to illustrate the great injustice that may be done to the ultimate beneficiaries of a trust fund if a large part of such fund as invested must necessarily, by reason of an extraordinary dividend and an arbitrary rule, be paid over to the life beneficiaries of the trust. If dividends by a corporation payable out of surplus earnings whenever accumulated must be paid to the life

beneficiaries of the trust unless special provision to the contrary is made in the will or instrument creating the trust, it will make the retention or purchase of stocks by a trustee in corporations having a large surplus a matter of questionable propriety. It must also be remembered that if all such dividends are adjudged to constitute income as a matter of law, then their retention in the trust, even by direction of the testator or maker of the trust, would, in many instances, amount to an unlawful accumulation of income.

We think that in each case the court should look into the facts, circumstances, and nature of the transaction, and determine the nature of the dividend and the rights of the contending parties according to justice and equity.

In Cook on Corporations (6th Ed. c. 33, § 552) it is said: "Where shares of stock are held by an estate, and the income of the estate is to go to a life tenant for life, and the remainder to another party, the question of whether the life tenant or the remainderman is entitled to a stock dividend or extraordinary cash dividend is a perplexing one. The stock dividend or extraordinary cash dividend may represent profits which were earned or accumulated before the life tenancy began. In that case it is clear that in justice the remainderman should receive it. If, however, it was earned after the life tenancy began, it is clear that the life tenant should have it. If it was earned partly before and partly after the life tenancy began, then it is apparent that in justice some apportionment should be made if possible."

In Thompson on Corporations (2d Ed. § 5414) it is said: "The courts now inquire into the actual nature and source of dividends for the purpose of determining their character, and, as between the life tenant and remainderman, if they are found to represent earnings that accrued prior to the creation of the trust, they belong to the corpus of the trust; or if they represent the natural growth and increase in the value of the corporate plant and business, whether that growth and increase took place before or after the trust was created, they are to such extent capital. The court, in making the inquiry, concerns itself with the substance of the transaction, and not the form in which the corporation has seen fit to clothe it, and the fact that a dividend is distributed in cash or stock is said to be of little importance in determining whether it is capital or income. * * * The object of the inquiry in every case should be to do justice to the life tenant and remainderman, and at the same time effectuate the intention of the creator of the trust; and on this theory in order to effectuate such intention and to do justice between the parties, a court may, under the circumstances of a given case, apportion a dividend between the life tenant and the remainderman."

It is manifest that any apportionment of a dividend is more or less troublesome in the practical handling of trust estates. It may be necessary in many cases to make the apportionment of dividends in an accounting by the trustee where all the parties interested are bound thereby. The dividends usually declared by corporations are the ordinary dividends such as are declared from year to year or at other regular dividend periods. Extraordinary dividends are the exception. In all cases of ordinary dividends the courts uniformly hold that they should be paid to the life beneficiary of the trust in conformity with

the general rule that dividends are deemed to have been earned as of the date of their declaration. In cases of extraordinary and unusual dividends declared in whole or in part from earnings actually accumulated prior to the creation of the trust or the purchase of the stock, an adherence to the rule that dividends are deemed to have been earned as of the date of their declaration in many cases shocks the sense of justice.

Notwithstanding the difficulty in many cases of apportioning dividends, it is wiser and better to leave an apportionment to courts of equity, in preference to adhering to a rule that depends more upon its simplicity and convenience of enforcement than upon justice and right. The distinction between ordinary and extraordinary dividends is necessary to make a workable rule, and at the same time preserve the integrity of the trust fund. The integrity of the trust fund and rights of the life beneficiary under the trust should each be considered, determined, and preserved by a court of equity. As far as the courts in this state have made statements to the contrary, it has been in opinions where such statements have been unnecessary to the determination of the case then under consideration, and such statements are disapproved. It should be held: (1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.

It has been argued that the will in this case as quoted shows that the testator intended that the value of the stock of the Singer Manufacturing Company owned by him at his decease should be preserved inviolate, and it is also argued that it was not the intent of said corporation, as shown by the resolution quoted, to distribute the surplus of the corporation, but to capitalize it so that thereafter it should be incapable of distribution. It is not necessary to discuss the question so presented, in view of the decision that we are making herein.

This case is one that requires an apportionment of the dividend. There is no dispute about the portion thereof that was earned prior to the creation of the trust, and the decree of the surrogate and order of the Appellate Division should be modified so as to award $^{13956551}/_{51560757}$ parts of the stock dividend to the respondent, and directing that the remainder thereof be retained as a part of the capital of the trust fund, and, as thus modified, the order and decree should be affirmed, with costs to the appellant and respondent payable out of the estate.

GRAY, J., dissents. * * *

SECTION 11.—RIGHTS OF THE CORPORATION AGAINST OFFICERS AND DIRECTORS

BRIGGS v. SPAULDING et al.

(Supreme Court of the United States, 1891. 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.)

Briggs exhibited his bill, as receiver of the First National Bank of Buffalo, against Reuben Porter Lee, Francis E. Coit, Elbridge G. Spaulding, William H. Johnson, and Thomas W. Cushing, as directors of that bank, and Anne Vought as executrix of John H. Vought, and Frank S. Coit and Joseph C. Barnes, as administrators of Charles C. Coit, former directors.

Mr. Chief Justice FULLER delivered the opinion of the court.

In the language of appellant's counsel, the bill was framed upon the theory of a breach by the defendants as directors "of their common-law duties as trustees of a financial corporation, and of breaches of special restrictions and obligations of the national banking act." And it is claimed that the defendants should have been held liable for the losses which occurred through loans of the bank's funds and moneys during their term of office as directors to Lee, his father, his wife, and certain designated persons, which were the principal losses, though there were others smaller in amount for which they were responsible. * * *

It is not contended that the defendants knowingly violated, or permitted the violation of, any of the provisions of the banking act, or that they were guilty of any dishonesty in administering the affairs of the bank; but it is charged that they did not diligently perform duties devolved upon them by the act. * * * It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. Whether they were responsible for any neglect of the board as such, or in failing to obtain proper action on its part, is another question. Indeed, it is frankly stated by counsel that, "although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrong doing;" and section 556, Mor. Priv. Corp., is cited, which is to the effect that "the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material, under these circumstances, merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed."

It is perhaps unnecessary to attempt to define with precision the de-

gree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents. * * * Bank directors are often styled "trustees," but not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract, and not of trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to cestui que trust.

In Percy v. Millaudon, 8 Mart. (N. S.) 68, which has been cited as a leading case for more than 60 years, the supreme court of Louisiana, through Judge Porter, declared that the correct mode of ascertaining whether an agent is in fault "is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties. It is not contemplated by any of the charters which have come under our observation, and it was not by that of the Planters' Bank, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684, was the case of a bill filed by Spering, as assignee of a trust company, against its directors and others, to compel them to make good losses sustained by the depositors on the ground of fraudulent mismanagement of the affairs of the company; and Judge Sharswood, speaking for the court, said: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said

in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and managment of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more. * * * We are dealing now with their responsibility to stockholders, not to outside parties—creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many dicta not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that there might not exist such a case of negligence, or of acts clearly ultra vires, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places." * * *

The theory of this bill is that the defendants are liable, not to stockholders nor to creditors, as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon different considerations. * * *

No one of the defendants is charged with the misappropriation or misapplication of or interference with any property of the bank nor with carelessness in respect to any particular property, but with the omission of duty which, if performed, would have prevented certain specified losses, in respect of which complainant seeks to charge them.

The doctrine that one trustee is not liable for the acts or defaults of his co-trustees, and while, if he remains merely passive, and does not obstruct the collection by a co-trustee of moneys, is not liable for waste, is conceded; but it is argued that if he himself receives the funds, and either delivers them over to his associate, or does any act by which they come into the possession of the latter or under his control, and but for which he would not have received them, such trustee is liable for any loss resulting from the waste, * * * and that this case comes within the rule as thus qualified. Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part. * * *

We pass, then, to the inquiry as to the liability of defendant Spaulding. * * * Spaulding had had a large and various experience, and, as a member of congress, drafted the original national banking act, was president of a leading bank, and connected with several financial cor-

porations, and testified that the practice of banks, so far as he knew, all over the country, was to a large extent to carry on the business through their executive officers, especially where these officers held a majority of the stock; that when he purchased his stock he believed this bank was being conducted by its duly authorized officers, and his judgment was that his duty as a director was discharged if he attended the meetings to which he was summoned, performed such duties as were specifically required of him, and gave such advice as was asked from him; that his summers were spent upon his farm in the country; that in 1882 he was 72 years of age; that he was in a measure retired from business, so that he gave very little attention to the affairs of his own bank, but was ready to give any advice or suggestions when called upon for that purpose upon any special matters; that for many years it had been the practice in the corporations in which he was a director to treat him as an advisory director, and not as a director occupied in the daily management of their affairs; and that he accepted the position upon the understanding that he should occupy this relation. * * * He further stated that he never received or expected to receive any compensation or benefit from the bank as a director; that Lee was the owner of a large majority of the stock; that, as is customary in such cases, Lee had assumed, to a large extent, the management and control of the bank, with the knowledge of the other directors, and with the knowledge of the stockholders of the bank, and most, if not all, of the depositors therein; and upon information and belief "that long before he became a stockholder of said bank, and up to the time he became such stockholder, and while he was such stockholder, it was understood by all persons having dealings with the said bank that the said Lee practically administered the affairs thereof, as its chief executive officer." * * *

The losses which it is claimed rendered it insolvent, and for the recovery of which losses this action was instituted, occurred by reason of the discounting by Lee of the paper of persons engaged with him in outside business and speculations, who were not adequately responsible for their engagements. The vice in the situation lay, not in the reports nor in the books, upon their face, but in the unreliability of the bills receivable. Were these defendants guilty of negligence in allowing Lee to remain in charge of the bank? * * * It appears that Lee went into the employment of this bank in 1868, being then 18 years old, and so remained until April 14, 1882, occupying in succession the positions of messenger boy, bookkeeper, teller, assistant cashier, cashier, vice president, and president. * * * His general character was good, his reputation for integrity and financial capacity excellent, and he possessed the confidence of his fellow-citizens. Upon the 10th of January, 1882, he was the owner of two-thirds of the stock of the bank, and had apparently a greater interest than any other person in seeing that its affairs were so managed that its capital would remain unimpaired. * * * We think no jury would have been justified in finding defendants guilty of negligence in retaining Lee in the management of the bank. * * *

But it is contended that defendants should have insisted on meetings of the board of directors. * * * Here, again, it should be observed that even trustees are not liable for the wrongful acts of their co-trustees unless they connive at them or are guilty of negligence conducive to their commission, and that Lee and Vought had long been

directors. It is shown that for 14 years the affairs of the bank had been left wholly with the president and cashier, and that from the 10th of January to the stoppage of the bank the business was done as it had always been done. No bonds had been required of the officers for at least 14 years. No meetings were held by the board of directors except the annual meeting and meetings to declare dividends, or on some special occasion. * * * All this was not as it should have been, and ought not to be countenanced; but the facts have an important bearing on the question whether Spaulding and Johnson should be held liable because they did not at once endeavor to change the entire methods of doing business, and enter upon an exhaustive investigation of the assets. Would ordinarily prudent and diligent men have done so under similar cirumstances? It is not so much a question of holding meetings as of examination, searching and thorough; an overhauling of the bills receivable, and the detection of the uncollectible indebtedness which rendered the bank insolvent. * * *

Would it not have been the exercise of an extraordinary degree of care if these defendants had insisted within the first 90 days upon making such an examination? Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption. * * *

It must be remembered that in cases turning upon questions of fact in order to reverse, we must be prepared to hold that the findings were not justified, and this we cannot do, taking into consideration all the facts contained in this voluminous record, which we have attempted thoroughly to explore. The turning point, so far as defendants Spaulding and Johnson are concerned, (and we include with them Francis E. Coit,) is whether under all the circumstances they were guilty of negligence, producing any of the losses in question, not affirmatively, but because they did not prevent them; and this depends upon whether they should have made an examination of the books and assets of the bank, and whether, if they had, that would have enabled them to discover such a condition of affairs as would have resulted in placing the bank in liquidation, and whether thereby some of the losses would have been averted. Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention; but in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, and it is really to that the case becomes reduced at last. For the reasons given, the decree will be affirmed.

HARLAN, J., (dissenting.) Mr. Justice GRAY, Mr. Justice BREWER, Mr. Justice BROWN, and myself are unable to concur in the opinion and judgment of the court. But we are of opinion that, under the evidence, the defendants Elbridge G. Spaulding, Francis E. Coit, and W. H. Johnson became respectively liable for such of those losses as could have been prevented by proper diligence upon their part as di-

rectors. It would serve no useful purpose to refer in detail to all the evidence establishing their dereliction of duty. In our opinion, the proof is clear and convincing that a considerable part of the amount lost to the bank, and therefore to its stockholders and depositors, could have been saved if they had exercised such care in the supervision and management of the bank's business as men of ordinary diligence exercise in respect to their own business. In fact, those gentlemen, while they were directors, had no knowledge whatever of what was being done by Lee in the conduct of the bank. They took his word that all was right, and gave no attention whatever to the management of its business. Their eyes were as completely closed to what he did from day to day in directing the affairs of the bank, as if they had deliberately determined not to see and not to know how he controlled its business. * * *

In the case of Mr. Spaulding there are absolutely no circumstances of a mitigating character. He was learned in the law, and had large experience in banking. He accepted the position of director to accommodate Lee, and without any examination of the condition of the bank. Lee told him the bank was all right; and upon that, and that alone, he rested with implicit confidence. Having taken the oath required by the statute, that he would, so far as the duty devolved upon him, diligently and honestly administer the affairs of the association, and having ascertained that the executive officers were in charge of the bank, performing the duties belonging to their respective positions, he did not, he says, "go any further." Under such circumstances, and as he interpreted the national banking act, he felt himself "relieved from any specified duty." * * * It is plain from the evidence that if, with his long experience in banking business, he had given one hour, or at the utmost a few hours' time, in any week while he was director, to ascertain how this bank was being managed, he would have discovered enough that was wrong and reckless to have saved the association, its stockholders and depositors, many, if not all, the losses thereafter occurring. Upon his theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer its business diligently and honestly, turn over all its affairs to the control of some one or more of its officers, and never go near the bank again, unless they are notified to come there, or until they are informed that there is something wrong; and when it is ascertained that these officers, or some of them, while in full control, have embezzled or recklessly squandered the assets of the bank, the only comfort that swindled stockholders and depositors have is the assurance, not that the directors have themselves diligently administered the affairs of the bank, or diligently supervised the conduct of those to whom its affairs were committed by them, but that they had confidence in the integrity and fidelity of its officers and agents, and relied upon their assurance that all was right. No bank can be safely administered in that way. Such a system cannot be properly characterized otherwise than as a farce. It cannot be tolerated without peril to the business interests of the country. * * *

SECTION 12.—RIGHTS AND LIABILITIES OF PARTIES WITH RESPECT TO TRANSFERS OF STOCK

NATIONAL SAFE DEPOSIT, SAVINGS & TRUST CO. OF THE DISTRICT OF COLUMBIA v. HIBBS.

(Supreme Court of the United States, 1913. 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241.)

Mr. Justice DAY delivered the opinion of the court.

This case is in this court upon writ of error to the judgment of the court of appeals of the District of Columbia * * * affirming the judgment of the supreme court of the District of Columbia in an action brought by the plaintiff in error, hereinafter called the bank, against the defendant in error, for the alleged conversion of certain shares of stock. The case was tried upon an agreed statement of facts, from which it appears:

The plaintiff in error has been doing a general banking business in the city of Washington, including the making of loans to its customers on promissory notes secured by stock collateral, and to a limited extent, the buying and selling of stock for its customers and occasionally for itself.

On March 12, 1903, the bank made a loan to one T. M. Kelley of $12,500, for which he gave his promissory note, payable on demand, and deposited with the bank certain stock certificates of the Mergenthaler Linotype Company as collateral security. Each of the certificates stood in the name of T. M. Kelley, and on its face recited that it was transferable by him, in person or by proxy, only upon the books of the company upon surrender of the certificate, and each upon its back contained an assignment with power of attorney to transfer the stock upon the books of the company, signed in blank by Kelley, whose signature was duly attested.

One Willard H. Myers had been in the continuous employ of the bank for over twenty years, and had committed no acts inconsistent with his duty to the bank, and was trusted as a faithful employee. During the last ten years of his employment he had been general bookkeeper and assistant note teller, a part of his duties being to receive and enter upon the cash book of the bank the payment of loans by customers, and to procure from one of the officers of the bank and deliver to such customers the collateral security pledged for the loans, it being usual, in the ordinary course of business, for the bank to thus deliver certificates to him upon his request. He had no authority and it was not a part of his employment to dispose of, by sale, pledge, or otherwise, any stock held as collateral by the bank, or owned by it or any of its customers.

On May 26, 1904, Myers requested the secretary of the bank to procure from the vault where such securities were kept the certificates deposited by Kelley, whereupon the secretary delivered the certificates to Myers, in the usual course of business, for the purpose of having them returned to Kelley, similar requests having been made by Myers prior thereto. Kelley had not paid the loan or asked for the delivery of the stock, and Myers made no entry in the cash book.

The day following, May 27th, Myers delivered two of such certifi-

cates to the cashier of the defendant in error, a stock broker, for sale on his account, and at the request of the cashier, as was the usual custom where the signatures of the assignor and attesting witness are unknown, Myers, as a further identification of such signatures, signed his name to the attestation clause of the assignment. The defendant in error being out of the city, the certificates were turned over to another broker, by whom they were on that day sold on the Washington stock exchange, and on the same day Myers received the check of the defendant in error for the proceeds of the sale, which he subsequently cashed.

Myers did not represent to the cashier of the defendant in error that he was selling the stock for the bank, or that he was acting for it in any way, or indicate that he did not own the stock, nor did the defendant in error or his cashier know or have cause to suspect that the stock did not belong to Myers. The stock was sold, however, without the knowledge or consent of the bank or Kelley. By the custom of banks, brokers, and others dealing in stock, which custom was known to the bank, the possession of stock certificates assigned in blank and attested, as were the certificates here in controversy, has been recognized, in the absence of knowledge or cause of suspicion to the contrary, as evidence of ownership or of authority to sell, pledge, or otherwise deal with such certificates as the owner might do.

Certain of the other certificates deposited by Kelley were disposed of by Myers, some in like manner, through the defendant in error, for which Myers received the proceeds, others being hypothecated with the American Security & Trust Company, while the rest were surrendered by Myers to the authorities.

In this case conflicting legal principles are invoked and relied upon. For the defendant in error the familiar principle "that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it" is advanced. The plaintiff in error invokes the principle that where the owner of property, such as stock certificates, has lost it by the criminal or fraudulent act of another, the owner, not voluntarily or negligently conferring upon such another the indicia of ownership or apparent title, cannot be deprived of his property by the attempted transfer of title to a third person for value, no matter how innocent the purchaser may be of knowledge of the crime or fraud by which the property was acquired.

In this case the diligence of counsel has called to the attention of the court many cases more or less applicable to the facts herein involved. We will not stop to pass them in review. It is enough to say that they have been attentively considered.

Stock certificates are a peculiar kind of property. Although not negotiable paper, strictly speaking, they are the basis of commercial transactions large and small, and are frequently sold in open market as negotiable securities are. In First Nat. Bank v. Lanier, 11 Wall. 369, 377, 20 L. Ed. 172, 174, this court said: "Stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. * * * Whoever in good faith buys the stock, and produces to the

corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him."

These principles are well known to business men and are constantly acted upon by them. This circumstance should be given due weight in determining the rights of the parties in this case. * * * "In Scollans v. E. H. Rollins & Sons, 179 Mass. 346, 60 N. E. 983, 88 Am. St. Rep. 386, it is admitted that the general principle there laid down would not apply to an instrument indorsed in blank and stolen before it had been transferred. We shall not examine the premises of this defense because we cannot accept the conclusion. The qualification of the rule, as not applying when the instrument is stolen, is not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not intrusted the agent with the document, and therefore is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But in a case like the present, the agent has been intrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present and the estoppel arises. The distinction is not new. On the one side are cases like Knox v. Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700, where an agent or servant simply had access to a document remaining in the possession of the owner; on the other, cases like Pennsylvania R. Co.'s Appeal, 86 Pa. 80, where possession is intrusted to the agent for one purpose and he uses it for another. It cannot matter in the latter class that the agent intended the fraud from the outset."

We think this case correctly states the principle, and, applied to the case in hand, is decisive of it. Here one of two innocent persons must suffer and the question at last is, Where shall the loss fall? It is undeniable that the broker obtained the stock certificates, containing all the indicia of ownership and possible of ready transfer, from one who had possession with the bank's consent, and who brought the certificates to him, apparently clothed with the full ownership thereof by all the tests usually applied by business men to gain knowledge upon the subject before making a purchase of such property. On the other hand, the bank, for a legitimate purpose, with confidence in one of its own employees, intrusted the certificates to him, with every evidence of title and transferability upon them. The bank's trusted agent, in gross breach of his duty, whether with technical criminality or not is unimportant, took such certificates, thus authenticated with evidence of title, to one who, in the ordinary course of business, sold them to parties who paid full value for them. In such case we think the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible.

Applying this principle, we think the Court of Appeals was right in affirming the judgment of the Supreme Court, and its judgment is affirmed.

UNIFORM STOCK TRANSFER ACT

Section 1. Title to a certificate and to the shares represented thereby can be transferred only:

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or bylaws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby, shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

Section 2. Nothing in this act shall be construed as enlarging the powers of an infant or other person lacking full legal capacity, or of a trustee, executor or administrator, or other fiduciary, to make a valid indorsement, assignment or power of attorney.

Section 3. Nothing in this act shall be construed as forbidding a corporation—

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares.

Section 4. The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document.

Section 5. The delivery of a certificate to transfer title in accordance with the provisions of section 1, is effectual, except as provided in section 7, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.

Section 6. The indorsement of a certificate by the person ap-

pearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in section 7, though the indorser or transferor—

(a) Was induced by fraud, duress or mistake, to make the indorsement or delivery, or

(b) Has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or

(c) Has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate, or

(d) Has received no consideration.

Section 7. If the indorsement or delivery of a certificate—

(a) Was procured by fraud or duress, or

(b) Was made under such mistake as to make the indorsement or delivery inequitable; or

If the delivery of a certificate was made—

(c) Without authority from the owner, or

(d) After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless:

(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or

(2) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof, and, pending litigation, may enjoin the further transfer of the certificate or impound it.

Section 8. Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby.

Section 9. The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares, shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Section 10. An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation,

if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts.

Section 11. A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants—

(a) That the certificate is genuine;

(b) That he has a legal right to transfer it, and

(c) That he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim.

Section 12. A mortgagee, pledgee, or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby.

Section 13. No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except were a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it.

Section 14. A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

Section 15. There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-laws of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate.

Section 16. The alteration of a certificate, whether fraudulent or not and by whomsoever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such a certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby.

Section 17. Where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate therefor on service of process upon the corporation and on reasonable notice by publication, and in any other way which

the court may direct, to all persons interested, and upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees.

The issue of a new certificate under an order of the court as provided in this section, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate.

Section 18. In any case not provided for by this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

Section 19. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 20. A certificate is indorsed when an assignment or a power of attorney to sell, assign, or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written without more upon the back of the certificate. In any of such cases a certificate is indorsed, though it has not been delivered.

Section 21. The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also indorses the certificate to another specified person. Subsequent special indorsements may be made with like effect.

Section 22. (1) In this act, unless the context or subject-matter otherwise requires—

"Certificate" means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.

"Delivery" means voluntary transfer of possession from one person to another.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Shares" means a share or shares of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act.

"State" includes state, territory, district and insular possessions of the United States.

"Transfer" means transfer of legal title.

"Title" means legal title and does not include a merely equitable or beneficial ownership or interest.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not.

Section 23. The provisions of this act apply only to certificates issued after the taking effect of this act.

Section 24. All acts or parts of acts inconsistent with this act are hereby repealed.

Section 25. This act may be cited as the Uniform Stock Transfer Act.[1]

[1] The Uniform Stock Transfer Act has been adopted in Connecticut, Illinois, Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Wisconsin, and Alaska.

CHAPTER V

THE RELATION OF CREDITORS TO THE CORPORATION

Section
1. Rights of Corporation Creditors Against a Purchaser of the Assets of the Debtor Company.
2. Priorities Among the Various Classes of Creditors in General.
3. Current Operating Expenses to be Paid out of Current Earnings in Preference to Claims of Secured Creditors.
4. Rights of Unsecured Creditors Arising upon Reorganization
5. Rights of Creditors Against Stockholders.

SECTION 1.—RIGHTS OF CORPORATION CREDITORS AGAINST A PURCHASER OF THE ASSETS OF THE DEBTOR COMPANY

ZIEMER v. C. G. BRETTING MFG. CO.

(Supreme Court of Wisconsin, 1911. 147 Wis. 252, 133 N. W. 139, Ann. Cas. 1912D, 1275.)

Action by W. W. Ziemer against the C. G. Bretting Manufacturing Company. Judgment for defendant. Plaintiff appeals.

TIMLIN, J. * * * It appeared that C. G. Bretting carried on a foundry business, under the name of the C. G. Bretting Manufacturing Company, at Ashland, Wis., prior to his death, which occurred in A. D. 1904. * * * C. G. Bretting left surviving him his widow and three sons, Ralph Bretting, William Henry Bretting, and Henry L. Bretting. These four may be said to have owned the foundry plant and business as widow and heirs of C. G. Bretting, deceased. * * * On or about March 16, 1907, Jane Bretting, Sam Wheeler, and C. A. Lamoreaux executed articles of incorporation of the C. G. Bretting Manufacturing Company, and caused the same to be duly filed with the Secretary of State and recorded with the register of deeds of Ashland county. This corporation was empowered by such articles to carry on a similar business to that carried on by the natural persons aforesaid, under the same name, and at the same place.

The plaintiff was employed as a molder by the C. G. Bretting Manufacturing Company in April, 1907, and on June 19, 1907, while in that employment, was injured by reason of alleged defective appliances. * * * On September 12, 1907, Jane Bretting and her three sons executed a transfer of this property to the corporation. The corporation used the same books of account as its predecessor, continuing the same accounts, without rest or break. * * *

The question is whether the corporation is liable to an employé, injured in consequence of a defective appliance on June 19, 1907. * * * There is a line of authority which may be fairly said to hold that where copartners or other joint owners of a solvent going business transform themselves into a corporation, to which the joint property is transferred in exchange for shares of stock, there must, in order

to bind the new corporation for the liabilities of the former partnership, be an express assumption by the corporation of such liabilities. * * * There are also cases which hold that no such express agreement need be shown, but seem to go upon the presumption that such liabilities are assumed under these circumstances. * * * A third line of cases holds that the assumption of liabilities may be express or implied, and the latter rule has been established for this court in Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84. * * *

This agreement on the part of the corporation may be proven, like any other fact, by any competent evidence which will establish either an express or an implied valid agreement to assume the liabilities. * * * The evidence of assumption in the instant case is as follows: (1) The identity in name; (2) the almost complete identity of interest; (3) the continuation of the same business at the same place; (4) the identity of property; (5) the use of the old books, without break or rest in the accounts; and (6) the resolution to take the property of the former associates as of date of April 1st. This last is very significant. In order to take the property as of April 1st, the corporation would necessarily acquire all increase or increment accruing after that date, and be subject to all diminution or loss occurring after that date in the ordinary vicissitudes of business. If the copartners sold goods or merchandise after April 1st on credit, the account, including the profit on the transaction, would go to the corporation. If, by reason of breach of warranty on this sale, a liability accrued to the purchaser, the corporation would be chargeable with this liability. No other reasonable effect could be given to the resolution to take the property as of date of April 1st. * * *

The plaintiff was not in the employment of the corporation at the time he was injured, but was in the employment of the precedent managers and owners of the business; and, assuming that there was an outstanding liability of such manager and owners to the plaintiff, incurred in the operation of this business and accruing on June 19, 1908, when the corporation took over this property as of April 1, 1908, and continued the same account books under the same name, at the same place, for the purpose of continuing the same business, it assumed by this form of resolution the liability to the plaintiff if any such liability existed. It follows that the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

LUDECKE v. DES MOINES CABINET CO. et al.

(Supreme Court of Iowa, 1908. 140 Iowa, 223, 118 N. W. 456, 32 L. R. A. [N. S.] 616.)

DEEMER, J. Plaintiff recovered judgment against the Des Moines Cabinet Company December 31, 1900, in the sum of $325 for breach of a contract of employment. The cabinet company was a corporation organized under the laws of this state, and at all times material to our inquiry the entire stock of the corporation was owned by defendant Hartung. On the 15th day of August, 1900, and after plaintiff had commenced his suit against the cabinet company, Hartung, as president of that company, sold and transferred to the Wells & Antes Undertaking Company, also an Iowa corporation, all the assets of the cabinet company, the consideration named being $3,500. Instead of cash Hartung individually received 35 shares of the stock of the un-

dertaking company, which he immediately hypothecated for his private account. Plaintiff, after obtaining his judgment, caused execution to issue against the cabinet company, which was returned no property found. He thereupon brought this suit in equity, alleging that when the undertaking company purchased the property, it knew of plaintiff's claim, and with intent to hinder, delay, and defraud him it took possession of all the assets of the cabinet company, and converted the same to its own use without other consideration than the issuance of its own stock in payment therefor; that by reason of the transfer the undertaking company became possessed of all of the assets of the cabinet company, leaving nothing for the payment of its debts.

Upon the trial plaintiff withdrew all charges of fraud and deceit, "except such fraud as may arise from the transaction between the parties at law." As we understand it, plaintiff relies upon a single proposition in this case, and that is that, where one corporation transfers all its assets to another corporation, and thus practically ceases to exist without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and this without reference to the question of actual fraud. If the affirmative of this proposition be held, it must be upon the theory that the assets of a corporation are in the nature of a trust fund for the payment of its debts, and that a sale of the entire property works a dissolution of the selling corporation, and justifies an accounting at the suit of creditors. Plaintiff also claims that under the facts disclosed by this record he became entitled to a judgment against the undertaking company and its successor in interest for the amount of the judgment he obtained against the cabinet company. The trial court was evidently of this opinion, for it rendered judgment against all the defendants personally, and also established a lien to the amount of the judgment against the property of the cabinet company sold by Hartung to the undertaking company, and directed its sale under special execution.

Appellants challenge that part of the decree rendering personal judgment against the undertaking company, the successor to the assets of the cabinet company, and we are constrained to sustain them in this position. In order to render the purchasing company personally liable for the debts of the selling corporation, it must appear that (a) there be an agreement to assume such debts; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; or (c) that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transaction was fraudulent in fact. * * * None of these things appear in this case, and in our opinion the court was in error in rendering a personal judgment against the purchasing corporation.

Little is said specifically of that part of the decree which establishes plaintiff's judgment against the cabinet company as a lien upon the property purchased by the undertaking company, although we assume that appellants' counsel are adopting the same theories with reference thereto that they urge against the personal judgment. The cases they cite do not go to this extent, however, although there are some which sustain the proposition that the purchasing corporation takes the property free from all debts or claims against the selling one. A great many authorities in this country hold to the doctrine that, if one corporation transfers all its assets to another, and thus practically ceases

to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation. Some courts announce a modified doctrine declaring that the principle has no application to a sale made in the usual course of business, nor to a bona fide sale for a full consideration in cash or its equivalent.

Although announcing in general terms the first proposition, we are probably committed to the modified one in Warfield v. Marshall Canning Co., 72 Iowa, 666, 34 N. W. 467, 2 Am. St. Rep. 263. It has been broadly asserted by courts of the highest standing that the capital stock of a corporation is a fund for the payment of its debts. "It is a trust fund of which the directors are trustees. * * * The capital stock paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away." Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203. This modern or so-called American doctrine has never been recognized in England, nor does it exist at common law; and, while at one time quite generally adopted in this country, it is now believed to be unsupported to its full extent by any considerable number of courts. Indeed the court which first announced it has largely receded from its former position, and now says that no trust in its true sense exists; that all that was intended by the previous expressions was to announce the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, has taken possession of its assets. "It is never understood that there is a specific lien or a direct trust." See Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

We have recently gone over this matter in the case of State Trust Co. v. Turner, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136, and have repudiated the trust-fund doctrine as broadly announced in some of the earlier cases in this country. The creditors of a corporation in a proper case have an equitable right or lien upon the assets of a corporation. But a corporation, like a partnership, may transfer its property in good faith to a bona fide purchaser, and such purchaser will hold it free from the debts of the corporation. The statutes of this state, however, prohibit the diversion of corporate funds to other objects than those mentioned in its articles, * * * and it is a well-settled rule of the common law that the stockholders of a corporation cannot divide its property or assets among themselves without first paying the corporate debts. The rules thus announced have been stated very clearly in McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169, 119 Am. St. Rep. 970. * * * The instant case seems to call for a rather full discussion of the so-called "trust-fund" doctrine, and we have perhaps said enough to indicate our view of the matter. * * *

Going now to the facts of the case, it will be observed that the exact point for decision is a narrow one. Plaintiff was a creditor of the Des Moines Cabinet Company, holding an unliquidated demand against it, which was in suit when the cabinet company sold its assets to the undertaking company. The undertaking company acquired practically all of the assets of the cabinet company by purchase, and it issued in payment therefor certain of its shares of stock, not to the cabinet company for proper distribution, but to Hartung individually, who immediately pledged the same as security for his individual debts, leaving nothing from which plaintiff could collect his judgment, which he ob-

tained in due course. The charge of actual fraud—that is, of intent to hinder, delay, and defraud plaintiff in the collection of his claim—has been withdrawn, and reliance is placed upon the general doctrine that plaintiff, under this brief recitation of the facts, is entitled in equity to enforce his judgment against the property of the cabinet company which was received, and is still held, by the undertaking company, on the theory that he has an equitable lien upon this property, or that the facts show a case of legal fraud entitling him to proceed against the property. We do not recognize the trust-fund doctrine to the extent that it has obtained in some of the courts; but are of opinion that corporate creditors are entitled in equity to the payment of their debts before any distribution of corporate property is made among the stockholders, and recognize the right of a creditor of a corporation to follow its assets or property into the hands of any one who is not a good-faith holder in the ordinary course of business.

We must also enforce our statute which prohibits the diversion of corporate funds and the payment of dividends not earned. So that, in its last analysis, the question here is, Is the undertaking company and its successor in interest such a bona fide purchaser as that it may hold the assets of the cabinet company free from the debts of that corporation? The answer to this must be in the negative, and for these among other reasons: It issued to Hartung individually whatever of consideration it paid for the assets of the cabinet company, knowing before it finally issued its stock that it was being used by Hartung for his own private ends. It did not buy the property in the usual course of business. On the contrary, it took it over, and issued its own stock in payment therefor, which did not go to the corporation from which it purchased. That it did not take the property free from liability for corporate debts under such circumstances is held by practically all of the cases which we have been able to find or which have been cited by counsel. In Thompson on Corporations, § 6547, it is said: "Where one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation. * * * And while the right to follow a trust fund into the hands of a third party depends upon the answer to the inquiry whether such third party took it with knowledge of the trust, the case being one where the trustee who transferred it to him had a power of disposition, yet in such a case as we are supposing, where one corporation transfers all its assets to another, not in the ordinary course of business, the very circumstances of the case imply full knowledge, on the part of the transferee, of all the facts necessary to charge the property in his hands with the debts of the transferror, and the case is still clearer where the corporation receiving the transfer agrees to assume and pay the debts of the corporation making it, in which case, under the principles of equity, and under the modern Codes of Procedure, the creditors of the transferring corporation may maintain a direct action against the transferee corporation upon the contract, as a contract made for their benefit. * * * The theory under which these cases proceed is that the purchasing corporation is not a good-faith buyer for value, in that the transaction is an unusual one; and the purchasing company is held to acknowledge that the property it buys is subject to the payment of corporate debts, and the buyer is not a bona

fide purchaser for value. * * * There are a very few cases which hold to a contrary doctrine, as, for example, O'Bear Co. v. Volfer, 106 Ala. 205, 17 South. 525, 28 L. R. A. 707, 54 Am. St. Rep. 31.

For appellant it is argued that the plaintiff should have followed the stock received by Hartung. That proposition is very satisfactorily answered in Hibernia Co. v. St. Louis Co. (C. C.) 13 Fed. 516, where it is said that a creditor in such cases is not required to run the chances of following and recovering the value of the shares of the stock after they are placed upon the market. * * * On account of the importance of the questions presented, we have given the case careful consideration, and have come to the conclusion that, while there is no personal liability on the part of the undertaking company as successor in interest to the plaintiff, yet it holds the property received from the cabinet company subject to the payment of plaintiff's claim, and that the trial court was right in establishing a lien against it and ordering a sale on special execution. The decree must be modified to the extent indicated; but, as this is of no material benefit to the defendant, as the property is worth very much more than plaintiff's claim, we think that the modification should be without cost to appellee.

The decree will be modified, and, as so modified, will stand.

LANGHORNE v. RICHMOND RY. CO. et al.

(Supreme Court of Appeals of Virginia, 1895. 91 Va. 369, 22 S. E. 159.)

BUCHANAN, J. * * * The declaration contains but one count, and that is for an injury alleged to have been done the plaintiff by the Richmond Railway Company. The declaration alleges substantially, after giving a history of the organization of the first-named company, and of three deeds of trust that it had given upon its property, works, and franchises to secure its creditors, that there had been a sale under the second and third deeds of trust, subject to the lien of the first, and that certain parties, who were the owners and officers of the corporation, became the purchasers at such sale of its works and property, and continued to carry on the business of said corporation, subject to the first lien or deed of trust, adopting the name of the Richmond City Railway Company, by which last name said corporation has since been known and called; that on or about the 2d day of January, 1882, said Parker Campbell, president of the said Richmond Railway Company, and styling himself president of the Richmond City Railway Company, filed a petition with the common council of the city of Richmond praying for the extension of the charter of the said Richmond Railway Company; that said petition was granted, and on the 17th of May, 1882, said common council of the city of Richmond passed an ordinance extending the charter of the Richmond Railway Company, and continuing to it its powers and privileges until the 31st of December, 1900; that by an act of the general assembly of Virginia passed 17th day of March, 1884, the said Richmond City Railway Company was "recognized" as the same corporation chartered by and under the act of assembly of 20th of March, 1860, and the ordinance thereunder, and contract with the city of Richmond of the 17th May, 1860, and subsequent amendments thereto, under the name of the Richmond Railway company; that, under and by virtue of statutes of Virginia for such case made and

provided, the said defendant the Richmond City Railway Company, by deed dated October, 1890, and recorded in the clerk's office of the chancery court the 20th November, 1890, conveyed to the Richmond Railway & Electric Company all its works, property, and franchises, and, by such sale and the statutes aforesaid, became consolidated with the said Richmond Railway & Electric Company, subject to the following provision, in the said conveyance contained, to wit: "The foregoing conveyance is made subject to the payment by the Richmond Railway and Electric Company of all the liabilities of the party of the first part which may not have been discharged prior to this conveyance." * * *

Whether the Richmond Railway Company and the Richmond City Railway Company was the same corporation or not, or whether there had been a consolidation of the Richmond City Railway Company with the Richmond Railway & Electric Company, as alleged in the declaration, would depend upon the evidence introduced upon these questions, and could not properly be the subject of a demurrer to the declaration. * * *

The grounds of demurrer relied on are that there is a misjoinder of causes of action, of the form of action, and of parties. The declaration states a good cause of action against the Richmond Railway Company for the injury complained of. It alleges that the Richmond City Railway Company is one and the same corporation as the Richmond Railway Company. It also alleges the authority of the Richmond City Railway Company to consolidate with the Richmond Railway & Electric Company, and that a consolidation has been made by which the last-named company acquired all the works, property, and franchises of the Richmond City Railway Company, and assumed all its liabilities. Such a consolidation as is alleged in the declaration not only renders the property and works of the old company, which passed to the company with which it is consolidated, subject to the liabilities of the old company, but also makes the new or surviving company responsible for them. Where two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges and is subject to all the restrictions and liabilities of those out of which it is created. * * * The corporation which is created by such consolidation, or the surviving corporation, where another or others are merged into it or consolidated with it, is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporation, and may be sued under its new name or under the name of the surviving company for their debts as if no change had been made in the name or in the organization of the original corporations. * * *

The privity, some cases say, necessary to support this action, is created by the statute authorizing the consolidation and the purchase and conveyance under it. Other authorities place the right to bring such action on the ground that the effect of the consolidation is, as to the liabilities of the old company, not to dissolve the corporation which is the immediate debtor, but to continue its existence in the consolidated corporation. * * *

Since, by authority of law and the act of the parties, the consolidated corporations are molded into one with none of their rights im-

paired, and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old to compel payment of liabilities. It avoids circuity of action. It allows the party with whom the contract was made or to whom the injury was done to proceed directly against the corporation which, by virtue of the consolidation proceedings, is made liable for it.

In this case, as the plaintiff had instituted his action to recover damages from the consolidated corporation for the injury alleged to have been done him by the corporation consolidated with it, it was necessary for him to allege generally the authority of the old companies to consolidate, and the fact that they had consolidated, and under what name, in order to show the liability of the new or consolidated corporation for the injury sued for. * * *

The declaration states a good cause of action, not only against the Richmond Railway Company, known also as the Richmond City Railway Company, but also against the Richmond Railway & Electric Company. To this there can be no objection, as it was necessary to state a good cause of action against both the Richmond City Railway Company and the Richmond Railway & Electric Company; otherwise there could be no recovery against the last-named company, since its liability depends upon the liability of the Richmond City Railway Company. But the defect in the declaration is in joining them as defendants. They are not jointly liable. One is liable for committing the alleged injury; the other is liable by reason of the consolidation proceedings. The plaintiff has the right to sue either for the injury alleged to have been done, but has no right to sue both in the same action at law. If an action at law be brought against two or more persons, it must appear from the declaration that the contract or tort upon which it is brought is a joint contract or a joint tort. * * *

On these grounds, it was proper for the trial court to sustain the demurrer to the declaration, and its judgment must be affirmed.

SECTION 2.—PRIORITIES AMONG THE VARIOUS CLASSES OF CREDITORS IN GENERAL

WESTERN UNION TELEGRAPH CO. v. UNITED STATES & MEXICAN TRUST CO. et al.

(United States Circuit Court of Appeals, Eighth Circuit, 1915. 221 Fed. 545, 137 C. C. A. 113.)

SANBORN, Circuit Judge. The property of an insolvent railroad corporation in the custody of a court in a suit to foreclose a mortgage upon it is charged with a trust for the benefit, first, of the holders of preferential claims superior in equity to the lien of the mortgage; second, of the holders of the lien of the mortgage and of other such liens in their order of priority; third, of the unsecured or general creditors of the mortgagor; and, fourth, of its stockholders. Any plan or scheme threatened or executed whereby the holders of the bonds secured by the mortgage and the stockholders secure, or intend or undertake to secure, to the stockholders, by contract, foreclosure sale, or other device, an equal or a greater benefit from the property than is thereby secured to, or offered to and rejected by, the general cred-

itors, is such a breach or threatened breach of trust as entitles any complaining creditor to relief in a court of equity. A purchase through a foreclosure sale, or otherwise, of the property of an insolvent corporation by a new corporation, pursuant to a plan or scheme of the bondholders and stockholders of the insolvent company, whereby the stockholders thereof derive, by receipt of stock or bonds of the new company, or otherwise, benefits equal to or greater than those received by, or openly offered to and rejected by, its general creditors, is fraudulent in law as to the latter, and renders the new corporation and the property it purchased at such sale liable for the claims of such creditors against the old company, at least to the extent of the value of the interest secured by the stockholders of the old company in excess of the value of the interest secured by, or openly offered to and rejected by, the unsecured creditors. Northern Pacific Ry. Co. v. Boyd, 177 Fed. 804, 101 C. C. A. 18. * * *

SECTION 3.—CURRENT OPERATING EXPENSES TO BE PAID OUT OF CURRENT EARNINGS IN PREFERENCE TO CLAIMS OF SECURED CREDITORS

SOUTHERN RY. CO. v. CARNEGIE STEEL CO.

(Supreme Court of the United States, 1900. 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458.)

HARLAN, J. * * * It appears from the above statement that the property in the hands of the receivers in the Clyde or insolvency suit was surrendered to the receivers in the foreclosure suit under an order that expressly reserved power in the court to adjudge and decree in the Clyde suit upon the rights of creditors asserting claims against the property of the railroad company or its income in preference to mortgage debts. Besides, the decree of sale provided that the purchaser or purchasers, or his or their assigns, under any decretal sale should, as a part of the consideration, in addition to any sum bid, take the property upon the express condition that he or they would pay and satisfy (among other specified claims) all claims theretofore "filed in this case or in either of the causes consolidated herein, but only when said court shall allow such claims and adjudge the same to be prior in lien or superior in equity to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto." And the right was distinctly reserved to retake and resell the property in case the purchaser or purchasers, or his or their assigns, failed or neglected to comply with the order of court in respect of the payment of such prior liens. These conditions were repeated in the order confirming the sale. So that the right of the Carnegie Company to have its claims determined upon their merits is not at all affected by the sale of the property held by the receivers in the consolidated cause, or by the fact of its transfer to the Southern Railway Company. And we add that the above reservation in the orders and decree of the Circuit Court left it open for the Southern Railway Company to contest, upon their merits, any claims allowed after its purchase under the decree of sale.

The respective rights of the mortgagees of a railroad company and of parties having claims against it at the time its property passed into the hands of receivers have been frequently the subject of consideration by this court. But as counsel differ as to the scope and effect of former decisions, it is necessary to examine them and ascertain whether those decisions embrace the case now before the court.

The leading case is Fosdick v. Schall, 99 U. S. 235, 252, 253, 25 L. Ed. 339, which related to a claim against a railroad company for rent of cars. In that case Chief Justice Waite delivered the unanimous judgment of the court. After observing that the business of all railroad companies was done to a greater or less extent on credit, and that this credit was longer or shorter as the necessities of the case required said: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control."

The court further said: "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favoring one injustice is not done to another. If this cannot be accomplished the application should ordinarily be denied. We think also that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies and the like, it is within the power of the court to use the income from the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because, in a sense, the officers of the company are trustees of the earnings for the benefit of

the different classes of creditors and stockholders; and if they give to one class of creditors that which properly belongs to another, the court may upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. * * * No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act. The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of the restoration should be made to depend upon the amount of the diversion. * * *"

In Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419, it appeared that a receiver was appointed in a suit brought by trustees to foreclose mortgages executed by a railroad company. He was appointed May 19, 1875, at which time the company owed employés for back wages and was indebted for current supplies. To the Union Car Spring Manufacturing Company it was indebted for springs and spirals furnished in March and April before the appointment of the receiver, and which he continued to use. It was also indebted to Hale, Ayer & Co. for supplies to the machinery department and for materials for construction purposes; and on the 13th day of February, 1873, a given amount was due them, as evidenced by the notes of the railroad company falling due on that day. The judges who heard the case in the court of original jurisdiction were divided in opinion on the following points made by intervening creditors: (1) That the railway mortgage was a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road was in the possession of the company. * * * (3) That the net earnings of the road, while in the possession of the court and operated by its receiver, were not necessarily and exclusively the property of the mortgagees, but were subject to the disposal of the chancellor in the payment of claims which had superior equities, if such should be found to exist, and that the intervening petitioners' claims had superior equities to those of the mortgagees. The petitions were dismissed and the intervenors appealed. This court, speaking by Chief Justice Waite, said: "The first question certified in this case is answered in the affirmative, upon the authority of Fosdick v. Schall. The third question is answered in the same way upon the same authority. The Union Car Spring Manufacturing Company is entitled to payment in full, and Hale, Ayer & Co. to payment of so much of their claim only as is for supplies to the machinery department. * * *"

In Burnham v. Bowen, 111 U. S. 776, 780, 783, 4 Sup. Ct. 675, 28 L. Ed. 596, it appeared that the trustees of a mortgage covering all the property of a railroad company and all the revenues and income

thereof, brought suit to foreclose the mortgage and had a receiver appointed. In the order appointing the receiver no special provision was made for the payment of debts owing for current expenses. When the receiver took possession the railroad company was indebted for coal used on locomotives—a debt contracted by the company in the ordinary course of a continuing business, and which would have been paid out of current earnings at the time agreed on if the company had remained in possession. The debt due the coal company was evidenced by the acceptances of the railroad company, which were for different amounts, maturing a month apart, thus implying, as this court, said, monthly settlements of monthly accounts, with a somewhat extended credit to meet the business requirements of the railroad company. A decree was entered finding the amount due to Bowen, the holder of the acceptances, and declaring that the mortgaged property in the hands of the trustees under the decree of foreclosure was equitably bound for the payment thereof.

Chief Justice Waite, delivering the unanimous judgment of this court, said: "In our opinion the view which the Circuit Court took of this case was the correct one. The company had never paid its bonded interest. From the very beginning it was in default in this particular, yet the mortgage trustees suffered it to keep possession and manage the property. The maintenance of the road and prosecution of its business were essential to the preservation of the security of the bondholders. The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings. Consequently, it almost always happens that the current income is incumbered to a greater or less extent with current debts made in the prosecution of the business out of which the income is derived. As was said in Fosdick v. Schall, 99 U. S. 235, 252, 25 L. Ed. 339, the income (of a railroad company) out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. * * *"

It was contended in that case that no part of the income, prior to the receiver's appointment, was used to pay mortgage interest or to put permanent improvements on the property, or to increase the equipment, and therefore there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. Touching that contention, this court said: "The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. * * * So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances we think the debt was a charge in equity on the continuing income, as well as that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing

the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in Fosdick v. Schall the 'current debt fund,' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. * * *"

The opinion in that case thus concluded: "We do not now hold, any more than we did in Fosdick v. Schall or Huidekoper v. Locomotive Works, 99 U. S. 258, 260, 25 L. Ed. 344, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if the current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." * * *

In St. Louis, Alton, etc., Railroad v. Cleveland, Columbus, etc., Railway, 125 U. S. 658, 673, 8 Sup. Ct. 1011, 31 L. Ed. 832, the court, speaking by Mr. Justice Matthews, after stating that ordinarily the unsecured debts of an insolvent railroad company cannot take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens, said: "There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens." "The rule," the court said, "governing in all these cases was stated by Chief Justice Waite in Burnham v. Bowen, 111 U. S. 776, 783, 4 Sup. Ct. 675, 28 L. Ed. 596, as follows: 'That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all."

In Kneeland v. American Loan & Trust Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 34 L. Ed. 379, this court said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness, in preference to the mortgaged liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt

upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as a holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell a railroad company or to work for it, and whoever has dealings with a company when property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced." Again: "It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." * * *

It is apparent from an examination of the above cases that the decision in each one depended upon its special facts. This court has uniformly refrained from laying down any rule as absolutely controlling in every case involving the right of unsecured creditors of a corporation, whose property is in the hands of a receiver, to have their demands paid out of net earnings in preference to mortgage creditors. But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction; and that when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use. * * *

Can the decree below be sustained consistently with these principles? Are the debts due the Carnegie Company of the class designated in the adjudged cases as current debts contracted, not on the personal credit of the railroad company, but in the ordinary course of its business and to be met out of current receipts? * * *

All the rails furnished by the Carnegie Company were not supplied under one contract—a circumstance not to be ignored when determining whether the debts were of the kind that would ordinarily be met out of current receipts. * * *

What was the condition of the roads owned and controlled by the Danville Company at the time the rails were purchased and used? It was in the power of the railroad company and its receivers, who had possession of the books of the company, to have furnished evi-

dence on this point that would have removed all possible doubt. But there is enough in the record to show that the rails purchased from the Carnegie Company were needed in order that the roads in question might be kept by the railroad company in that condition of safety which its duty to the public and to the mortgage bondholders required. * * *

It is apparent that the purchases of new steel rails while the railroads were in possession of receivers were made in the ordinary course of business and were properly chargeable upon and payable out of current receipts in preference to the claims of mortgage creditors. In every substantial sense the expenses thus incurred were operating expenses. They were incurred in the interest of mortgage creditors, the value of whose securities depended upon the unity of the Danville system being preserved and the interests of all concerned not allowed to go to ruin. Why should a different rule be applied to the contracts made with the Carnegie Company shortly before the appointment of receivers in the Clyde suit, the original contract being for only 2,500 tons, and the last one for only 1,656 tons? * * * No one will say that the use of these rails did not add directly to the value of the securities of mortgage creditors. Within the reason of the rule adverted to, the debts contracted with the Carnegie Company were as much current debts in the ordinary course of the business of the railroad company as were the debts contracted by the receivers under the orders of court, when they purchased new rails to put the road in safe condition, or when they purchased at one time four passenger locomotives, and at another time eight passenger and freight locomotives, the cost of which was charged upon the income in their hands. Is it to be said that such expenses incurred by the receivers were preferential debts, but that debts incurred by the railroad company shortly prior to the receivership for rails needed to keep its road in safe condition for use are not of that class? * * *

These figures show that both during the receivership in the Clyde suit and the receivership in the foreclosure suit immense sums were expended in paying interest, sinking fund and car trust debts, and for construction and equipment, which were all for the benefit of mortgage creditors, and which, to the extent necessary, should have been applied in payment of preferential claims, including those of the Carnegie Company. It is a clear case of a diversion of income from the payment of current debts in the interest of mortgage creditors. * * *

We must not be understood as saying that a general unsecured creditor of an insolvent railroad corporation in the hands of a receiver is entitled to priority over mortgage creditors in the distribution of net earnings simply because that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and for the benefit of the mortgage securities. That, no doubt, is an important element in the matter. Before, however, such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear from all the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as part of the operating expenses of the railroad incurred in the ordinary course of business, and to be met out of current receipts. * * *

Our conclusion is that as current earnings which should have been applied in meeting current expenses or liabilities, including the debt due the Carnegie Company, were diverted for the benefit of mortgage creditors, it was the duty of the court to see that that company was reinstated in its claim of priority over the mortgage creditors in the distribution or application of the net earnings of the property. That duty was properly performed by the Circuit Court, and the decree of the Circuit Court of Appeals affirming the judgment of the Circuit Court is affirmed.

SECTION 4.—RIGHTS OF UNSECURED CREDITORS ARISING UPON REORGANIZATION

CENTRAL IMPROVEMENT CO. v. CAMBRIA STEEL CO. et al. GUARDIAN TRUST CO. v. SAME.

(United States Circuit Court of Appeals, Eighth Circuit, 1913. 210 Fed. 696, 127 C. C. A. 184.)

Before SANBORN, Circuit Judge, and MARSHALL and WILLIAM H. MUNGER, District Judges.

PER CURIAM. The paramount issue in these cases is: Did the Southern Company become liable to pay the unsecured debt of the Belt Company to the Trust Company by participating in the execution of a scheme whereby it acquired the title to the property of the Belt Company, deprived its creditor, the Trust Company, of recourse thereto by execution to collect its claim and yet reserved to itself and other stockholders of the Belt Company an equity in its property and a benefit therefrom more valuable than the amount of the Trust Company's claim? After exhaustive arguments and briefs and a review of the master's report on which this case came to this court, the conclusion was reached that this question should be answered in the affirmative. * * *

The history of this litigation, the issues, and many of the facts found by the master are set forth in our former opinion. Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 120 C. C. A. 121.

From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deduced this decisive conclusion: "That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company." * * *

It is conceded that by the transaction described in the former opinion of this court and deemed by it violative of the rights of the Trust Company, a creditor of the Belt Company, if that transaction be valid, was deprived of legal recourse to the property of the Belt Company to obtain payment of that company's debt to the Trust Company of about $360,000. At that time the Southern Company, by an exchange of its stock and bonds for the stock and bonds of the Belt Company, and by a formal foreclosure by itself, as holder of about 89 per cent. of its bonds, by means of its representative, the Provident Company, trustee for the bondholders, against and with the consent of itself as the holder of about 97 per cent. of its stock, and by a foreclosure sale of the property of the Belt Company to itself obtained the title to the Belt Company's property to itself, the bondholders of the Belt Company

secured about $1,330,000 par value of the bonds and $250,000 of the preferred stock of the Southern Company, aggregating at their par value $1,580,000 for their $1,000,000 par value of bonds of the Belt Company, and the stockholders of the Belt Company secured for their $4,750,000 par value of the stock of that company about $1,187,500 par value of the preferred stock and about $3,562,500 par value of the common stock, in all about $4,750,000 par value of the stock of the Southern Company.

The following propositions of law are deemed incontestable:

"A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company." * * *

Where such a transaction is consummated without offering to the unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser at the foreclosure sale, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial and the fact that it has that effect charges the purchaser with liability.

"As against him the sale is void in equity, regardless of the motive with which it was made; for if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company." Northern Pacific Rv. Co. v. Boyd, 228 U. S. 482, 502, 33 Sup. Ct. 554, 559 (57 L. Ed. 931).

"For, if purposely or unintentionally a single creditor was not paid or provided for by the reorganization, he could assert his superior rights against the subordinate rights of the old stockholders in the property transferred to the new company. They [the stockholders of the old company] were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditors was invalid. Being bound by the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim they were none the less bound to recognize his superior right in the property, when years later his contingent claim was liquidated and established." * * *

The plan of reorganization was made November 7, 1899, and it became effective December 20, 1899. This plan was made a part of the reorganization agreement, and it stated that it was expected and intended that the property of the Gulf Company would be purchased

by the reorganized committee, that a successor of the company would be organized to which this property and the stocks and bonds of the Belt Company deposited under the plan would be conveyed, that all this property was to be made subject to the mortgage of the new company, and that it was "intended, as soon as practicable, that the new company acquire the property of the terminal companies in fee and bring them directly under the lien of the mortgage," and the acquisition of the stocks and bonds of that company and their pledge under that mortgage were but the means to the accomplishment of this end which the plan contemplated.

It is conceded that the organization of the Southern Company, its purchase of the Gulf Company property, its exchange of its stocks and bonds for those of the Belt Company, and its possession and control of its property on April 1, 1900, by means of its ownership of this stock, were steps in the execution of the scheme. But the reorganization committee did not cease its work until October 1, 1900, and before that date the Southern Company by its representative, the Provident Company, had, on September 6, 1900, commenced the suit to foreclose the Belt mortgage and to put its property in the hands of receivers and had caused the Belt Company to consent to the receivership. For what purpose did the Southern Company take these steps? It had the possession and absolute control of the Belt Property by its ownership of 89 per cent. of its bonds and 97 per cent. of its stock. A default on its bonds was in reality a default of itself to itself. Foreclosure could give it no more power over the Belt Company than it already had. For what purpose then was the foreclosure? Evidently to carry out the reorganization agreement, as it was within the power and as it was the duty of the committee and of that company, its creature, to do, to acquire the property of the Belt Company in fee and bring it directly under the lien of the mortgage. Why did the Southern Company exchange its stock for the stock of the Belt Company? Was it not for the purpose of silencing the opposition of the Belt stockholders to the coming foreclosure, and to its acquisition of the fee of the Belt Company's property, and was not the scheme of reorganization the primary cause, the vesting of the fee of the Belt property in the Southern Company by the foreclosure the object and effect of that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative. * * *

Another argument is that the Trust Company is entitled to no relief because the equitable interest of the creditors in the property of the Belt Company was of no value. This contention is founded on the findings of the master that there was no direct testimony of the fair value of the Belt Company's property at or before the time of the foreclosure, no proof that it was worth more than the $1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was $1,000,000, and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here in the absence of an estoppel, that issue was: What was the equitable interest of the creditors in the mortgaged

property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company, the trustee for the creditors, to itself, for a trustee who violates his trust may not profit thereby? * * * The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property.

"If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." Northern Pacific Ry. Co. v. Boyd, 228 U. S. 508, 33 Sup. Ct. 561, 57 L. Ed. 931.

The report of the master discloses other facts than that he received no direct evidence of the fair market value of the property except the bid at the foreclosure sale, which leave no doubt that the equitable interest of the creditors was worth much more than the amount of the Trust Company's claim, $360,000. That report shows that the Southern Company paid $1,330,000 of its bonds and $250,000 of its preferred stock, or $1,580,000 of its new bonds and stock for the $1,000,000 of the old bonds of the Belt Company. The fact to which counsel call attention, that the new bonds drew but 3 per cent. interest per annum while the old bonds drew 5 per cent., has not been overlooked. But even so, the reorganization committee and the Southern Company would not have given for these old bonds a bonus of 33 per cent. in new bonds and $250,000 in the stock of the Southern Company unless the old bonds had been well secured. The master's report also shows that the Southern Company gave $1,187,500 of its preferred stock and $3,562,500 of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received, $10 per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common stock. That stock must therefore have been worth at least the $10 cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company therefore paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them $4,750,000 of its preferred and common stock for their stock in that company. But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders, and its value could not have been less, and was undoubtedly greater, than the $475,000. That interest was therefore worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company, and the Southern Company cannot escape liability on the ground that it was worthless. The fact that at the foreclosure sale, where there was no competition, the Belt Company was bid in at $1,000,000, fails to disprove or to even render doubtful

this conclusion, and the Southern Company which gave $4,750,000 of its full paid stock, which it was readily selling for $10 cash per share, and Gulf stock of equal amount, for the inferior stock of the Belt Company, cannot be heard to say that the superior equity of the creditors therein was worthless. Northern Pacific Ry. Co. v. Boyd, 228 U. S. 508, 33 Sup. Ct. 554, 57 L. Ed. 931. * * *

Deliberate consideration has been given to the earnest objection to the consideration by this court of the question of the value of this equitable interest of the creditors in the Belt property on the ground that the master found that there was no direct evidence that the property of the Belt Company was worth more than $1,000,000, and hence that this was its fair value, that no exception was taken to that finding, and that the evidence is not here. But because the finding of the fair market value of the mortgaged property is not conclusive of the value of the creditors' equity therein, and because other facts and findings contained in the master's report, all of which are available to this court for the determination of that issue, have convinced that the value of that equity was more than $475,000, the objection of counsel has not been thought fatal to the consideration and determination of this question. * * *

It is another contention of counsel for the Southern Company that the remedy of the Trust Company in this court of equity is limited to the subjection of the property of the Belt Company in the possession of the Southern Company to the payment of its claim and that it may not have a decree that the Southern Company pay it. This court does not concede the soundness of this position. * * *

The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company, so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. * * *

And if the Southern Company has disposed of the property or destroyed it, or placed it beyond the reach of the Trust Company or the court, or given a mortgage or incumbrance upon it to a party without notice, the court has plenary power, and it is its duty to require the Southern Company to account for and pay over the proceeds of the property or the value of it, or the proceeds of the mortgage, or the amount of it, to the extent of the Trust Company's claim, and to so conduct its proceedings and mold its decrees that full relief may be secured by the Trust Company. And as the property of the Belt Company was worth many times the amount of the claim of the Trust Company at the time of its transfer to the Southern Company, the ultimate result will be the same whether the decree be for the seizure and sale of the Belt property or for the payment of the claim of the Trust Company by the Southern Company, for it must ultimately be paid either out of the property in its hands or by the Southern Company itself. * * *

And the conclusion of the whole matter is * * * that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of $639,658.86 and interest from the date of the former decree on $473,723.59 at 6 per cent. per annum, on $46,565.76 at 7 per cent. per annum, and on $119,369.51 at 8 per cent. per annum, and the costs of this suit; that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale, and conveyance, and otherwise, was and is prior in time and superior in equity and right, to the extent necessary to pay that debt, to the right, title, and equity of the Southern Company therein. * * *

Let the decree be reversed, and let the cases be remanded to the District Court, with directions to render a decree for the Trust Company in accord with the views expressed in this opinion.[1]

SECTION 5.—RIGHTS OF CREDITORS AGAINST STOCKHOLDERS

CLARK v. BEVER.

(Supreme Court of the United States, 1891. 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88.)

In the year 1872, the Burlington, Cedar Rapids & Minnesota Railway Company—of which at the time the intestate, George Greene, was president, as well as a stockholder, and of which he continued to be president until February, 1875—had a settlement with the Northwestern Construction Company, of which also Greene was a member, for work done in building a part of its road. This settlement showed the sum of $70,000 to be due the construction company. The railway company, being unable to pay this claim in money, delivered to the construction company 3,500 shares of its stock, at 20 cents on the dollar, each share being for $100, and the same was accepted in full satisfaction of the debt. The stock, which was not worth anything in the market, was issued directly to the members of the construction company, the intestate Greene receiving 910 shares as his portion. No other payment than this 20 per cent. was made for or on account of the stock. The good faith of the parties in making this arrangement is not impugned by allegation or proof. The construction company was reluctant to take the stock, and insisted upon payment in cash. What the original stockholders paid for their shares does not appear; nor does the record show whether or not Greene exercised any of the privileges of a stockholder. * * *

Clark, the plaintiff below, a citizen of Ohio, being the holder of 50 gold bonds of $1,000 each of the Burlington, Cedar Rapids & Minnesota Railway Company, dated June 1, 1874, payable in the year 1914,

[1] See the collection of papers, Some Legal Phases of Corporate Financing, Reorganization and Regulation by Stetson, Lynde, Cravath et al., and the article by Samuel Spring, on Upset Prices in Corporate Reorganization, in 32 Harvard Law Review, 489.

and bearing interest at 7 per cent. per annum,—which bonds were part of a series of 2,000 each for $1,000, secured by mortgage upon the company's net income, rolling stock, and additions, and convertible at the option of the holder into capital stock,—brought suit to recover the amount due thereon, and on the 4th of June, 1878, recovered judgment against the railroad company for the sum of $65,517, to bear interest from that date. We infer, though the record contains no distinct statement or proof on the subject, that the bonds became due and payable prior to this suit, on account of default in the payment of interest. Execution was issued upon the judgment, and was returned August 10, 1880, "No property found."

The present suit was commenced July 5, 1881, by Clark against the administrator of Greene, a citizen of Iowa, in the circuit court for Linn county in that state. The petition, after setting out the foregoing judgment, the return of the execution thereon unsatisfied, and the ownership of the 910 shares of stock by Greene up to his death, and by his estate since, alleged "that of the value of said shares of stock owned by said decedent there has been paid only the sum of eighteen thousand two hundrd dollars, or about twenty per centum of the full value of said stock, and there is still due upon said shares a balance of eighty per centum of their full value, amounting to the sum of seventy-two thousand and eight hundred dollars; that the said balance due upon said shares was a trust fund in the hands of said decedent for the payment of said judgment, and is still a trust fund for the purpose in the hands of decedent's administrator. * * *

The court below * * * held, as matter of law, that upon the evidence the intestate, Greene, by taking the 910 shares of stock upon which the 20 per cent. was paid, did not become liable to pay anything further on account thereof to creditors of the railway company; and, pursuant to its direction, the jury returned a verdict for the defendant. * * *

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court. * * *

We come now to consider the principal questions in the case. They relate to the liability of the defendant for the difference between the face value of the stock issued to Greene in 1872, and the value at which it was rated in the settlement of that year with the Burlington, Cedar Rapids & Minnesota Railway Company. The general proposition advanced by the plaintiff is that it was not competent for the railway company to issue to Greene and his associates in discharge of its debt to them, amounting to $70,000, 3,500 shares of stock of the par value of $350,000, although the settlement upon that basis may have been demanded by the best interests of the company, and was made in good faith, without intention to harm the corporation or to defraud its creditors, existing or subsequent, and although the stock at the time "was not worth anything in the market;" and that Greene took the 910 shares issued to him for 20 per cent. of its face value, subject to the implied condition that he should be liable for any unpaid debts of the corporation to the extent of the difference between the face value of the stock and the amount at which it was taken by him. It is not contended that such liability arises from the relations Green held to the two companies making the settlement of 1872, but from the obligations the law imposed for the benefit of creditors both upon the corporation issuing the stock and its stockholders. * * *

The statutory provisions that are supposed by the plaintiff to sustain his position, which were in force when the stock in question was issued, are found in title 10, c. 52, of the Revision of the Statutes of Iowa of 1860. * * *

The argument in behalf of the plaintiff assumes that, consistently with these statutory provisions, no one can, under any circumstances whatever, become the owner of the stock of an Iowa corporation, except subject to the condition that, where property of the corporation cannot be found, the private property of the stockholder may be seized under execution in favor of a judgment creditor to the extent of the difference between what he actually paid for the stock, whether in money or in property, and its face value. And it is further insisted that, independently of the statute, such is the doctrine of general law relating to subscriptions to the stock of corporations, as announced by this court in several cases. We are of opinion that neither of these positions can be maintained.

The local statute undoubtedly proceeds upon the ground that unpaid installments of stock subscribed constitute—no other rule being prescribed by legislative enactment—a trust fund for the benefit of creditors. But it does not declare that a corporation is without power, under any circumstances whatever, to dispose of its stock at less than par, or that stock purporting to be full paid shall, in all cases, and without reference to the circumstances under which it was acquired, be deemed unpaid to the extent that the amount given for it by the owner, whether in money or in property, was less than its face value. On the contrary, the statute itself imposes no express restriction upon the disposition by a corporation of its stock except such as is imposed upon individuals, and prescribes no rule in respect to the liability of a stockholder to creditors except that when corporate property cannot be found to pay a judgment creditor his private property may be seized under the execution to the extent of any unpaid installments on the stock owned by him. Whether any such indebtedness really exists upon the part of a particular stockholder, and whether he in law or in fact owes any sum on the stock held by him, was left by the statute to be determined in each case, upon its own circumstances, and in accordance with the principles of general law touching the rights and liabilities of creditors and stockholders. If the legislature had intended that the acquisition of stock at less than its face value should be conclusive evidence in every case that the stock, as between creditors and stockholders, is "unpaid," it would have been easy to so declare, as has been done in some of the states. If such a rule be demanded by considerations of public policy, the remedy is with the legislative department of the government creating the corporation. A rule so explicit and unbending could be enforced without injustice to any one, for all would have notice from the statute of the will of the legislature. It is not for the courts, by mere interpretation of a statute, not justified by its language, to accomplish objects that are within the exclusive province of legislation. * * *

Do the decisions of this court require us to hold, in such a case, that a creditor taking stock in payment of his claim is bound to other creditors for the face value of the stock? The plaintiff contends that our decisions are to that effect. Let us see. In Sawyer v. Hoag, 17 Wall. 610, 620, 21 L. Ed. 731, it was held that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund sub

modo for the benefit of its general creditors. * * * There is no dispute here as to the soundness of this general principle. The dispute is as to its application to a case like the present one. We can be aided in solving this inquiry by ascertaining the character of the particular cases in which it has been applied by this court. In Sawyer v. Hoag, a subscription of $5,000 to the stock of an insurance company for which the subscriber paid in full, but received in return the check of the corporation for $4,250 under an agreement that the debt for the stock should be extinguished, and the amount of the check should be treated simply as a loan of money to the stockholder, was held to be a mere device to evade the rule that unpaid subscriptions of stock constitute a trust fund for the benefit of the creditors of the corporation; consequently, that the stock there in question was to be regarded, as between the corporation and creditors, to be unpaid to the extent of the amount received back from the corporation under the pretense of a loan. * * * In Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384, a person holding certificates of stock by transfer from the original subscriber, and standing upon the books of the corporation as a stockholder, was held liable for the balance due upon the stock, without proof of an "express" promise upon his part to pay, * * * and in Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818, that a transferee of stock who caused the transfer to be made to himself, as collateral security for a debt of the transferrer, was liable for the balance due on such stock. * * * In Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968, it was declared, among other things, that a contract between a corporation and its stockholders, that they should never be called upon to pay any other assessment than that paid at the outset, while good as between the corporation and the stockholders, was a fraud in law upon creditors, which they could have set aside whenever their rights intervened and their claims were unsatisfied. In Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516, it was held that the issuing by a corporation of bonus stock was in violation of a statute of the state declaring it to be unlawful to issue certificates of stock until the shares were fully paid, and that one exercising the privileges and powers of a stockholder in a corporation was not exempt from the liabilities attaching to a bona fide stockholder who took shares purporting to be, but which in fact were not, fully paid.

This detailed statement of the above cases has been made because of the confident assertion that they rest upon doctrines necessarily requiring the reversal of the judgment. We do not concur in this view. In all of these cases, except one, there was an actual subscription of a given amount. They were cases of promises to pay the company the amount subscribed, not of sales by it. According to those cases, a stockholder, becoming such by formal subscription or by transfer upon the books of the corporation, cannot be discharged to the injury of creditors by any agreement, arrangement, or device to which creditors do not give their assent, and by which the stockholder is to pay less than the amount due upon such stock. * * *

The present case presents features that are not to be found in the others. It is not the case of an ordinary subscription of stock in a given amount. Nor is it, strictly, one of an ordinary purchase of stock for purposes of investment. It is the case of a creditor of an insolvent railroad corporation which, in consequence of its inability to pay creditors in money, was threatened with bankruptcy, and which re-

fused or was unable to pay except in stock that was without market value. To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value—there being no statute forbidding such a transaction—without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property. We do not think the statute of Iowa can be properly construed to cause such a result in respect to corporations organized under its laws.

We must not be understood as modifying in any respect the principles laid down in the cases above cited. * * * As said by this court in Peters v. Bain, 133 U. S. 670, 691, 10 Sup. Ct. 354, 33 L. Ed. 696, "unpaid subscriptions to stocks are assets, and have frequently been treated by courts of equity as if impressed with a trust sub modo, in the sense that neither the stockholders nor the corporations can misappropriate subscriptions so far as creditors are concerned." * * *

Judgment affirmed.

DOWNER v. UNION LAND CO. OF ST. PAUL et al.

(Supreme Court of Minnesota, 1911. 113 Minn. 410, 129 N. W. 777.)

START, C. J. This is an appeal by the plaintiff from an order of the district court of the county of Ramsey overruling his demurrer to the second alleged defense in the answer of the defendant Willius. * * *

The here material allegations of the complaint, briefly stated, are to the effect following: The defendant Union Land Company, * * * on April 5, 1887, issued 17,000 shares of its capital stock, of the par value of $100 each, as full paid to its organizers, of which 50 shares were delivered to the defendant Willius, hereafter referred to as the defendant. The company, after such issue of stock, became indebted in the sum of $98,000, and thereafter, for the purpose of securing the money to pay such indebtedness, it issued its bonds, amounting in the aggregate to $126,000, with 10 per cent. annual interest, payable to trustees or bearer February 1, 1894. The plaintiff purchased 6 of such bonds, each for $500, and paid therefor $3,000, relying upon the representation that the 17,000 shares of stock so issued had been paid for in full. None of his bonds, or any part thereof, were paid, except interest to August 1, 1895. He recovered a judgment against the company in the district court of the county of Ramsey, on February 5, 1902, for the amount due on the bonds, $4,979.83. Execution was issued on the judgment and returned satisfied only to the extent of $1,023.87. The balance of the judgment has never been paid and the company is insolvent. The organizers and stockholders of the company, including the defendant, with the intent of acquiring the 17,000 shares of stock as full paid, when in fact they were not, purchased 1,476 acres of land, for which they paid only $679,289, which was more than it was worth. They caused this land, with cash sufficient to make the price actually paid for the stock not more than $850,000, to be transferred and turned over to the company in payment of the 17,000 shares of stock, an overvaluation of the land of

more than $790,000. Such valuation was not the result of mistake, but was a gross overvaluation, intentionally made by all the parties to the transaction, with the knowledge of all the past and present stockholders of the company, and with the intent to enable such stockholders to acquire, and they did thereby acquire, each his respective portion of the 17,000 shares of the capital stock, by paying to the company therefor not to exceed $50 per share. The 17,000 shares so issued are the only portion of the authorized capital stock of the company which was ever issued. * * *

The complaint prays, in effect, judgment against the company for the amount due on the original judgment, and that each of the defendant stockholders be required to pay so much of the difference between the par value of his stock and the amount actually paid by him therefor as may be necessary to pay the judgment against the company, and for general relief.

The answer of the defendant avers four alleged defenses, viz.: (1) The stock was in fact fully paid. (2) The plaintiff's bonds contained an express agreement that the stockholders should in no wise be liable for their payment. (3) The action is barred by the statute of limitations. (4) Laches.

The plaintiff replied to all the alleged defenses, except the second, to which he demurred. The trial court overruled the demurrer. * * *

The pivotal question presented by the record is whether the contract as to stockholders' liability contained in the bonds is a defense on the merits to this action. The demurrer admits the execution of the contract, the consideration therefor, and, therefore, its validity. Counsel for defendant contend that such contract is an absolute bar to this action, and cite in support of the claim, with others, the case of Brown v. Eastern Slate Co. et al., 134 Mass. 590. * * * Another case relied on is U. S. v. Stanford, 161 U. S. 412, 16 Sup. Ct. 576, 40 L. Ed. 751. * * *

These cases sustain the proposition that, if a person contracting with a corporation expressly agrees to look only to the corporation and its property for the payment of his debt against it, such agreement will be a waiver of the constitutional or statutory liability of stockholders for the payment of the debt. It is clear that the agreement contained in the bonds, which we have quoted, released the stockholders from any and all liability for the payment of the bonds imposed by the Constitution or statute, and from all liability whatever, in the absence of any element of fraud; that is, if they had then paid the full par value of their stock as represented by the issuance of it as full paid. This is not an action to enforce any constitutional or statutory liability of the defendant for the payment of the bonds; but it is, in effect, one to compel the defendants to make good, so far as may be necessary to satisfy the plaintiff's judgment against the corporation, their alleged representation, alleged to have been relied upon by him, that the assets of the corporation had been increased to the full par value of their stock, when in fact only one-half thereof had been paid. The question, then, in its last analysis, is whether such a liability was within the contemplation of the parties when the bond agreement was made, and did the plaintiff thereby waive such liability in case he might thereafter discover for the first time the facts upon which liability must rest? The right of a creditor to maintain such an action is settled by the repeated decisions of this court. * * *

The basis of the action is not contract, but fraud, for the reason that: People deal with the corporation and give it credit on the faith of its stock, and they have the right to assume that it has a paid-in capital to the amount which it represents itself as having. If the representation is false, it is a fraud on creditors; and, in case the corporation becomes insolvent, equity will compel the holders of bonus stock, or stock not in fact paid in full, to make the representation good, by paying the balance due on their stock to the extent necessary to pay creditors whose debts were contracted subsequent to the issuing of the stock as fully paid, and who are presumed to have relied on the representation. It is the misrepresentation of fact in stating the amount of capital to be greater than it is in fact which is the basis of the liability of the stockholders in such cases. A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets of the corporation have been increased to the amount of the par value of the stock so issued.

The very basis of this action clearly indicates that the alleged liability sought to be enforced in this action was not within the contemplation of the parties at the time the bond agreement was made, and that it was not waived thereby. * * *

It was alleged in the second defense, and admitted by the demurrer, that no representations were ever made to the plaintiff that the shares of stock were fully paid, except the fact that they were issued as fully paid; that he made no inquiries either as to the amount thereof, or the amount paid thereon; and that he had no information in regard thereto. It is urged, in effect, on behalf of the defendant, that in view of this admission the plaintiff did not rely on any representation that the stock was fully paid. We cannot concur in this view of the effect of the allegations referred to. The complaint expressly alleged that the plaintiff, relying upon the representation that the shares had been paid in full, purchased and paid for his bonds. * * *

With reference to a trial of this issue we deem it proper to say that the presumption of reliance by creditors upon the representation that stock issued as fully paid is so in fact is only prima facie. The rule in such cases is that: "It is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of 'bonus stock.'" * * *

It follows that the demurrer to the defense should have been sustained.

Reversed.

CHAPTER VI

RELATION OF THE CORPORATION TO THE STATE

Section
1. Power to Alter the Charter.
2. Police Powers of the State.
3. Taxing Powers of the State.
4. Powers with Respect to Foreign Corporations.

SECTION 1.—POWER TO ALTER THE CHARTER

THE RAILROAD TAX CASES.

SAN MATEO COUNTY v. SOUTHERN PAC. R. CO.

(Circuit Court of the United States, 1882. 13 Fed. 722.)

FIELD, J. * * * The state, in the creation of corporations, or in amending their charters, or rather in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them when created, or by amendment, from the guaranties of the federal constitution. It cannot impose the condition that they shall not resort to the courts of law for the redress of injuries or the protection of its property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law, or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the state may exercise unlimited and irresponsible power. Whatever the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer, by its general laws, upon corporations certain capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications and impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances.

The state grants to railroad corporations formed under its laws a franchise, and over it retains control, and may withdraw or modify it. By the reservation clause it retains power only over that which it grants; it does not grant the rails on the road; it does not grant the depots alongside of it; it does not grant the cars on the track, nor the engines which move them, and over them it can exercise no power except such as may be exercised through its control over the franchise, and such as may be exercised with reference to all property used by carriers for the public. The reservation of power over the fran-

chise—that is, over that which is granted—makes its grant a conditional or revocable contract, whose obligation is not impaired by its revocation or change. The Supreme Court established, in the Dartmouth College Case, that the charter of a private corporation is a contract between the corporators and the state, and that it was, therefore, within the prohibition of the federal constitution against the impairment of contracts. To avoid this result the states have generally inserted clauses in their constitutions reserving a right to repeal, alter, or amend charters granted by their legislatures, or to repeal, alter, or amend the general laws under which corporations are allowed to be formed. The reservation relates only to the contract of incorporation, which, without such reservation, would be irrepealable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the supreme court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts. The property of the corporation, acquired in the exercise of its faculties, is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business. * * *

SECTION 2.—POLICE POWERS OF THE STATE

ATLANTIC COAST LINE R. CO. v. CITY OF GOLDSBORO.

(Supreme Court of the United States, 1914. 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721.)

Mr. Justice PITNEY delivered the opinion of the court.

The Atlantic Coast Line Railroad Company, plaintiff in error, has succeeded to the ownership of the property, franchises, and rights of the Wilmington & Raleigh Railroad Company, which was chartered by the general assembly of North Carolina in the year 1833, and whose name was afterwards changed to Wilmington & Weldon Railroad Company. Under its charter powers the original company constructed its railroad from Wilmington to and into Wayne county, North Carolina, passing through the place which later, and in the year 1847, became incorporated as the town of Goldsboro, now the city of Goldsboro, defendant in error. * * *

In November, 1909, the board of aldermen passed an ordinance or ordinances containing the following provisions: Section 1 rendered it unlawful for any railroad company to run any freight or passenger train on East or West Center streets at a rate of speed exceeding four miles per hour, and required the companies to have flagmen proceed 50 feet in front of every train to warn persons of its approach. Section 2 provided that the shifting limits on East and West Center streets should be from Spruce street to the city limits on the south, and from Ash street to the city limits on the north; thus excluding the four blocks between Spruce and Ash streets. Section 3 declared it to be unlawful for any railroad company to do any shifting within those four blocks at any other time than between the hours of 6:30 and 8:30 a. m., and between 4:30 and 6:30 p. m. Section 4 rendered it unlawful for any railroad company to place any car and allow it to stand

for a longer period than five minutes at any point on East and West Center streets within the same four blocks. Section 5 required all railroad companies owning tracks on East and West Center streets between Walnut and Vine (four blocks) to lower the tracks so as to make them conform to the grade line of the streets, and to fill in the tracks between the rails; the required lowering being specified as six inches from Walnut to Mulberry, ten inches between Mulberry and Ash, and eighteen inches between Ash and Vine streets. Substantial penalties were prescribed for violations of these prohibitions.

Plaintiff in error began this action against the city of Goldsboro in the superior court of Wayne county, seeking to restrain the enforcement of the ordinances. A temporary restraining order was granted. At the hearing, the objection to the enforcement of section 1 was abandoned by plaintiff; as to the other sections the court vacated the restraining order. Upon appeal, the Supreme Court of North Carolina affirmed the judgment. 155 N. C. 356, 71 S. E. 514. The present writ of error * * * is based upon the insistence, made in the state courts and there overruled, that the ordinances impair the obligation of the contract contained in the charter of the company, in contravention of section 10, art. 1, of the federal Constitution, and deprive the company of its property without due process of law, in contravention of the Fourteenth Amendment. * * *

We must therefore treat the ordinances as legislation enacted by virtue of the lawmaking power of the state. They are manifestly an exertion of the police power, and the question is whether, viewed in that light, they run counter to the "contract" or "due process" clauses.

That a railroad charter may embody a contract, within the meaning of the Constitution, hardly needs to be stated. Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629. In the present case the supreme court of North Carolina held that by the Constitution of the state, the charter was subject to alteration or repeal at the legislative will. If the right of repeal was indeed thus reserved, the result is obvious. Greenwood v. Union Freight R. Co., 105 U. S. 13, 21, 26 L. Ed. 961, 965. * * * We are not referred to and are unable to find, in the state Constitution as it existed when the charter now in question was granted, any reservation of the right of repeal, and will assume for present purposes that the contract was not thus qualified, and deal only with the question whether it has been impaired. * * *

Adopting the extreme assumption that the railroad company has still a complete and unqualified ownership of every portion of the strip of land that was originally acquired in fee simple, and as proprietor might lawfully exercise its dominion by excluding the public from it; yet it does not do this, but permits, and long has permitted, the public to use material portions of the strip for ordinary street purposes; it apparently excludes the public from no portion except as the existence of the tracks and the passage of trains may have such a tendency or effect. And thus the company, at least for the time, devotes its property in part to public uses that are more or less inconsistent with the railroad uses, and under conditions such as to render the railroad operations necessarily a source of danger to the public while enjoying the permitted use. Under such circumstances the state, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim, "Sic utere tuo ut alienum non lædas," so far as may be requisite for the protection of the public.

For it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. Slaughter House Cases, 16 Wall. 36, 62, 21 L. Ed. 394, 404; Munn v. Illinois, 94 U. S. 113, 125, 24 L. Ed. 77, 84; * * * Mugler v. Kansas, 123 U. S. 623, 665, 31 L. Ed. 205, 211, 8 Sup. Ct. 273. * * * And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 255, 41 L. Ed. 979, 991, 17 Sup. Ct. 581; * * * Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 591, 592, 50 L. Ed. 596, 608, 609, 26 Sup. Ct. 341, 4 Ann. Cas. 1175.

Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power.

The ordinances now in question must be considered in view not only of the charter and property rights of plaintiff in error, but of the actual situation that has developed and now exists in Goldsboro, with the consent and long acquiescence of plaintiff in error and its predecessors in interest. A town of considerable size and importance has grown up along the line of the railroad. The strip of land 130 feet in width, so far as it is not occupied by the railroad tracks, for many years has been and still is used for the ordinary purposes of a street. The supreme court of North Carolina found, upon adequate evidence, that it is the main business street of the town, frequently crowded with pedestrians and vehicles; and that the operation of trains along it, notwithstanding the utmost care of the railroad company, tends to obstruct the crossings and is fraught with danger to life and property. There are, within the blocks covered by the ordinances, two main lines of railway besides that of plaintiff in error. These, of course, complicate the situation by narrowing the spaces available for ordinary travel north and south on East and West Center streets, and must also enhance the dangers at the crossings.

It is very properly conceded that the company may be required to limit the speed of its trains, and to have flagmen precede them to warn persons of their approach; and that the company may be required to change its grade at the street crossings. * * *

The regulations in question are thus found to be fairly designed to promote the public health, safety, and welfare; the measures adopted appear to be reasonably suited to the purposes they are intended to accomplish; and we are unable to say that there is any unnecessary interference with the operations of the railroad, or with the property rights of plaintiff in error. Therefore, no violation of the "contract" or "due process" clauses is shown.

Judgment affirmed.

SECTION 3.—TAXING POWERS OF THE STATE

HAWLEY v. CITY OF MALDEN.

(Supreme Court of the United States, 1914. 232 U. S. 1, 34 Sup. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916C, 842.)

Mr. Justice HUGHES delivered the opinion of the court.

The plaintiff in error, a resident of the city of Malden, brought this action to recover the amount of certain taxes which he had paid under protest. The taxes were assessed upon shares which he held in foreign corporations most of which did no business and had no property within the state of Massachusetts. It was alleged that the levy and collection were in violation of the due process and equal protection clauses of the Fourteenth Amendment. Demurrer to the declaration was sustained by the superior court, and the case was reported to the Supreme Judicial Court of the commonwealth, which directed judgment for the defendant. * * *

It is contended that the shares were not within the jurisdiction of the state, and hence that the enforcement of the tax constitutes an unconstitutional deprivation of property.

The power thus challenged, as the state court points out, has been continuously exercised by the state of Massachusetts for more than three-quarters of a century; * * * and the rulings in the state cases * * * proceed upon the view that shares are personal property, and, having no situs elsewhere, are taxable by the state of the owner's domicile, whether the corporations be foreign or domestic.

It is said that the question of the constitutional validity of such taxation has not hitherto been raised definitely in this court and has not been directly passed upon. There is no doubt, however, that the existence of the state authority has invariably been assumed. * * *

To support the contention that this familiar state action, hitherto assumed to be valid, is fundamentally violative of the federal Constitution, the plaintiff in error invokes the doctrine that a state has no right to tax the property of its citizens when it is permanently located in another jurisdiction. * * * But these decisions did not involve the question of the taxation of intangible personal property; * * * nor do they apply to tangible personal property which, although physically outside the state of the owner's domicile, has not acquired an actual situs elsewhere. * * * When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation. * * *

While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or choses in action. * * * As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. * * *

Undoubtedly, the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares,

whether owned by residents or nonresidents. * * * This is by virtue of the authority of the creating state to determine the basis of organization and the liabilities of shareholders. * * * So, by reason of its dominant power to provide for the organization and conduct of national banks, Congress has fixed the places at which alone shares in those institutions may be taxed. * * * Whether, in the case of corporations organized under state laws, a provision by the state of incorporation, fixing the situs of shares for the purpose of taxation, by whomever owned, would exclude the taxation of the shares by other states in which their owners reside, is a question which does not arise upon this record and need not be decided. No such provision is here involved, and the present case must be determined by the application of the established principle which has been stated.

The real ground of complaint in this class of cases is not that the shares are taxed in one place rather than in another, but that they are taxed at all, when presumably the property and franchises of the corporation which give to the shares their value are also taxed. As to this we may repeat what was said in Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669: "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

The judgment is affirmed.

EISNER v. MACOMBER.

(Supreme Court of the United States, 1919. 252 U. S. 189, 40 Sup. Ct. 189. 64 L. Ed. 521, 9 A. L. R. 1570.)

Mr. Justice PITNEY delivered the opinion of the Court.

This case presents the question whether, by virtue of the Sixteenth Amendment, Congress has the power to tax, as income of the stockholder and without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.

It arises under the Revenue Act of September 8, 1916, * * * which plainly evinces the purpose of Congress to tax stock dividends as income. * * *

In view of the importance of the matter, and the fact that Congress in the Revenue Act of 1916 declared * * * that a "stock dividend shall be considered income, to the amount of its cash value," we will deal at length with the constitutional question, incidentally testing the soundness of our previous conclusion.

The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted. In Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, under the Act of August 27, 1894 (28 Stat. 509, 553, c. 349, § 27), it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by rea-

son of ownership; and that Congress could not impose such taxes without apportioning them among the states according to population, as required by article 1, § 2, cl. 3, and section 9, cl. 4, of the original Constitution.

Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the Sixteenth Amendment was adopted, in words lucidly expressing the object to be accomplished:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income. * * * It becomes essential to distinguish between what is and what is not "income," as the term is there used, and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution. * * *

The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term "income," as used in common speech, in order to determine its meaning in the amendment, and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue. * * *

"Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case, 247 U. S. 183, 185, 38 Sup. Ct. 467, 469, 62 L. Ed. 1054.

Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. *"Derived—from—capital;"* "the *gain—derived—from—capital,*" etc. Here we have the essential matter: *not* a gain *accruing to* capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being *"derived"*—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal—*that* is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the Sixteenth Amendment—"incomes, *from* whatever *source derived*"—the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.

Can a stock dividend, considering its essential character, be brought within the definition? To answer this, regard must be had to the nature of a corporation and the stockholder's relation to it. * * *

Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole, entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects, entitled to vote at stockholders' meetings, to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors. Short of liquidation, or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return. If he desires to dissociate himself from the company he can do so only by disposing of his stock.

For bookkeeping purposes, the company acknowledges a liability in form to the stockholders equivalent to the aggregate par value of their stock, evidenced by a "capital stock account." If profits have been made and not divided they create additional bookkeeping liabilities under the head of "profit and loss," "undivided profits," "surplus account," or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only (excluding, of course, a possible advantageous sale of his stock or winding-up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested. * * *

The profits of a corporation, as they appear upon the balance sheet at the end of the year, need not be in the form of money on hand in excess of what is required to meet current liabilities and finance current operations of the company. Often, especially in a growing business, only a part, sometimes a small part, of the year's profits is in property capable of division; the remainder having been absorbed in the acquisition of increased plant, equipment, stock in trade, or accounts receivable, or in decrease of outstanding liabilities. When only a part is available for dividends, the balance of the year's profits is carried to the credit of undivided profits, or surplus, or some other account having like significance. If thereafter the company finds it-

self in funds beyond current needs it may declare dividends out of such surplus or undivided profits; otherwise it may go on for years conducting a successful business, but requiring more and more working capital because of the extension of its operations, and therefore unable to declare dividends approximating the amount of its profits. Thus the surplus may increase until it equals or even exceeds the par value of the outstanding capital stock. This may be adjusted upon the books in the mode adopted in the case at bar—by declaring a "stock dividend."

This, however, is no more than a book adjustment, in essence not a dividend but rather the opposite; no part of the assets of the company is separated from the common fund, nothing distributed except paper certificates that evidence an antecedent increase in the value of the stockholder's capital interest resulting from an accumulation of profits by the company, but profits so far absorbed in the business as to render it impracticable to separate them for withdrawal and distribution. In order to make the adjustment, a charge is made against surplus account with corresponding credit to capital stock account, equal to the proposed "dividend"; the new stock is issued against this and the certificates delivered to the existing stockholders in proportion to their previous holdings. This, however, is merely bookkeeping that does not affect the aggregate assets of the corporation or its outstanding liabilities; it affects only the form, not the essence, of the "liability" acknowledged by the corporation to its own shareholders, and this through a readjustment of accounts on one side of the balance sheet only, increasing "capital stock" at the expense of "surplus"; it does not alter the pre-existing proportionate interest of any stockholder or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood before. The new certificates simply increase the number of the shares, with consequent dilution of the value of each share.

A "stock dividend" shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. * * *

It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the Sixteenth Amendment is taxable by Congress without apportionment. The same would be true were he to sell some of his original shares at a profit. But if a shareholder sells dividend stock he necessarily disposes of a part of his capital interest, just as if he should sell a part

of his old stock, either before or after the dividend. What he retains no longer entitles him to the same proportion of future dividends as before the sale. His part in the control of the company likewise is diminished. * * *

Yet, without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show that to tax a stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax.

Throughout the argument of the government, in a variety of forms, runs the fundamental error already mentioned—a failure to appraise correctly the force of the term "income" as used in the Sixteenth Amendment, or at least to give practical effect to it. Thus the government contends that the tax "is levied on income derived from corporate earnings," when in truth the stockholder has "derived" nothing except paper certificates which, so far as they have any effect, deny him present participation in such earnings. * * *

We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable by Congress without apportionment. But, looking through the form, we cannot disregard the essential truth disclosed, ignore the substantial difference between corporation and stockholder, treat the entire organization as unreal, look upon stockholders as partners, when they are not such, treat them as having in equity a right to a partition of the corporate assets, when they have none, and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized. We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend—even one paid in money or property—can be regarded as income of the stockholder. * * *

It is said there is no difference in principle between a simple stock dividend and a case where stockholders use money received as cash dividends to purchase additional stock contemporaneously issued by the corporation. But an actual cash dividend, with a real option to the stockholder either to keep the money for his own or to reinvest it in new shares, would be as far removed as possible from a true stock dividend, such as the one we have under consideration, where nothing of value is taken from the company's assets and transferred to the individual ownership of the several stockholders and thereby subjected to their disposal.

The government's reliance upon the supposed analogy between a dividend of the corporation's own shares and one made by distributing shares owned by it in the stock of another company, calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders while the former does not. * * *

That Congress has power to tax shareholders upon their property interests in the stock of coroprations is beyond question, and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence

would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court. * * *

Thus, from every point of view we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder. The Revenue Act of 1916, in so far as it imposes a tax upon the stockholder because of such dividend, contravenes the provisions of article 1, § 2, cl. 3, and article 1, § 9, cl. 4, of the Constitution, and to this extent is invalid, notwithstanding the Sixteenth Amendment.

Judgment affirmed. * * *

Mr. Justice HOLMES dissenting, with whom concurred Mr. Justice DAY.

Mr. Justice BRANDEIS dissenting, with whom concurred Mr. Justice CLARKE.

SECTION 4.—POWERS WITH RESPECT TO FOREIGN CORPORATIONS

ST. CLAIR et al. v. COX.

(Supreme Court of the United States. 1882. 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222.)

FIELD, J. This doctrine of the exemption of a corporation from suit in a state other than that of its creation, was the cause of much inconvenience and often of manifest injustice. * * * To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein. While the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred. * * *

A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. * * *

The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated, and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be

served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable; and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. * * *

We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words "agent of such corporation within this state." They do not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there. * * *

MAHAR v. HARRINGTON PARK VILLA SITES et al.

(Court of Appeals of New York, 1912. 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. [N. S.] 210.)

WILLARD BARTLETT, J. * * * The complaint alleges that at the city of New York, about July 27, 1909, the plaintiff had negotiations with the defendants regarding the sale by the defendants and the purchase by the plaintiff of certain lots of land situated at Harrington Park, N. J.; that thereafter the defendants and plaintiff entered into a written agreement for the sale of said property to the plaintiff; that the contract required plaintiff to pay to the Harrington Park Villa Sites, as a part payment thereon, the sum of $500, and plaintiff delivered to said defendant a check on the Carnegie Trust Company, drawn to its order, which check was afterwards duly indorsed by said defendant and paid; that the Harrington Park Villa Sites, at the time named, was a foreign corporation, other than a money corporation, organized and existing under the laws of New Jersey, and had an office for the transaction of its business in the city of New York, and the transaction relating to and the making of the agreement above named took place in the city and state of New York; that at the time of the making of said agreement the Harrington Park Villa Sites had not filed with the Secretary of State of New York the statement required by law, and had not paid the tax or obtained a certificate to enable it, as a foreign stock corporation, other than a money corporation, to do business in the state of New York, and at said times was doing business in violation of section 15 of the general corporation law; and that the plaintiff under said contract deposited with the defendants the said sum of $500, and before the commencement of this action demanded from them the aforesaid sum, no part of which has been paid. Upon these facts the plaintiff demanded judgment against the defendants for the sum of $500 and costs. * * *

The theory upon which the complaint has been upheld by the Appellate Division is that the contract therein mentioned was void, because made by a foreign stock corporation, other than a moneyed corporation, doing business in the state of New York in violation of the

provision of section 15 of the general corporation law; * * * and hence that there was a failure of consideration for the payment of the $500 by the plaintiff, and an action lies to recover back the money. * * * The only penalty which the general corporation law itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the courts of New York. "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate." Consol. Laws, c. 23, § 15. This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint; but, in my opinion, it is not operative to wholly invalidate the contract. I think that the penalty imposed upon a foreign stock corporation for doing business in New York without the certificate of authority required by section 15 of the general corporation law is limited to that thus prescribed in the section itself. No doubt the Legislature could have gone further and declared all contracts to be void which were made by a foreign stock corporation doing business in this state without having obtained the certificate; but it has not done so. * * *

The Supreme Court of the United States has distinctly held that a contract made by a foreign corporation with a citizen of another state is not necessarily void because the corporation had not complied with the laws of such other state imposing conditions upon it as a prerequisite to the lawful transaction of business therein. * * *

If I am right in assuming that the only infirmity in the contract mentioned in the complaint is the disability of one of the parties to it, namely, the foreign corporation, to sue upon it in the courts of this state, it remains a valid and effective instrument in all other respects. There is not a word in the complaint to indicate any other defect. Here, then, we have the case of a contract which is not void and upon which the plaintiff has made a payment, which he was expressly required to make by its very terms, and where there is no intimation that the defendant corporation has failed in any respect to comply with the conditions on its part. It is manifest that these facts afford no basis for any legal claim whatever.

The complaint fails to disclose a cause of action, and therefore the order of the Appellate Division should be reversed, and the order of the Appellate Term affirmed, with costs in both courts, and the question certified answered in the negative. * * *

DICTIONARY OF LEGAL TERMS

(Abridged and Adapted from Black's Law Dictionary.)

A

AB INITIO. Latin. From the beginning. E. g., void ab initio. An agreement is said to be "void ab initio" if it has at no time had any legal validity.

ABROGATE. To annul; to repeal. A statute may abrogate a rule of the common law.

ABSTRACT OF TITLE. A condensed history of the title to land, consisting of a synopsis or summary of the material or operative portion of all the conveyances, of whatever kind or nature, which in any manner affect said land, or any estate or interest therein, together with a statement of all liens, charges, or liabilities to which the same may be subject, and of which it is in any way material for purchasers to be apprised.

ACCEPTANCE. In contracts and sales. The act of a person to whom a thing is offered or tendered by another, whereby he receives the thing with the intention of retaining it, such intention being evidenced by a sufficient act.

In negotiable instruments. Acceptance of a bill of exchange. The act by which the person on whom a bill of exchange is drawn (called the "drawee") assents to the request of the drawer to pay it, or, in other words, engages, or makes himself liable to pay it when due. 2 Bl. Comm. 469. Under the Negotiable Instruments Law, "the acceptance must be in writing and signed by the drawee."

ACCOMMODATION PAPER. An accommodation bill or note is one to which the accommodating party, be he acceptor, drawer, or indorser, has put his name, without consideration, for the purpose of benefiting or accommodating some other party who desires to raise money on it and is to provide for the bill or note when due.

ACCORD AND SATISFACTION. An agreement between two persons, one of whom has a right of action against the other, that the latter should do or give, and the former accept, something in satisfaction of the right of action different from, and usually less than, what might be legally enforced. When the agreement is executed, and satisfaction has been made, it is called "accord and satisfaction." Accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one, and execution of the latter agreement. Such is the definition of this sort of defense usually given. But a broader application of the doctrine has been made in later times, where one promise or agreement is set up in satisfaction of a prior one, unless it has been expressly accepted as such; as, where a new promissory note has been given in lieu of a former one, to have the effect of a satisfaction of the former, it must have been accepted on an express agreement to that effect.

ACCOUNT. A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation.

Account closed. An account to which no further additions can be made on either side, but which remains still open for adjustment and set-off, which distinguishes it from account stated.

Account current. An open or running or unsettled account between two parties.

Account rendered. An account made out by the creditor, and presented to the debtor for his examination and acceptance. When accepted, it becomes an account stated.

Account stated. The settlement of an account between the parties, with a balance struck in favor of one of them; an account rendered by the creditor, and by the debtor assented to as correct, either expressly, or by implication of law from the failure to object.

ACKNOWLEDGMENT. In conveyancing. The act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer, or court, and declares or acknowledges the same as his genuine

and voluntary act and deed. The certificate of the officer on such instrument that it has been so acknowledged.

The term is also used of the act of a person who avows or admits the truth of certain facts which, if established, will entail a civil liability upon him. Thus, the debtor's acknowledgment of the creditor's demand or right of action will revive the enforceability of a debt barred by the statute of limitations.

ACTION. A lawsuit. A right of action; i. e., a right to bring suit.

ACT OF GOD. Any misadventure or casualty is said to be caused by the "act of God," when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled and uninfluenced by the power of man, and without human intervention, and is of such a character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use. Any accident produced by any physical cause which is irresistible, such as lightning, tempests, perils of the seas, inundations, earthquakes; and also the sudden death or illness of persons.

ADJUDICATION. The giving or pronouncing of a judgment in a case; also the judgment given. The term is principally used in bankruptcy proceedings; the adjudication being the order which declares the debtor to be a bankrupt.

ADMINISTRATOR. In the most usual sense, is a person to whom letters of administration—that is, an authority to administer the estate of a deceased person—have been granted by the proper court. He resembles an executor, but is appointed by the court, without any nomination by the deceased. An administrator of the estate is appointed, if the deceased has made no will, or has named no executor in his will.

ADVERSE POSSESSION. The actual, open, and notorious possession and enjoyment of real property, or of any estate lying in grant, continued for a certain length of time, held adversely and in denial and opposition to the title of another claimant, or under circumstances which indicate an assertion or color of right or title on the part of the person maintaining it, as against another person who is out of possession.

AFFIANT. The person who makes and subscribes an affidavit. The word is used, in this sense, interchangeably with "deponent." But the latter term should be reserved as the designation of one who makes a deposition.

AFFIDAVIT. A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.

A FORTIORI. Lat. By a stronger reason.

AGENCY. A relation, created either by express or implied contracts or by law, whereby one party (called the principal) delegates the transaction of some lawful business or the power to do certain acts for him or in relation to his rights or property, with more or less discretionary power, to another person (called the agent, attorney in fact, or proxy) who undertakes to manage the affair and render him an account thereof.

AGENT. One who represents and acts for another under the relation of agency.

ALLEGATION. The assertion, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove.

ALLEGE. To state, recite, assert, or charge; to make an allegation.

ANIMO CONTRAHENDI. Lat. With the intention of contracting.

ANNUL. To cancel; make void; destroy. To annul a judgment or judicial proceeding is to deprive it of all force and operation, either ab initio or prospectively as to future transaction.

ANSWER. In pleading. Any pleading setting up matters of fact by way of defense. In chancery pleading, the term denotes a defense in writing, made by a defendant to the allegations contained in a bill or information filed by the plaintiff against him. In pleading, under the Codes of Civil Procedure, the answer is the formal written statement made by a defendant setting forth the ground of his defense; corresponding to what, in actions under the common-law practice, is called the "plea."

APPEAL. In civil practice. The complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse. The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial.

APPELLANT. The party who takes an appeal from one court or jurisdiction.

APPELLEE. The party in a cause against whom an appeal is taken; that is, the party who has an interest adverse to setting aside or reversing the judgment.

APPRAISE. In practice. To fix or set a price or value upon; to fix and state the true value of a thing, and, usually, in writing.

ARBITRATION. In practice. The investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called "arbitrators," or "referees."

ARREST OF JUDGMENT. In practice. The act of staying a judgment, or refusing to render judgment in an action at law, after verdict, for some matter intrinsic appearing on the face of the record, which would render the judgment, if given, erroneous or reversible.

ASSUMPSIT. Latin. He undertook; he promised. A promise or engagement by which one person assumes or undertakes to do some act or pay something to another. It may be either oral or in writing, but is not under seal. It is express, if the promisor puts his engagement in distinct and definite language; it is implied, where the law infers a promise (though no formal one has passed) from the conduct of the party or the circumstances of the case.

In practice. A form of action which lies for the recovery of damages for the non-performance of a parol or simple contract, or a contract that is neither of record nor under seal.

The ordinary division of this action is into (1) common or indebitatus assumpsit, brought for the most part on an implied promise; and (2) special assumpsit, founded on an express promise.

The action of assumpsit differs from trespass and trover, which are founded on a tort, not upon a contract; from covenant and debt, which are appropriate where the ground of recovery is a sealed instrument, or special obligation to pay a fixed sum; and from replevin, which seeks the recovery of specific property, if attainable, rather than of damages.

ASSURANCE. In conveyancing. A deed or instrument of conveyance. The legal evidences of the transfer of property are in England called the "common assurances" of the kingdom, whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

ATTACHMENT. The act or process of taking, apprehending, or seizing a person's property, by virtue of a writ, and bringing the same into the custody of the law, used either for the purpose of bringing a person before the court, of acquiring jurisdiction over the property seized, to compel an appearance, to furnish security for debt or costs, or to arrest a fund in the hands of a third person who may become liable to pay it over. Also the writ or other process for the accomplishment of the purposes above enumerated, this being the more common use of the word.

ATTESTATION. The act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness. Execution and attestation are clearly distinct formalities; the former being the act of the party, and the latter of the witnesses only.

ATTORNEY. In the most general sense, this term denotes an agent or substitute, or one who is appointed and authorized to act in the place or stead of another.

It is "an ancient English word, and signifieth one that is set in the turne, stead, or place of another; and of these some be private * * * and some be publike, as attorneys at law." Co. Litt. 51b.

One who is appointed by another to do something in his absence, and who has authority to act in the place and turn of him by whom he is delegated.

When used with reference to the proceedings of courts, the term always means "attorney at law."

AWARD, v. To grant, concede, adjudge to. Thus, a jury awards damages; the court awards an injunction.

AWARD, n. The decision or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders, upon a controversy submitted to them; also the writing or document embodying such decision.

B

BAIL, v. To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court.

BAIL, n. In practice. The sureties who procure the release of a person under arrest, by becoming responsible for his appearance at the time and place designated. Those persons who become sureties for the appearance of the defendant in court.

BAILEE. In the law of contracts. One to whom goods are bailed; the

party to whom personal property is delivered under a contract of bailment.

BAILMENT. A delivery of goods or personal property, by one person to another in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

BAILOR. The party who bails or delivers goods to another, in the contract of bailment.

BANKRUPT. A person who has committed an act of bankruptcy; one who has done some act or suffered some act to be done in consequence of which, under the laws of his country, he is liable to be proceeded against by his creditors for the seizure and distribution among them of his entire property.

BARTER. A contract by which parties exchange goods or commodities for other goods. It differs from sale, in this: That in the latter transaction goods or property are always exchanged for money.

BATTERY. Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without consent.

BENEFICIARY. A person having the enjoyment of property of which a trustee, executor, etc., has the legal possession. The person to whom a policy of insurance is payable.

BEQUEATH. To give personal property by will to another.

BEQUEST. A gift by will of personal property; a legacy.

BID. An offer by an intending purchaser to pay a designated price for property which is about to be sold at auction.

BILL. A formal declaration, complaint, or statement of particular things in writing. As a legal term, this word has many meanings and applications, the more important of which are enumerated below.

BILL OF LADING. In common law. The written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. A written memorandum, given by the person in command of a merchant vessel, acknowledging the receipt on board the ship of certain specified goods, in good order or "apparent good order," which he undertakes, in consideration of the payment of freight, to deliver in like good order (dangers of the sea excepted) at a designated place to the consignee therein named or to his assigns. The term is often applied to a similar receipt and undertaking given by a carrier of goods by land. A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

BILL OF PARTICULARS. In practice. A written statement or specification of the particulars of the demand for which an action at law is brought, or of a defendant's set-off against such demand (including dates, sums, and items in detail), furnished by one of the parties to the other, either voluntarily or in compliance with a judge's order for that purpose.

BILL OF SALE. In contracts. A written agreement under seal, by which one person assigns or transfers his right to or interest in goods and personal chattels to another. An instrument by which, in particular, the property in ships and vessels is conveyed.

C

CAPITAL. Partnership. "The capital of a partnership is the aggregate of the sums contributed by its members to establish or continue the partnership business." Gilmore on Partnership, p. 132.

Corporations. In reference to a corporation, it is the aggregate of the sum subscribed and paid in, or secured to be paid in, by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums, or, if loss have been incurred, then it is the residue after deducting such losses.

CAPITAL STOCK. The common stock or fund of a corporation. The sum of money raised by the subscriptions of the stockholders, and divided into shares. It is said to be the sum upon which calls may be made upon the stockholders, and dividends are to be paid.

CAUSE OF ACTION. Matter for which an action may be brought. The ground on which an action may be sustained. The right to bring a suit.

CAVEAT EMPTOR. Let the buyer take care. This maxim summarizes the rule that the purchaser of an article must examine, judge, and test it for himself, being bound to discover any obvious defects or imperfections.

CERTIFICATE OF DEPOSIT. In the practice of bankers. This is a writing acknowledging that the person named has deposited in the bank a specified sum of money, and that the same is held subject to be drawn out on his own check or order, or that of some other person named in the instrument as payee.

CERTIFICATE OF STOCK. A certificate of a corporation or joint-stock company that the person named is the owner of a designated number of shares of its stock; given when the subscription is fully paid and the "scrip certificate" taken up.

CESTUI QUE TRUST. He who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another. 2 Washb. Real Prop. 163. The person who possesses the equitable right to property and receives the rents, issues, and profits thereof, the legal estate of which is vested in a trustee. It has been proposed to substitute for this uncouth term the English word "beneficiary," and the latter, though still far from universally adopted, has come to be quite frequently used. It is equal in precision to the antiquated and unwieldy Norman phrase, and far better adapted to the genius of our language.

CHAMPERTY. A bargain made by a stranger with one of the parties to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if he wins the suit, a part of the land or other subject sought to be recovered by the action.

CHANCELLOR. In American law, this is the name given in some states to the judge (or the presiding judge) of a court of chancery. In England, besides being the designation of the chief judge of the Court of Chancery, the term is used as the title of several judicial officers attached to bishops or other high dignitaries and to the universities.

CHANCERY. Equity; equitable jurisdiction; a court of equity; the system of jurisprudence administered in courts of equity.

CHARTER. An instrument emanating from the sovereign power, in the nature of a grant, authorizing the formation of a corporation. Under modern statutes, a charter is usually granted by the state secretary of state, who acts under general statutory authority conferred by the state legislature.

CHARTER PARTY. A contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places.

CHATTEL. An article of personal property; any species of property not amounting to a freehold or fee in land.

CHATTEL MORTGAGE. An instrument of sale of personalty conveying the title of the property to the mortgagee with terms of defeasance; and, if the terms of redemption are not complied with, then, at common law, the title becomes absolute in the mortgagee.

CHECK. A draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand.

CHOSE IN ACTION. A right to personal things of which the owner has not the possession, but merely a right of action for their possession. 2 Bl. Comm. 389, 397; 1 Chit. Pr. 99.

A right to receive or recover a debt, demand, or damages on a cause of action ex contractu, or for a tort connected with contract, but which cannot be made available without recourse to an action.

CHOSE IN POSSESSION. A thing in possession, as distinguished from a thing in action.

CIVIL. In contradistinction to "criminal," it indicates the private rights and remedies of men, as members of the community, in contrast to those which are public and relate to the government; thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction.

CIVIL LAW. The "Roman law" and the "civil law" are convertible phrases, meaning the same system of jurisprudence; it is now frequently denominated the "Roman civil law."

CLIENT. A person who employs or retains an attorney, or counsellor, to appear for him in courts, advise, assist, and defend him in legal proceedings, and to act for him in any legal business.

CLOSE. A portion of land, as a field, inclosed, as by a hedge, fence, or other visible inclosure.

CODE. A collection or compendium of laws. A complete system of positive law, scientifically arranged, or promulgated by legislative authority.

COLLATERAL. By the side; at the side; attached upon the side. Not lineal, but upon a parallel or diverging line. Additional or auxiliary; supplementary; co-operating.

COLLATERAL SECURITY. A security given in addition to the direct security, and subordinate to it, intended to guarantee its validity or convertibility or insure its performance; so that, if the direct security fails, the creditor may fall back upon the collateral security. Collateral security, in bank phraseology, means some security additional to the personal obligation of the borrower.

COLOR. An appearance or semblance, as distinguished from a reality. Hence, color of title.

COMITY OF NATIONS AND STATES. The most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and it is inadmissible when it is contrary to its known policy, or prejudicial to its interest. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided.

COMMERCIAL LAW. A phrase used to designate the whole body of substantive jurisprudence applicable to the rights, intercourse, and relation of persons engaged in commerce, trade, or mercantile pursuits. It is not a very scientific or accurate term. As foreign commerce is carried on by means of shipping, the term has come to be used occasionally as synonymous with "maritime law;" but, in strictness, the phrase "commercial law" is wider, and includes many transactions or legal questions which have nothing to do with shipping or its incidents.

COMMERCIAL PAPER. The term "commercial paper" means bills of exchange, promissory notes, bank checks, and other negotiable instruments for the payment of money, which, by their form and on their face, purport to be such instruments as are, by the law-merchant, recognized as falling under the designation of "commercial paper."

COMMISSION. A warrant or authority or letters patent, issuing from the government, or one of its departments, or a court, empowering a person or persons named to do certain acts, or to exercise jurisdiction, or to perform the duties and exercise the authority of an office (as in the case of an officer in the army or navy).

Also, in private affairs, it signifies the authority or instructions under which one person transacts business or negotiates for another.

In a derivative sense, a body of persons to whom a commission is directed. A board or committee officially appointed and empowered to perform certain acts or exercise certain jurisdiction of a public nature or relation; as a "commission of assize."

In commercial law. The recompense or reward of an agent, factor, broker, or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal. But in this sense the word often occurs in the plural.

COMMISSION MERCHANT. A factor.

COMMITTEE. A term applied, in some states, to the guardian of an insane person.

COMMON CARRIER. Of goods. "One who holds himself out to transport for hire the goods of such as choose to employ him." Goddard on Bailments and Carriers, § 191.

Of passengers. "Such as hold themselves out for hire to carry all persons indifferently who apply for passage." Id. § 317.

COMMON COUNTS. Certain general counts or forms inserted in a declaration in an action to recover a money debt, not founded on the circumstances of the individual case, but intended to guard against a possible variance, and to enable the plaintiff to take advantage of any ground of liability which the proof may disclose within the general scope of the action. In the action of assumpsit, these counts are as follows: For goods sold and delivered, or bargained and sold; for work done; for money lent; for money paid; for money received to the use of the plaintiff; for interest; or for money due on an account stated.

COMMON LAW. As distinguished from the Roman law, the modern civil law, the canon law, and other systems, the common law is that body of law and juristic theory which was originated, developed, and formulated and is administered in England, and has obtained among most of the states and peoples of Anglo-Saxon stock.

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their

authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs, and, in this sense, particularly the ancient unwritten law of England.

As distinguished from equity law, it is a body of rules and principles, written or unwritten, which are of fixed and immutable authority, and which must be applied to controversies rigorously and in their entirety, and cannot be modified to suit the peculiarities of a specific case, or colored by any judicial discretion, and which rests confessedly upon custom or statute, as distinguished from any claim to ethical superiority.

COMPLAINT. In civil practice. In those states having a Code of Civil Procedure, the complaint is the first or initiatory pleading on the part of the plaintiff in a civil action. It corresponds to the declaration in the common law practice.

In criminal law. A charge, preferred before a magistrate having jurisdiction, that a person named (or a certain person whose name is unknown) has committed a certain offense, with an offer to prove the fact, to the end that a prosecution may be instituted. It is a technical term, descriptive of proceedings before a magistrate.

COMPOSITION. An agreement, made upon a sufficient consideration, between an insolvent or embarrassed debtor and his creditors, whereby the latter, for the sake of immediate payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata, in discharge and satisfaction of the whole.

COMPOS MENTIS. Sound of mind.

COMPOUNDING A FELONY. The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute.

The offense of taking a reward for forbearing to prosecute a felony; as where a party robbed takes his goods again, or other amends, upon an agreement not to prosecute.

COMPROMISE. An arrangement arrived at, either in court or out of court, for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts, or the law and the facts together.

CONFESSION OF JUDGMENT. The act of a debtor in permitting judgment to be entered against him by his creditor, for a stipulated sum, by a written statement to that effect or by warrant of attorney, without the institution of legal proceedings of any kind.

CONFLICT OF LAWS. An opposition, conflict, or antagonism between different laws of the same state or sovereignty upon the same subject-matter.

A similar inconsistency between the municipal laws of different states or countries, arising in the case of persons who have acquired rights or a status, or made contracts, or incurred obligations, within the territory of two or more states.

That branch of jurisprudence, arising from the diversity of the laws of different nations in their application to rights and remedies, which reconciles the inconsistency, or decides which law or system is to govern in the particular case, or settles the degree of force to be accorded to the law of a foreign country (the acts or rights in question having arisen under it), either where it varies from the domestic law, or where the domestic law is silent or not exclusively applicable to the case in point. In this sense it is more properly called "private international law."

CONNIVANCE. The secret or indirect consent or permission of one person to the commission of an unlawful or criminal act.

CONSANGUINITY. Kinship; blood relationship; the connection or relation of persons descended from the same stock or common ancestor.

CONSERVATOR. A guardian of an insane person's estate.

CONSIDERATION. The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract.

Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

CONSIGNEE. In mercantile law. One to whom a consignment is made. The person to whom goods are shipped for sale.

CONSIGNMENT. The act or process of consigning goods; the transportation of goods consigned; an article or collection of goods sent to a factor to be sold; goods or property sent, by the aid of a common carrier, from one

person in one place to another person in another place.

CONSIGNOR. One who sends or makes a consignment. A shipper of goods.

CONSPIRACY. In criminal law. A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.

CONSTRUCTIVE. That which is established by the mind of the law in its act of construing facts, conduct, circumstances, or instruments; that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence, inferred, implied, made out by legal interpretation.

Constructive assent. An assent or consent imputed to a party from a construction or interpretation of his conduct; as distinguished from one which he actually expresses.

CONTRA. Lat. Opposite, contrary. Where a decision is said to be contra, it is on the opposite side of the question.

CONTRACT. "In its broadest sense, an agreement whereby one or more of the parties acquire a right, in rem or in personam, in relation to some person, thing, act, or forbearance." Clark on Contracts (3d Ed.) p. 1.

CONTRIBUTION. In common law. The sharing of a loss or payment among several. The act of any one or several of a number of co-debtors, co-sureties, etc., in reimbursing one of their number who has paid the whole debt or suffered the whole liability, each to the extent of his proportionate share.

CONVERSION. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights.

Constructive conversion. An implied or virtual conversion, which takes place where a person does such acts in reference to the goods of another as amount in law to the appropriation of the property to himself.

CORPORATION. An artificial person or legal entity, created by or under the authority of the laws of a state or nation, composed in some rare instances of a single person and his successors, being the incumbents of a particular office, but ordinarily consisting of an association of numerous individuals, who subsist as a body politic under a special denomination, which is regarded in law as having a personality and existence distinct from that of its several members, and which is, by the same authority, vested with the capacity of continuous succession, irrespective of changes in its membership, either in perpetuity or for a limited term of years, and of acting as a unit or single individual in matters relating to the common purpose of the association, within the scope of the powers and authorities conferred upon such bodies by law.

CORPOREAL PROPERTY. Such as affects the senses, and may be seen and handled by the body, as opposed to incorporeal property which cannot be seen or handled, and exists only in contemplation. Thus, a house is corporeal, but the annual rent payable for its occupation is incorporeal. Corporeal property is, if movable, capable of manual transfer; if immovable, possession of it may be delivered up. But incorporeal property cannot be so transferred, but some other means must be adopted for its transfer, of which the most usual is an instrument in writing.

COSTS. A pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending a suit or a distinct proceeding within a suit.

COUNT, n. In pleading. The different parts of a declaration, each of which, if it stood alone, would constitute a ground for action, are the counts of the declaration. Used also to signify the several parts of an indictment, each charging a distinct offense.

COUNTERCLAIM. A claim presented by a defendant in opposition to or deduction from the claim of the plaintiff. A species of set-off or recoupment introduced by the codes of civil procedure in several of the states, of a broad and liberal character.

COURT. In practice. An organ of the government, belonging to the judicial department, whose function is the application of the laws to controversies brought before it and the public administration of justice.

COURT ABOVE—COURT BELOW. In appellate practice, the "court above" is the one to which a cause is removed for review, whether by appeal, writ of error, or certiorari; while the "court below" is the one from which the case is being removed.

COVENANT. An agreement, convention, or promise of two or more parties, by deed in writing, signed, sealed, and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done, or stipulates for the truth of certain facts. A promise contained in such an agreement.

COVERT. Covered, protected, sheltered. A pound covert is one that is close or covered over, as distinguished from pound overt, which is open overhead. A feme covert is so called, as being under the wing, protection or cover of her husband.

COVERTURE. The condition or state of a married woman.

CRIME. A crime is an act committed or omitted, in violation of a public law, either forbidding or commanding it; a breach or violation of some public right or duty due to a whole community, considered as a community in its social aggregate capacity, as distinguished from a civil injury.

D

DAMAGE. Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property.

DAMAGES. 1. The plural of damage.
2. Compensation claimed or awarded in a judicial proceeding for damage or for the invasion of a legal right. Bauer on Damages, p. 1.

DEBT. A sum of money due to certain and express agreement; as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it.

DECEIT. A fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon.

DECREE. In practice. The judgment of a court of equity or admiralty, answering to the judgment of a court of common law.

DEED. A sealed instrument, containing a contract or covenant, delivered by the party to be bound thereby, and accepted by the party to whom the contract or covenant runs.

DE FACTO. In fact, in deed, actually.

DE JURE. Of right; legitimate; lawful; by right and just title.

DEL CREDERE. An agreement by which a factor, when he sells goods on credit, for an additional commission (called a "del credere commission"), undertakes that the purchase price will be paid the seller. The del credere factor is usually held to have undertaken a primary and absolute liability, but some cases hold that he is a mere surety.

DELICTUM. Lat. A tort.

DEMISE. 1. A conveyance of an estate to another for life, for years, or at will; a lease.
2. Death or decease.

DEMURRER. In pleading. The formal mode of disputing the sufficiency in law of the pleading of the other side. In effect it is an allegation that, even if the facts as stated in the pleading to which objection is taken be true, yet their legal consequences are not such as to put the demurring party to the necessity of answering them or proceeding further with the cause.

An objection made by one party to his opponent's pleading, alleging that he ought not to answer it, for some defect in law in the pleading. It admits the facts, and refers the law arising thereon to the court.

It imports that the objecting party will not proceed, but will wait the judgment of the court whether he is bound so to do.

In Equity. An allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer, or that, for some reason apparent on the face of the bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer to the whole bill, or to some certain part thereof.

DE NOVO. Lat. Anew.

DEPONENT. One who makes oath to a written statement.

DEPOSIT. In banking law. The act of placing or lodging money in the custody of a bank or banker, for safety or convenience, to be withdrawn at the will of the depositor or under rules and regulations agreed on; also the money so deposited.

DEPOSITION. The testimony of a witness taken upon interrogatories, not in court, but intended to be used in court.

DESCENT. Hereditary succession.

DESCRIPTIO PERSONÆ. Lat. Description of the person.

DETUR DIGNIORI. Lat. Let it be given to him who is more worthy.

DEVISE. A testamentary disposition of land or realty; a gift of real property by the last will and testament of the donor.

DICTUM. The word is generally used as an abbreviated form of obiter dictum, "a remark by the way;" that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion.

DISCOUNT. In a general sense, an allowance or deduction made from a gross sum on any account whatever. In a more limited and technical sense, the taking of interest in advance. By the language of the commercial world and the settled practice of banks, a discount by a bank means a drawback or deduction made upon its advances or loans of money, upon negotiable paper or other evidences of debt payable at a future day, which are transferred to the bank.

DISHONOR. In mercantile law and usage. To refuse or decline to accept a bill of exchange, or to refuse or neglect to pay a bill or note at maturity.

DIVIDEND. A fund to be divided. The share allotted to each of several persons entitled to share in a division of profits or property. Thus, dividend may denote a fund set apart by a corporation out of its profits, to be apportioned among the shareholders, or the proportional amount falling to each. In bankruptcy proceedings, a dividend is a proportional payment to the creditors out of the insolvent estate.

DOMICILE. That place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home.

DORMANT PARTNER. See Partners.

DOWER. The provision which the law makes for a widow out of lands or tenements of her husband, for her support and the nurture of her children. Co. Litt. 30a. Dower is an estate for life of the widow in a certain portion of the estate of her husband, to which she has not relinquished her right during the marriage.

DRAWEE. A person to whom a bill of exchange is addressed, and who is requested to pay the amount of money therein named.

DRAWER. The person drawing a bill of exchange and addressing it to the drawee.

DUEBILL. A brief written acknowledgment of a debt. It is not made payable to order, like a promissory note.

DURESS. Unlawful constraint exercised upon a person, whereby he is forced to do some act against his will.

E

EARNEST. The payment of a part of the price of goods sold, or the delivery of part of such goods, for the purpose of binding the contract.

EASEMENT. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. 2 Washb. Real Prop. 25.

A private easement is a privilege, service, or convenience which one neighbor has of another, by prescription, grant, or necessary implication, and without profit; as a way over his land, a gateway, watercourse, and the like. Kitch. 105.

EJECTMENT. An action of which the purpose is to determine whether the title to certain land is in the plaintiff or is in the defendant.

ELECTION. The act of choosing or selecting one or more from a greater number of persons, things, courses, rights, or remedies.

EMANCIPATION. The act by which an infant is set at liberty from the control of parent or guardian and made his own master.

EMBEZZLEMENT. The fraudulent appropriation to his own use or benefit of property or money intrusted to him by another, by a clerk, agent, trustee, public officer, or other person acting in a fiduciary character.

EMBLEMENTS. The vegetable chattels called "emblements" are the corn and other growth of the earth which are produced annually, not spontaneously, but by labor and industry, and thence are called "fructus industriales."

EMINENT DOMAIN. Eminent domain is the right of the people or government to take private property for public use.

ENTIRETY. The whole, in contradistinction to a moiety or part only.

When land is conveyed to husband and wife, they do not take by moieties, but both are seised of the entirety. Parceners, on the other hand, have not an entirety of interest, but each is properly entitled to the whole of a distinct moiety.

The word is also used to designate that which the law considers as one whole, and not capable of being divided into parts. Thus, a judgment, it is held, is an entirety, and, if void as to one of the two defendants, cannot be valid as to the other. So, if a contract is an entirety, no part of the consideration is due until the whole has been performed.

EQUITABLE. Just, fair, and right. Existing in equity; available or sustainable only in equity, or only upon the rules and principles of equity.

EQUITABLE ASSIGNMENT. An assignment which, though invalid at law, will be recognized and enforced in equity; e. g., an assignment of a chose in action, or of future acquisitions of the assignor.

EQUITY. In one of its technical meanings, equity is a body of jurisprudence, or field of jurisdiction, differing in its origin, theory, and methods from the common law.

In a still more restricted sense, it is a system of jurisprudence, or branch of remedial justice, administered by certain tribunals, distinct from the common-law courts, and empowered to decree "equity" in the complex of well-settled and well-understood rules, principles, and precedents.

Equity also signifies an equitable right; i. e., a right enforceable in a court of equity. Hence a bill of complaint which did not show that the plaintiff had a right entitling him to relief was said to be demurrable for want of equity; and certain rights now recognized in all the courts are still known as "equities," from having been originally recognized only in the court of chancery.

EQUITY OF REDEMPTION. The right of the mortgagor of an estate to redeem the same after it has been forfeited, at law, by a breach of the condition of the mortgage, upon paying the amount of debt, interest and costs.

ERROR. A mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law.

Such a mistaken or false conception or application of the law to the facts of a cause as will furnish ground for a review of the proceedings upon a writ of error; a mistake of law, or false or irregular application of it, such as vitiates the proceedings and warrants the reversal of the judgment.

"Error" is also used as an elliptical expression for "writ of error"; as, in saying that error lies; that a judgment may be reversed on error.

Assignment of errors. In practice. The statement of the plaintiff's case on a writ of error, setting forth the errors complained of; corresponding with the declaration in an ordinary action. A specification of the errors upon which the appellant will rely, with such fullness as to give aid to the court in the examination of the transcript.

Harmless error. In appellate practice. An error committed in the progress of the trial below, but which was not prejudicial to the rights of the party assigning it, and for which, therefore, the court will not reverse the judgment; as, where the error was neutralized or corrected by subsequent proceedings in the case, or where, notwithstanding the error, the particular issue was found in that party's favor, or where, even if the error had not been committed, he could not have been legally entitled to prevail.

Reversible error. In appellate practice. Such an error as warrants the appellate court in reversing the judgment before it.

ESCROW. The state or condition of a deed which is conditionally held by a third person, or the possession and retention of a deed by a third person pending a condition; as when an instrument is said to be delivered "in escrow."

ESTATE. The interest which any one has in lands, or in any other subject of property.

In another sense, the term denotes the property (real or personal) in which one has a right or interest; the subject-matter of ownership; the corpus of property.

In a wider sense, the term "estate" denotes a man's whole financial status or condition—the aggregate of his interests and concerns, so far as regards his situation with reference to wealth or its objects, including debts and obligations, as well as possessions and rights.

ESTOPPEL. A bar or impediment raised by the law, which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law.

EVICTION. Dispossession by process of law; the act of depriving a per-

son of the possession of lands which he has held, in pursuance of the judgment of a court.

EVIDENCE. Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.

EXCEPTION. In practice. A formal objection to the action of the court, during the trial of a cause, in refusing a request or overruling an objection; implying that the party excepting does not acquiesce in the decision of the court, but will seek to procure its reversal, and that he means to save the benefit of his request or objection in some future proceeding.

EXCHANGE. In conveyancing. A mutual grant of equal interests (in lands or tenements), the one in consideration of the other.

In commercial law. A negotiation by which one person transfers to another funds which he has in a certain place, either at a price agreed upon or which is fixed by commercial usage.

In law of personal property. Exchange of goods is a commutation, transmutation, or transfer of goods for other goods, as distinguished from "sale," which is a transfer of goods for money.

EX CONTRACTU. From or out of a contract. In both the civil and common law, rights and causes of action are divided into two classes—those arising ex contractu (from a contract); and those arising ex delicto (from a delict or tort).

EX DELICTO. From a delict, tort, fault, crime, or malfeasance. In both the civil and the common law, obligations and causes of action are divided into two great classes—those arising ex contractu (out of a contract); and those ex delicto.

EX DOLO MALO NON ORITUR ACTIO. Out of fraud no action arises; fraud never gives a right of action. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.

EXECUTED. Completed; carried into full effect; already done or performed; taking effect immediately; now in existence or in possession; conveying an immediate right or possession. The opposite of executory.

EXECUTION. The completion, fulfillment, or perfecting of anything, or carrying it into operation and effect. The signing, sealing, and delivery of a deed. The signing and publication of a will. The performance of a contract according to its terms.

EXECUTOR. A person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease.

EXECUTORY. That which is yet to be executed or performed; that which remains to be carried into operation or effect; incomplete; depending upon a future performance or event. The opposite of executed.

EXEMPLARY. Punitive, punitory, for punishment.

EXEMPLARY DAMAGES. Damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to punish the defendant for his evil behavior.

EXEMPTION. A privilege allowed by law to a judgment debtor, by which he may hold property to a certain amount, or certain classes of property, free from all liability to levy and sale on execution or attachment.

EX GRATIA. Lat. Out of grace; as a matter of favor or indulgence; gratuitous.

EX MERO MOTU. Lat. Of his own mere motion; of his own accord.

EX PARTE. Lat. On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

EXPRESS. Made known distinctly and explicitly, and not left to inference or implication. Declared in terms; set forth in words. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied."

EX TURPI CONTRACTU NON ORITUR ACTIO. Lat. Out of an immoral or illegal contract an action does not arise. A contract founded upon an illegal or immoral consideration cannot be enforced by action. 2 Kent, Comm. 466.

F

FACTOR. A commercial agent, employed by a principal to sell merchandise consigned to him for that purpose, for and in behalf of the principal, but usually in his own name, being intrusted

with the possession and control of the goods, and being remunerated by a commission.

FEE SIMPLE. In English law. A freehold estate of inheritance, absolute and unqualified. It stands at the head of estates as the highest in dignity and the most ample in extent; since every other kind of estate is derivable thereout, and mergeable therein.

FELONY. In American law. The term has no very definite or precise meaning, except in some cases where it is defined by statute. For the most part, the state laws, in describing any particular offense, declare whether or not it shall be considered a felony. Apart from this, the word seems merely to imply a crime of a graver or more atrocious nature than those designated as "misdemeanors."

FEME. L. Fr. A woman.

Feme covert. A married woman.

Feme sole. A single woman.

FICTION. An assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place.

FIDUCIARY. As an adjective it means of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence.

F. O. B. Free on board. "If a quotation is f. o. b., the seller undertakes for the price named to deliver the goods on board car or ship at a designated place, free of charges to the buyer." Whitaker's Foreign Exchange, p. 335.

FORCIBLE DETAINER. The offense of violently keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law.

FORCIBLE ENTRY. An offense against the public peace, or private wrong, committed by violently taking possession of lands and tenements with menaces, force, and arms, against the will of those entitled to the possession, and without the authority of law.

FORECLOSURE. A proceeding by which the rights of the mortgagee of real property are enforced. This procedure varies greatly in different states. The property is commonly put up at public auction and sold to the highest bidder. The mortgagee gets out of the proceeds the amount of his debt, with costs. The remaining portion of the proceeds, if any, goes to the debtor, the mortgagor. If the property sells at a price less than the amount of the debt and costs, judgment is given against the mortgagor for the deficiency.

FORGERY. In criminal law. The falsely making or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability.

FRANCHISE. A special privilege conferred by government upon an individual or corporation, and which does not belong to the citizens of the country generally, of common right.

FRAUD. Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional.

FREEHOLD. An estate in land or other real property, of uncertain duration; that is, either of inheritance or which may possibly last for the life of the tenant at the least (as distinguished from a leasehold), and held by a free tenure.

FRUCTUS INDUSTRIALES. Industrial fruits, or fruits of industry. Those fruits of a thing, as of land, which are produced by the labor and industry of the occupant, as crops of grain; as distinguished from such as are produced solely by the powers of nature.

FRUCTUS NATURALES. Those products which are produced by the powers of nature alone; as wool, metals, milk, the young of animals.

FUNGIBLE THINGS. Movable goods, which may be estimated and replaced according to weight, measure, and number. Things belonging to a class, which do not have to be dealt with in specie.

G

GARNISH, v. To issue process of garnishment against a person.

GARNISHEE. One garnished.

GARNISHMENT. In the process of attachment. A warning to a person in whose hands the effects of another are attached not to pay the money or deliver the property of the defendant in his hands to him, but to appear and answer the plaintiff's suit.

GENERAL AND SPECIAL ISSUE. The former is a plea which traverses and denies, briefly and in general and summary terms, the whole declaration, indictment, or complaint, without tendering new or special matter.

GENERAL VERDICT. A verdict whereby the jury find either for the

plaintiff or for the defendant in general terms; the ordinary form of verdict.

GRATIS DICTUM. A voluntary assertion; a statement which a party is not legally bound to make, or in which he is not held to precise accuracy.

GRAVAMEN. Lat. The burden or gist of a charge.

GUARANTY, n. A promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who, in the first instance, is liable to such payment or performance.

GUARDIAN. A guardian is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect or age, understanding, or self-control, is considered incapable of administering his own affairs.

H

HEARSAY. A term applied to that species of testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others.

HEIR. At common law. A person who succeeds, by the rules of law, to an estate in lands, tenements, or hereditaments, upon the death of his ancestor, by descent and right of relationship.

HEREDITAMENTS. Things capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, and including not only lands and everything thereon, but also heirlooms, and certain furniture which, by custom, may descend to the heir together with the land.

I

IMPLIED. This word is used in law as contrasted with "express"; i. e., where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties.

INCHOATE. Imperfect; unfinished; begun, but not completed; as a contract not executed by all the parties.

INCORPOREAL. Without body; not of material nature; the opposite of "corporeal."

INDEMNITY. An indemnity is a collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person.

INDENTURE. A deed to which two or more persons are parties, and in which these enter into reciprocal and corresponding grants or obligations towards each other; whereas a deed poll is properly one in which only the party making it executes it, or binds himself by it as a deed, though the grantors or grantees therein may be several in number.

INDICIA. Lat. Signs; indications.

INDORSEE. The person to whom a bill of exchange, promissory note, bill of lading, etc., is assigned by indorsement, giving him a right to sue thereon.

INDORSEMENT. The act of a payee, drawee, accommodation indorser, or holder of a negotiable instrument in writing his name upon the back of same, with or without further words, whereby the property in same is transferred to another.

INDORSER. He who makes an indorsement.

INFANT. A person within age, not of age, or not of full age; a person under the age of twenty-one years; a minor.

IN HÆC FŒDERA NON VENIMUS. Lat. We did not enter into these bonds; we did not make this contract.

IN INVITUM. Lat. Against an unwilling party.

INJUNCTION. A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law.

INJURY. Any wrong or damage done to another, either in his person, rights, reputation, or property.

IN LIMINE. Lat. On or at the threshold; at the very beginning; preliminarily.

IN PARI DELICTO. Lat. In equal fault; equally culpable or criminal.

In pari delicto, potior est conditio possidentis [defendentis]. In a case of equal or mutual fault (between two parties), the condition of the party in possession [or defending] is the better

one. This maxim is often applied to cases in which a plaintiff seeks to procure, under an illegal contract, money or other property in the possession of the defendant, or to get a judgment or decree of any kind, under such a contract.

INSOLVENCY. The condition of a person who is insolvent; inability to pay one's debts; lack of means to pay one's debts. Such a relative condition of a man's assets and liabilities that the former, if all made immediately available, would not be sufficient to discharge the latter. Or the condition of a person who is unable to pay his debts as they fall due, or in the usual course of trade and business.

IN SPECIE. Lat. In kind. Specific; specifically.

IN STATU QUO. Lat. In the condition or state (in which it was).

INSURABLE INTEREST. Such a real and substantial interest in specific property as will sustain a contract to indemnify the person interested against its loss. If the assured had no real interest, the contract would be a mere wager policy.

INSURANCE. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. The party agreeing to make the compensation is usually called the "insurer" or "underwriter"; the other, the "insured" or "assured"; the written contract, a "policy"; the events insured against, "risks" or "perils"; and the subject, right, or interest to be protected, the "insurable interest." Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event. Civ. Code Cal. § 2527. It must be borne in mind, however, that, although the usual definition fits policies of fire and marine insurance, it does not apply strictly to policies of life insurance. Life insurance is not a contract of indemnity, but a contract to pay a specified sum upon the occurrence of a certain event; as, the death of the insured.

INSURER. The underwriter or insurance company with whom a contract of insurance is made.

INTERPLEADER. When two or more persons claim the same thing (or fund) of a third, and he, laying no claim to it himself, is ignorant which of them has a right to it, and fears he may be prejudiced by their proceeding against him to recover it, he may file a bill in equity against them, the object of which is to make them litigate their title between themselves, instead of litigating it with him, and such a bill is called a "bill of interpleader."

INTER SE, or INTER SESE. Lat. Between or among themselves.

INTERVENER. An intervener is a person who voluntarily interposes in an action or other proceeding with the leave of the court.

INTESTATE. Without making a will.

J

JOINT. United; combined; undivided; done by or against two or more unitedly; shared by or between two or more.

A "joint" bond, note, or other obligation is one in which the obligors or makers (being two or more in number) bind themselves jointly, but not severally, and which must therefore be prosecuted in a joint action against them all. A "joint and several" bond or note is one in which the obligors or makers bind themselves both jointly and individually to the obligee or payee, and which may be enforced either by a joint action against them all or by separate actions against any one or more at the election of the creditor.

JOINTLY. Acting together or in concert or co-operation; holding in common or interdependently, not separately. Persons are "jointly bound" in a bond or note when both or all must be sued in one action for its enforcement, not either one at the election of the creditor.

Jointly and severally. Persons who bind themselves "jointly and severally" in a bond or note may all be sued together for its enforcement, or the creditor may select any one or more as the object of his suit.

JOINT-STOCK COMPANY. A partnership with a capital divided into transferable shares. Gilmore on Partnership.

JOINT TENANCY "exists when a single estate in land is owned by two or more persons claiming under one instrument; its most important characteristic being that, unless the statute otherwise provides, the interest of each joint tenant, upon his death, inures to the benefit of the surviving joint tenant or tenants, to the exclusion of his own heirs, devisees, or personal representatives." Tiffany on Real Property, p. 368.

JUDGMENT. The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein

litigated and submitted to its determination.

JUDGMENT DEBTS. Debts, whether on simple contract or by specialty, for the recovery of which judgment has been entered up, either upon a cognovit or upon a warrant of attorney or as the result of a successful action.

JUDGMENT IN PERSONAM. A judgment against a particular person, as distinguished from a judgment against a thing or a right or status. The former class of judgments are conclusive only upon parties and privies; the latter upon all the world.

JUDGMENT IN REM. A judgment in rem is an adjudication, pronounced upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment in personam, in this: That the latter judgment is in form, as well as substance, between the parties claiming the right; and that it is so inter partes appears by the record itself.

JUDGMENT NOTE. A promissory note, embodying an authorization to any attorney, or to a designated attorney, or to the holder, or the clerk of the court, to enter an appearance for the maker and confess a judgment against him for a sum therein named, upon default of payment of the note.

JUDICIAL. Belonging to the office of a judge; as judicial authority.

JURAT. The clause written at the foot of an affidavit, stating when, where, and before whom such affidavit was sworn.

JURISDICTION. The power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a res) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient.

L

LACHES. Negligence, consisting in the omission of something which a party might do, and might reasonably be expected to do, towards the vindication or enforcement of his rights. The word is generally the synonym of "remissness," "dilatoriness," "unreasonable or unexcused delay"; the opposite of "vigilance"; and means a want of activity and diligence in making a claim or moving for the enforcement of a right (particularly in equity) which will afford ground for presuming against it, or for refusing relief, where that is discretionary with the court.

LANDLORD. He of whom lands or tenements are holden. He who, being the owner an estate in land, has leased the same for a term of years, on a rent reserved, to another person, called the "tenant."

LAPSE, n. In the law of wills. The failure of a testamentary gift in consequence of the death of the devisee or legatee during the life of the testator.

LARCENY. In criminal law. The wrongful and fraudulent taking and carrying away by one person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) use, and make them his property, without the consent of the owner.

LAW MERCHANT. The system of rules, customs, and usages generally recognized and adopted by merchants and traders, and which either in its simplicity or as modified by common law or statutes, constitutes the law for the regulation of their transactions and the solution of their controversies.

LEASE. A conveyance of lands or tenements to a person for life, for a term of years, or at will, in consideration of a return of rent or some other recompense. The person who so conveys such lands or tenements is termed the "lessor," and the person to whom they are conveyed, the "lessee"; and when the lessor so conveys lands or tenements to a lessee, he is said to lease, demise, or let them.

LEASEHOLD. An estate in realty held under a lease; an estate for a fixed term of years.

LEGACY. A bequest or gift of personal property by last will and testament.

LEGAL TENDER. That kind of coin, money, or circulating medium which the law compels a creditor to accept in payment of his debt, when tendered by the debtor in the right amount.

LESSEE. He to whom a lease is made.

LESSOR. He who grants a lease.

LET, v. In conveyancing. To demise or lease. "To let and set" is an old expression.

LETTERS OF ADMINISTRATION. The formal instrument of authority and appointment given an administrator by the proper court, empowering him to

enter upon the discharge of his duties as administrator.

LETTERS TESTAMENTARY. The formal instrument of authority and appointment given to an executor by the proper court, empowering him to enter upon the discharge of his office as executor.

LEVY, v. To raise; execute; exact; collect; gather; take up; seize. Thus, to levy (raise or collect) a tax; to levy (raise or set up) a nuisance; to levy (acknowledge) a fine; to levy (inaugurate) war; to levy an execution—i. e., to levy or collect a sum of money on an execution.

LIEN. A qualified right of property which a creditor has in or over specific property of his debtor, as security for the debt or charge or for performance of some act.

LIFE ESTATE. An estate whose duration is limited to the life of the party holding it, or of some other person; a freehold estate, not of inheritance.

LIFE TENANT. One who holds an estate in lands for the period of his own life or that of another certain person.

LIMITED PARTNERSHIP. A partnership consisting of one or more general partners, jointly and severally responsible as ordinary partners, and by whom the business is conducted, and one or more special partners, contributing in cash payments a specific sum as capital to the common stock, and who are not liable for the debts of the partnership beyond the fund so contributed.

LIQUIDATED. Ascertained; determined; fixed; settled; made clear or manifest. Cleared away; paid; discharged.

LIQUIDATED ACCOUNT. An account whereof the amount is certain and fixed, either by the act and agreement of the parties or by operation of law; a sum which cannot be changed by the proof; it is so much or nothing; but the term does not necessarily refer to a writing.

LIQUIDATED AND UNLIQUIDATED DAMAGES. The former term is applicable when the amount of the damages has been ascertained by the judgment in the action, or when a specific sum of money has been expressly stipulated by the parties to a bond or other contract as the amount of damages to be recovered by either party for a breach of the agreement by the other.

LIS PENDENS. A suit pending; that legal process, in a suit regarding land, which amounts to legal notice to all the world that there is a dispute as to the title. In equity the filing of the bill and serving a subpœna creates a lis pendens, except when statutes require some record.

LOCUS PŒNITENTIÆ. A place for repentance; an opportunity for changing one's mind; a chance to withdraw from a contemplated bargain or contract before it results in a definite contractual liability. Also used of a chance afforded to a person, by the circumstances, of relinquishing the intention which he has formed to commit a crime, before the perpetration thereof.

L. S. An abbreviation for "locus sigilli," the place of the seal; i. e., the place where a seal is to be affixed, or a scroll which stands instead of a seal.

M

MAINTENANCE. An unauthorized and officious interference in a suit in which the offender has no interest, to assist one of the parties to it, against the other, with money or advice to prosecute or defend the action.

MALFEASANCE. The wrongful or unjust doing of some act which the doer has no right to perform, or which he has stipulated by contract not to do. It differs from "misfeasance" and "nonfeasance" (which titles see).

MALUM IN SE. A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. An act is said to be malum in se when it is inherently and essentially evil—that is, immoral in its nature and injurious in its consequences—without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc.

MALUM PROHIBITUM. A wrong prohibited; a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law; an act involving an illegality resulting from positive law. Contrasted with malum in se.

MANDAMUS. Lat. We command. A legal writ compelling the defendant to do an official duty.

MANDATE. A bailment of property in regard to which the bailee engages to do some act without reward. Story, Bailm. § 137.

MATURITY. In mercantile law. The time when a bill of exchange or promissory note becomes due.

MECHANIC'S LIEN. A species of lien created by statute in most of the states, which exists in favor of persons who have performed work or furnished material in and for the erection of a building. Their lien attaches to the land as well as the building, and is intended to secure for them a priority of payment.

MERGER. The fusion or absorption of one thing or right into another; generally spoken of a case where one of the subjects is of less dignity or importance than the other. Here the less important ceases to have an independent existence.

MINOR. An infant or person who is under the age of legal competence. A term derived from the civil law, which described a person under a certain age as less than so many years. Minor viginti quinque annis, one less than twenty-five years of age.

MISDEMEANOR. In criminal law. A general name for criminal offenses of every sort, punishable by indictment or special proceedings, which do not in law amount to the grade of felony.

MISFEASANCE. A misdeed or trespass. The doing what a party ought to do improperly. The improper performance of some act which a man may lawfully do.

Misfeasance, strictly, is not doing a lawful act in a proper manner, omitting to do it as it should be done, while malfeasance is the doing an act wholly wrongful, and nonfeasance is an omission to perform a duty, or a total neglect of duty. But "misfeasance" is often careléssly used in the sense of "malfeasance."

MISREPRESENTATION. An intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract and influential in producing it.

MORTGAGE. An estate created by a conveyance absolute in form, but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance.

A conditional conveyance of land, designed as a security for the payment of money, the fulfillment of some contract, or the performance of some act, and to be void upon such payment, fulfillment, or performance.

A debt by specialty, secured by a pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence or their own laches.

The foregoing definitions are applicable to the common-law conception of a mortgage. But in many states, in modern times, it is regarded as a mere lien, and not as creating a title or estate. It is a pledge or security of particular property for the payment of a debt, or the performance of some other obligation, whatever form the transaction may take, but is not regarded as a conveyance in effect, though it may be cast in the form of a conveyance.

MUTUUM. Lat. In the law of bailments. A loan for consumption; a loan of chattels, upon an agreement that the borrower may consume them, returning to the lender an equivalent in kind and quantity.

N

NEGLIGENCE. The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances.

Negligence, in its civil relation, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another.

NEGLIGENCE VEL NON. Lat. Negligence or not.

NEGOTIABLE. An instrument embodying an obligation for the payment of money is called "negotiable" when the legal title to the instrument itself and to the whole amount of money expressed upon its face, with the right to sue therefor in his own name, may be transferred from one person to another without a formal assignment, but by mere indorsement and delivery by the holder or by delivery only.

NIL DEBET. Lat. He owes nothing.

NOMINAL AND SUBSTANTIAL DAMAGES. Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant's duty, or in cases where, although there has been a real injury, the

plaintiff's evidence entirely fails to show its amount.

NOMINAL PARTNER. A person who appears to be a partner in a firm, or is so represented to persons dealing with the firm, or who allows his name to appear in the style of the firm or to be used in its business, in the character of a partner, but who has no actual interest in the firm or business.

NON ASSUMPSIT. The general issue in the action of assumpsit, being a plea by which the defendant avers that "he did not undertake" or promise as alleged.

NON COMPOS MENTIS. Lat. Not sound of mind; insane.

NON EST FACTUM. Lat. It was not made.

NONFEASANCE. The neglect or failure of a person to do some act which he ought to do.

NONSUIT. Not following up the cause; failure on the part of a plaintiff to continue the prosecution of his suit. An abandonment or renunciation of his suit, by a plaintiff, either by omitting to take the next necessary steps, or voluntarily relinquishing the action, or pursuant to an order of the court. An order or judgment, granted upon the trial of a cause, that the plaintiff has abandoned, or shall abandon, the further prosecution of his suit.

NOTARY PUBLIC. A public officer whose function is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage.

NUDUM PACTUM. Lat. A naked pact; a bare agreement; a promise or undertaking made without any consideration for it.

NUISANCE. That class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to the right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.

O

OATH. An external pledge or asseveration, made in verification of statements made or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party and to visit him with punishment if they be false.

OBITER DICTUM. A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way"; that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument.

OMNIS RATIHABITIO RETROTRAHITUR ET MANDATO PRIORI ÆQUIPARATUR. Lat. Every ratification relates back and is equivalent to a prior authority. Broom, Max. 757, 871.

ORDINANCE. The term is used to designate the enactments of the legislative body of a municipal corporation.

OSTENSIBLE AGENCY. An implied or presumptive agency, which exists where one, either intentionally or from want of ordinary care, induces another to believe that a third person is his agent, though he never in fact employed him.

OSTENSIBLE PARTNER. A partner whose name is made known and appears to the world as a partner, and who is in reality such.

OUTLAWED, when applied to a promissory note, means debarred by the statute of limitations.

OYER. In modern practice. A copy of a bond or specialty sued upon, given to the opposite party, in lieu of the old practice of reading it.

P

PAR. In commercial law. Equal; equality. An equality subsisting between the nominal or face value of a bill of exchange, share of stock, etc., and its actual selling value. When the values are thus equal, the instrument or share is said to be "at par"; if it can be sold for more than its nominal worth, it is "above par"; if for less, it is "below par."

PARI PASSU. Lat. By an equal progress; ratably; without preference.

PARTICEPS. Lat. A participant; a sharer; anciently, a part owner, or parcener.

PARTICEPS CRIMINIS. A participant in a crime; an accomplice. One who shares or co-operates in a criminal offense, tort, or fraud.

PARTITION. The dividing of lands held by joint tenants, coparceners, or tenants in common, into distinct portions, so that they may hold them in severalty. And, in a less technical sense, any division of real or personal property between co-owners or co-proprietors.

PARTNERSHIP. A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them.

PART PERFORMANCE. The doing some portion, yet not the whole, of what either party to a contract has agreed to do.

PATENT, n. A grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals.

In English law. A grant by the sovereign to a subject or subjects, under the great seal, conferring some authority, title, franchise, or property; termed "letters patent" from being delivered open, and not closed up from inspection.

In American law. The instrument by which a state or government grants public lands to an individual.

A grant made by the government to an inventor, conveying and securing to him the exclusive right to make and sell his invention for a term of years.

PAWN, n. A bailment of goods to a creditor, as security for some debt or engagement; a pledge. Story, Bailm. art. 7.

PAYEE. The person in whose favor a negotiable instrument is made or drawn; the person to whom a negotiable instrument is made payable.

PAYER, or PAYOR. One who pays, or who is to make a payment; particularly the person who makes or is to make payment of a negotiable instrument.

PERFORM. To perform an obligation or contract is to execute, fulfill, or accomplish it according to its terms. This may consist either in action on the part of the person bound by the contract or in omission to act, according to the nature of the subject-matter; but the term is usually applied to any action in discharge of a contract other than payment.

PERFORMANCE. The fulfillment or accomplishment of a promise, contract, or other obligation according to its terms.

Part performance. The doing some portion, yet not the whole, of what either party to a contract has agreed to do.

Specific performance. Performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon. This is frequently compelled by a bill in equity filed for the purpose. 2 Story, Eq. Pl. § 712 et seq. The doctrine of specific performance is that, where damages would be an inadequate compensation for the breach of an agreement, the contractor will be compelled to perform specifically what he has agreed to do. Sweet.

PERJURY. In criminal law. The willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.

PER SE. Lat. By himself or itself; in itself; taken alone; inherently; in isolation; unconnected with other matters.

PERSONALTY. Personal property; movable property; chattels.

PERSONAL PROPERTY. (See Personalty.)

PLAINTIFF. A person who brings an action; the party who complains or sues in a personal action and is so named on the record.

PLAINTIFF IN ERROR. The party who sues out a writ of error to review a judgment or other proceeding at law.

PLEA. In common-law practice. A pleading; any one in the series of pleadings. More particularly, the first pleading on the part of the defendant. In the strictest sense, the answer which the defendant in an action at law makes to the plaintiff's declaration, and in which he sets up matter of fact as defense, thus distinguished from a demurrer, which interposes objections on grounds of law.

In equity. A special answer showing or relying upon one or more things as a cause why the suit should be either dismissed or delayed or barred.

PLEAD. To make, deliver, or file any pleading; to conduct the pleadings in a cause. To interpose any pleading in a suit which contains allegations of fact; in this sense the word is the antithesis of "demur." More particularly, to deliver in a formal manner the defendant's answer to the plaintiff's declaration, or to the indictment, as the case may be.

PLEADING. The peculiar science or system of rules and principles, established in the common law, according to which the pleadings or responsive allegations of litigating parties are framed, with a view to preserve technical propriety and to produce a proper issue.

The process performed by the parties to a suit or action, in alternately presenting written statements of their contention, each responsive to that which precedes, and each serving to narrow the field of controversy, until there evolves a single point, affirmed on one side and denied on the other, called the "issue," upon which they then go to trial.

The act or step of interposing any one of the pleadings in a cause, but particularly one on the part of the defendant; and, in the strictest sense, one which sets up allegations of fact in defense to the action.

PLEDGE, n. A bailment of goods to a creditor, as security for some debt or engagement; a pawn. Story, Bailm. art. 7.

PLEDGEE. The party to whom goods are pledged, or delivered in pledge.

PLEDGOR. The party delivering goods in pledge; the party pledging.

POLICE POWER. The power vested in a state to establish laws and ordinances for the regulation and enforcement of public order and tranquillity. The power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. The police power of the state is an authority conferred by the American constitutional system upon the individual states, through which they are enabled to establish a special department of police; adopt such regulations as tend to prevent the commission of fraud, violence, or other offenses against the state; aid in the arrest of criminals; and secure generally the comfort, health, and prosperity of the state, by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him by the laws of his country. It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the "police power" of the state, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects.

POLICY OF INSURANCE. A mercantile instrument in writing, by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation, whenever the event shall happen by which the loss is to accrue.

POST-DATE. To date an instrument as of a time later than that at which it is really made.

POWER OF APPOINTMENT. A power or authority conferred by one person by deed or will upon another (called the "donee") to appoint, that is, to select and nominate, the person or persons who are to receive and enjoy an estate or an income therefrom or from a fund, after the testator's death, or the donee's death, or after the termination of an existing right or interest.

POWER OF ATTORNEY. An instrument authorizing a person to act as the agent or attorney of the person granting it.

PREMIUM. The sum paid or agreed to be paid by an assured to the underwriter as the consideration for the insurance; being a certain rate per cent. on the amount insured.

PRESENTMENT. The production of a bill of exchange to the drawee for his acceptance, or to the drawer or acceptor for payment; or of a promissory note to the party liable, for payment of the same.

PRESUMPTION. An inference affirmative or disaffirmative of the truth or falsehood of any proposition or fact drawn by a process of probable reasoning in the absence of actual certainty of

its truth or falsehood, or until such certainty can be ascertained.

PRIMA FACIE. Lat. At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably.

A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it.

PRINCIPAL. In the law of agency. The employer or constitutor of an agent; the person who gives authority to an agent or attorney to do some act for him.

PROBATE. The act or process of proving a will. The proof before an ordinary, surrogate, register, or other duly authorized person that a document produced before him for official recognition and registration, and alleged to be the last will and testament of a certain deceased person, is such in reality.

PROCESS. In practice. This word is generally defined to be the means of compelling the defendant in an action to appear in court.

PROCURATION. Agency; proxy; the act of constituting another one's attorney in fact; action under a power of attorney or other constitution of agency. Indorsing a bill or note "by procuration" (or per proc.) is doing it as proxy for another or by his authority.

PROMISSORY NOTE. A promise or engagement, in writing, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or bearer.

PROMOTERS. In the law relating to corporations, those persons are called the "promoters" of a company who first associate themselves together for the purpose of organizing the company, issuing its prospectus, procuring subscriptions to the stock, securing a charter, etc.

PROSECUTE. To follow up; to carry on an action or other judicial proceeding; to proceed against a person criminally.

PRO TANTO. Lat. For so much; as far as it goes.

PROTEST. A notarial act, being a formal statement in writing made by a notary under his seal of office, at the request of the holder of a bill or note, in which such bill or note is described, and it is declared that the same was on a certain day presented for payment (or acceptance, as the case may be), and that such payment or acceptance was refused, and stating the reasons, if any, given for such refusal, whereupon the notary protests against all parties to such instrument, and declares that they will be held responsible for all loss or damage arising from its dishonor.

PROXY. A person who is substituted or deputed by another to represent him and act for him, particularly in some meeting or public body. Also the instrument containing the appointment of such person.

Q

QUA. Lat. As; in the character or capacity of. E. g., "the trustee qua trustee."

QUANTUM MERUIT. As much as he deserved.

In pleading. The common count in an action of assumpsit for work and labor, founded on an implied assumpsit or promise on the part of the defendant to pay the plaintiff as much as he reasonably deserved to have for his labor.

QUASI. Lat. As if; as it were; analogous to. This term is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are also intrinsic differences between them.

QUASI CONTRACT. In the civil law. A contractual relation arising out of transactions between the parties which give them mutual rights and obligations, but do not involve a specific and express convention or agreement between them.

QUIET, v. To pacify; to render secure or unassailable by the removal of disquieting causes or disputes. This is the meaning of the word in the phrase "action to quiet title," which is a proceeding to establish the plaintiff's title to land by bringing into court an adverse claimant and there compelling him either to establish his claim or be forever after estopped from asserting it.

QUITCLAIM DEED. A deed of conveyance operating by way of release; that is, intended to pass any title, interest, or claim which the grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title.

QUO WARRANTO. A name commonly applied, in the United States, to an "information in the nature of a quo warranto," an action compelling the defendant to show by what warrant he exercises certain powers or privileges. The proceeding is used to test the right of a person to public office, or the right of a private or public corporation to exercise certain franchises.

R

RATIFICATION. The confirmation of a previous act done either by the party himself or by another; confirmation of a voidable act.

REAL ESTATE. (See Real Property.)

REALTY. (See Real Property.)

REAL PROPERTY. A general term for lands, tenements, and hereditaments; property which, on the death of the owner intestate, passes to his heir. Real property is either corporeal or incorporeal.

RECEIPT. A receipt is the written acknowledgment of the receipt of money, or a thing of value, without containing any affirmative obligation upon either party to it; a mere admission of a fact in writing.

Also the act or transaction of accepting or taking anything delivered.

RECEIVER. A receiver is an indifferent person between the parties appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things which it does not seem reasonable to the court that either party should do; or where a party is incompetent to do so, as in the case of an infant. The remedy of the appointment of a receiver is one of the very oldest in the court of chancery, and is founded on the inadequacy of the remedy to be obtained in the court of ordinary jurisdiction.

RECOGNIZANCE. An obligation of record, entered into before some court of record, or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, or criminal court, to keep the peace, to pay a debt, or the like. It resembles a bond, but differs from it in being an acknowledgment of a former debt upon record.

RECOUPMENT. Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract.

"Recoupment" differs from "set-off" in this respect: that any claim or demand the defendant may have against the plaintiff may be used as a set-off, while it is not a subject for recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action.

RELATOR. The person upon whose complaint, or at whose instance, an information or writ of quo warranto is filed, and who is quasi the plaintiff in the proceeding.

RELEASE. The relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.

REMAINDER. An estate limited to take effect and be enjoyed after another estate is determined. As, if a man seised in fee-simple grants lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs forever, here A. is tenant for years, remainder to B. in fee.

REMEDY. The means by which the violation of a right is prevented, redressed, or compensated. Though a remedy may be by the act of the party injured, by operation of law, or by agreement between the injurer and the injured, we are chiefly concerned with one kind of remedy, the judicial remedy, which is by action or suit.

REMITTITUR DAMNA. (Lat.) Usually shortened to **Remittitur.** An entry made on record, in cases where a jury has given greater damages than a plaintiff has declared for, remitting the excess.

RENT. The compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof.

REPLEVIN. A personal action ex delicto brought to recover possession of goods unlawfully taken (generally, but not only, applicable to the taking of goods distrained for rent), the validity of which taking it is the mode of contesting, if the party from whom the goods were taken wishes to have them back in specie, whereas, if he prefer to have damages instead, the validity may be contested by action of trespass or unlawful distress.

REPLEVIN BOND. A bond executed to indemnify the officer who executed a writ of replevin and to indemnify the defendant or person from whose custody the property was taken for such damages as he may sustain.

RESCISSION. Rescission, or the act of rescinding, is where a contract is canceled, annulled, or abrogated by the parties, or one of them.

RESIDENCE. Living or dwelling in a certain place permanently or for a considerable length of time. The place where a man makes his home, or where he dwells permanently or for an extended period of time.

RESIDUARY. Pertaining to the residue; constituting the residue; giving or bequeathing the residue; receiving or entitled to the residue.

RESIDUARY DEVISEE. The person named in a will, who is to take all the real property remaining over and above the other devises.

RESIDUARY ESTATE. The remaining part of a testator's estate and effects, after payment of debts and legacies; or that portion of his estate which has not been particularly devised or bequeathed.

RESIDUARY LEGATEE. The person to whom a testator bequeaths the residue of his personal estate, after the payment of such other legacies as are specifically mentioned in the will.

RESPONDEAT SUPERIOR. Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent.

RESPONDENT. The party who makes an answer to a bill or other proceeding in chancery.

The party who appeals against the judgment of an inferior court is termed the "appellant"; and he who contends against the appeal, the "respondent."

REVOCATION. The recall of some power, authority, or thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void. It may be either general, of all acts and things done before; or special, to revoke a particular thing.

RIGHT OF ACTION. The right to bring suit; a legal right to maintain an action, growing out of a given transaction or state of facts and based thereon.

RIGHT OF ENTRY. A right of entry is the right of taking or resuming possession of land by entering on it in a peaceable manner.

RIGHT TO REDEEM. The term "right of redemption," or "right to redeem," is familiarly used to describe the estate of the debtor when under mortgage, to be sold at auction, in contradistinction to an absolute estate, to be set off by appraisement. It would be more consonant to the legal character of this interest to call it the "debtor's estate subject to mortgage."

S

SATISFACTION. The act of satisfying a party by paying what is due to him (as on a mortgage, lien, or contract), or what is awarded to him, by the judgment of a court or otherwise. Thus, a judgment is satisfied by the payment of the amount due to the party who has recovered such judgment, or by his levying the amount.

SCIENTER. Lat. Knowingly.

SCINTILLA. Lat. A spark; a remaining particle; the least particle.

SCIRE FACIAS. Lat. In practice. A judicial writ, founded upon some record, and requiring the person against whom it is brought to show cause why the party bringing it should not have advantage of such record, or (in the case of a scire facias to repeal letters patent) why the record should not be annulled and vacated.

The most common application of this writ is as a process to revive a judgment, after the lapse of a certain time, or on a change of parties, or otherwise to have execution of the judgment, in which cases it is merely a continuation of the original action.

SCROLL or SCRAWL. A mark intended to supply the place of a seal, made with a pen or other instrument of writing.

SEAL. An impression upon wax, wafer, or some other tenacious substance capable of being impressed.

SEISIN. Possession with an intent on the part of him who holds it to claim a freehold interest.

SET-OFF. A counterclaim or cross-demand; a claim or demand which the defendant in an action sets off against the claim of the plaintiff, as being his due, whereby he may extinguish the plaintiff's demand, either in whole or in part, according to the amount of the set-off.

SET UP. To bring forward or allege, as something relied upon or deemed sufficient; to propose or interpose, by way of defense, explanation, or justification; as, to set up the statute of limitations—i. e., offer and rely upon it as a defense to a claim.

SEVERANCE. The cutting of the crops, such as corn, grass, etc., or the separating of anything from the realty. Brown.

SHELLEY'S CASE, RULE IN. "That rule is that, where a life estate is given to A., with a future interest to A.'s heirs (the use of the particular word 'heirs' being necessary), the whole gift is construed as one 'to A. and his heirs,' at once giving an estate to A. in fee." Albert M. Kales, in 5 Am. Law & Proced. 105.

SILENT PARTNER. Popular name for dormant partners or special partners.

SIMPLE CONTRACT. A contract based upon consideration and not upon form.

SPECIAL INDORSEMENT. An indorsement in full, which specifically names the indorsee.

SPECIAL PARTNER. A member of a limited partnership, who furnishes certain funds to the common stock, and whose liability extends no further than the fund furnished.

SPECIAL PROPERTY. Property of a qualified, temporary, or limited nature; as distinguished from absolute, general, or unconditional property. Such is the property of a bailee in the article bailed, of a sheriff in goods temporarily in his hands under a levy, of the finder of lost goods while looking for the owner, of a person in wild animals which he has caught.

SPECIALTY. A writing sealed and delivered, containing some agreement.

SPECIAL VERDICT. A special finding of the facts of a case by a jury, leaving to the court the application of the law to the facts thus found.

SPOLIATION. In torts. Destruction of a thing by the act of a stranger, as the erasure or alteration of a writing by the act of a stranger, is called "spoliation." This has not the effect to destroy its character or legal effect.

SS. An abbreviation used in that part of a record, pleading, or affidavit, called the "statement of the venue." Commonly translated or read, "to wit," and supposed to be a contraction of "scilicet."

STATUS. The status of a person is his legal position or condition.

STATUTE, n. An act of the legislature.

STATUTE OF FRAUDS. A celebrated English statute, passed in 1677, and which has been adopted, in a more or less modified form, in nearly all of the United States. Its chief characteristic is the provision that no action shall be brought on certain contracts unless there be a note or memorandum thereof in writing, signed by the party to be charged or by his authorized agent.

STATUTE OF LIMITATION. A statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that no suit shall be maintained on such causes of action unless brought within a specified period after the right accrued.

STATUTORY UNDERTAKING. A penal bond, given, as required by statute, in connection with certain legal proceedings. "Common examples of statutory undertaking are: The bond given by a plaintiff in an injunction suit, as security to the defendant for damages caused by the issuance of an interlocutory injunction, such damages, within the amount of the penalty, to be collected by the defendant if the injunction is found to have been wrongfully issued; and the bond given for a very similar purpose in attachment or replevin." Bauer on Damages, p. 98, note.

STOCK. In corporation law. The capital or principal fund of a corporation or joint-stock company, formed by the contributions of subscribers or the sale of shares, and considered as the aggregate of a certain number of shares severally owned by the members or stockholders of the corporation; also the proportional part of the capital which is owned by an individual stockholder; also the incorporeal property which is represented by the holding of a certificate of stock, and in a wider and more remote sense, the right of a shareholder to participate in the general management of the company and to share proportionally in its net profits or earnings or in the distribution of assets on dissolution.

STOPPAGE IN TRANSITU. The act by which the unpaid vendor of goods stops their progress and resumes possession of them, while they are in course of transit from him to the purchaser, and not yet actually delivered to the latter.

STRICTISSIMI JURIS. Lat. Of the strictest right or law.

SUBAGENT. An under-agent; a substituted agent; an agent appointed by one who is himself an agent.

SUBPŒNA. The process by which the attendance of a witness is required is called a "subpœna." It is a writ or order directed to a person, and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

SUBROGATION. The substitution of one thing for another, or of one person into the place of another with respect to rights, claims, or securities.

Subrogation denotes the putting a third person who has paid a debt in the place of the creditor to whom he has paid it, so as that he may exercise against the debtor all the rights which the creditor, if unpaid, might have done.

SUBSCRIBE. In the law of contracts. To write under; to write the

name under; to write the name at the bottom or end of a writing.

SUBSTANTIVE LAW. The part of the law which the courts are established to administer, as opposed to the rules according to which the substantive law itself is administered. That part of the law which creates, defines, and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.

SUI GENERIS. Lat. Of its own kind or class.

SUI JURIS. Lat. Of his own right; having legal capacity to manage his own affairs.

SUIT. "Suit" is a generic term, of comprehensive signification, and applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the recovery of a right.

SUMMARY, adj. Immediate; peremptory; off-hand; without a jury; provisional; statutory.

SUMMON. In practice. To serve a summons; to cite a defendant to appear in court to answer a suit which has been begun against him; to notify the defendant that an action has been instituted against him, and that he is required to answer to it at a time and place named.

SUMMONS. In practice. A writ, directed to the sheriff or other proper officer, requiring him to notify the person named that an action has been commenced against him in the court whence the writ issues, and that he is required to appear, on a day named, and answer the complaint in such action.

SURETY. A surety is one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor.

T

TENANT. In the broadest sense, one who holds or possesses lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise. Cowell.

In a more restricted sense, one who holds lands of another; one who has the temporary use and occupation of real property owned by another person (called the "landlord"), the duration and terms of his tenancy being usually fixed by an instrument called a "lease."

TENDER. An offer of money; the act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, without any stipulation or condition.

TERM. Of court. The word "term" when used with reference to a court, signifies the space of time during which the court holds a session. A "session" signifies the time during the term when the court sits for the transaction of business, and the session commences when the court convenes for the term, and continues until final adjournment, either before or at the expiration of the term. The "term" of the court is the time prescribed by law during which it may be in "session." The "session" of the court is the time of its actual sitting.

TESTATOR. One who makes or has made a testament or will; one who dies leaving a will.

TITLE. The means whereby the owner of lands or of personalty has the just possession of his property. See Co. Litt. 345; 2 Bl. Comm. 195.

TORT. Wrong; injury; the opposite of right. So called, according to Lord Coke, because it is "wrested," or crooked, being contrary to that which is right and straight. Co. Litt. 158b.

In modern practice, "tort" is constantly used as an English word to denote a wrong or wrongful act, for which an action will lie, as distinguished from a "contract." 3 Bl. Comm. 117.

A tort is a legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual. In the former case, no special damage is necessary to entitle the party to recover. In the two latter cases, such damage is necessary. Code Ga. 1882, § 2951.

TORT-FEASOR. One who commits or is guilty of a tort.

TORTIOUS. Wrongful; of the nature of a tort. Formerly certain modes of conveyance (e. g., feoffments, fines, etc.) had the effect of passing not merely the estate of the person making the conveyance, but the whole fee simple, to the injury of the person really entitled to the fee; and they were hence called "tortious conveyances." Litt. par. 611; Co. Litt. 271b, note 1; 330b, note 1.

But this operation has been taken away. Sweet.

TRESPASS. Any misfeasance or act of one man whereby another is injuriously treated or damnified. 3 Bl. Comm. 208.

An injury or misfeasance to the person, property, or rights of another person, done with force and violence, either actual or implied by law.

In the strictest sense, an entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property. 3 Bl. Comm. 209.

In practice. A form of action, at the common law, which lies for redress in the shape of money damages for any unlawful injury done to the plaintiff, in respect either to his person, property, or rights, by the immediate force and violence of the defendant.

Trespass de bonis asportatis. (Trespass for goods carried away.) In practice. The technical name of that species of trespass for injuries to personal property which lies where the injury consists in carrying away the goods or property.

Trespass on the case. The form of action, at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force, or which is the indirect or secondary consequence of such act. Commonly called "case," or "action on the case."

Trespass quare clausum fregit. (Trespass wherefore he broke the close, or trespass for breaking the close.) The common-law action for damages for an unlawful entry or trespass upon the plaintiff's land.

TROVER. In common-law practice, the action of trover (or trover and conversion) is a species of action on the case, and originally lay for the recovery of damages against a person who had "found" another's goods and wrongfully converted them to his own use. Subsequently the allegation of the loss of the goods by the plaintiff and the finding of them by the defendant was merely fictitious, and the action became the remedy for any wrongful interference with or detention of the goods of another.

TRUST. An equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or ownership, recognized and enforced by courts of chancery.

TRUST DEED. An instrument in use in many states, taking the place and serving the uses of a common-law mortgage, by which the legal title to real property is placed in one or more trustees, to secure the repayment of a sum of money or the performance of other conditions.

TRUSTEE. The person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another.

TRUSTEE PROCESS. The name given, in the New England states, to the process of garnishment or foreign attachment.

U

ULTRA VIRES. A term used to express the action of a corporation which is beyond the powers conferred upon it by its charter, or the statutes under which it was instituted. 13 Am. Law Rev. 632.

UNDERTAKING. A promise, engagement, or stipulation. Each of the promises made by the parties to a contract, considered independently and not as mutual, may, in this sense, be denominated an "undertaking."

UNDERWRITER. The person who insures another in a fire or life policy; the insurer.

A person who joins with others in entering into a marine policy of insurance as insurer.

UNILATERAL. One-sided; ex parte; having relation to only one of two or more persons or things.

USURY. Unlawful interest; a premium or compensation paid or stipulated to be paid for the use of money borrowed or returned, beyond the rate of interest established by law. Webster.

V

VALID. Of binding force. A deed, will, or other instrument, which has received all the formalities required by law, is said to be valid.

VALIDITY. This term is used to signify legal sufficiency, in contradistinction to mere regularity.

VENDEE. A purchaser or buyer; one to whom anything is sold. Generally used of the transferee of real property, one who acquires chattels by sale being called a "buyer."

VENDITIONI EXPONAS. Lat. You expose to sale. This is the name of a writ of execution, requiring a sale to be made, directed to a sheriff when he

has levied upon goods under a fieri facias, but returned that they remained unsold for want of buyers; and in some jurisdictions it is issued to cause a sale to be made of lands, seized under a former writ, after they have been condemned or passed upon by an inquisition. Frequently abbreviated to "vend. ex."

VENDOR. The person who transfers property by sale, particularly real estate, "seller" being more commonly used for one who sells personalty.

VENIRE. Lat. To come; to appear in court. This word is sometimes used as the name of the writ for summoning a jury, more commonly called a "venire facias."

VENIRE FACIAS DE NOVO. A fresh or new venire, which the court grants when there has been some impropriety or irregularity in returning the jury, or where the verdict is so imperfect or ambiguous that no judgment can be given upon it, or where a judgment is reversed on error, and a new trial awarded.

VERDICT. The formal and unanimous decision or finding of a jury, impaneled and sworn for the trial of a cause, upon the matters or questions duly submitted to them upon the trial.

VESTED. Accrued; fixed; settled; absolute; having the character or giving the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent.

VINDICTIVE DAMAGES. Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages, and (vulgarly) "smart money."

VOID. Null; ineffectual, nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended.

VOIDABLE. That may be avoided, or declared void; not absolutely void, or void in itself. Most of the acts of infants are "voidable" only, and not absolutely void.

VOLUNTARY. Free; without compulsion or solicitation.

Without consideration; without valuable consideration; gratuitous.

VOLUNTEER. In conveyancing, one who holds a title under a voluntary conveyance; i. e., one made without consideration, good or valuable, to support it.

A person who gives his services without any express or implied promise of remuneration in return is called a "volunteer," and is entitled to no remuneration for his services, nor to any compensation for injuries sustained by him in performing what he has undertaken. Sweet. Also one who officiously pays the debt of another.

W

WAGER. A wager is a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event or upon the ascertainment of a fact which is in dispute between them.

WAIVER. The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect, irregularity, or wrong.

WARD. An infant or insane person placed by authority of law under the care of a guardian.

WARRANT, v. In contracts. To engage or promise that a certain fact or state of facts, in relation to the subject-matter, is, or shall be, as it is represented to be.

WARRANT, n. A writ or precept from a competent authority in pursuance of law, directing the doing of an act, and addressed to an officer or person competent to do the act, and affording him protection from damage, if he does it.

WARRANTY. In real property law. A real covenant by the grantor of lands, for himself and his heirs, to warrant and defend the title and possession of the estate granted, to the grantee and his heirs, whereby either upon voucher, or judgment in the writ of warrantia chartæ, and the eviction of the grantee by paramount title, the grantor was bound to recompense him with other lands of equal value.

In sales of personal property. A warranty is a statement or representation made by the seller of goods, contemporaneously with and as a part of the contract of sale, though collateral to

the express object of it, having reference to the character, quality, or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he then represents them.

A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future.

In contracts. An undertaking or stipulation, in writing, or verbally, that a certain fact in relation to the subject of a contract is or shall be as it is stated or promised to be.

A warranty differs from a representation in that a warranty must always be given contemporaneously with, and as part of, the contract; whereas, a representation precedes and induces to the contract. And, while that is their difference in nature, their difference in consequence or effect is this: That, upon breach of warranty (or false warranty), the contract remains binding, and damages only are recoverable for the breach; whereas, upon a false representation, the defrauded party may elect to avoid the contract, and recover the entire price paid. Brown.

WILL. A will is the legal expression of a man's wishes as to the disposition of his property after his death.

An instrument in writing, executed in form of law, by which a person makes a disposition of his property, to take effect after his death.

WRIT OF ENTRY. A real action to recover the possession of land where the tenant (or owner) has been disseised or otherwise wrongfully dispossessed.

WRIT OF ERROR. A writ issued from a court of appellate jurisdiction, directed to the judge or judges of a court of record, requiring them to remit to the appellate court the record of an action before them, in which a final judgment has been entered, in order that examination may be made of certain errors alleged to have been committed, and that the judgment may be reversed, corrected, or affirmed, as the case may require.

A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same, according to law.

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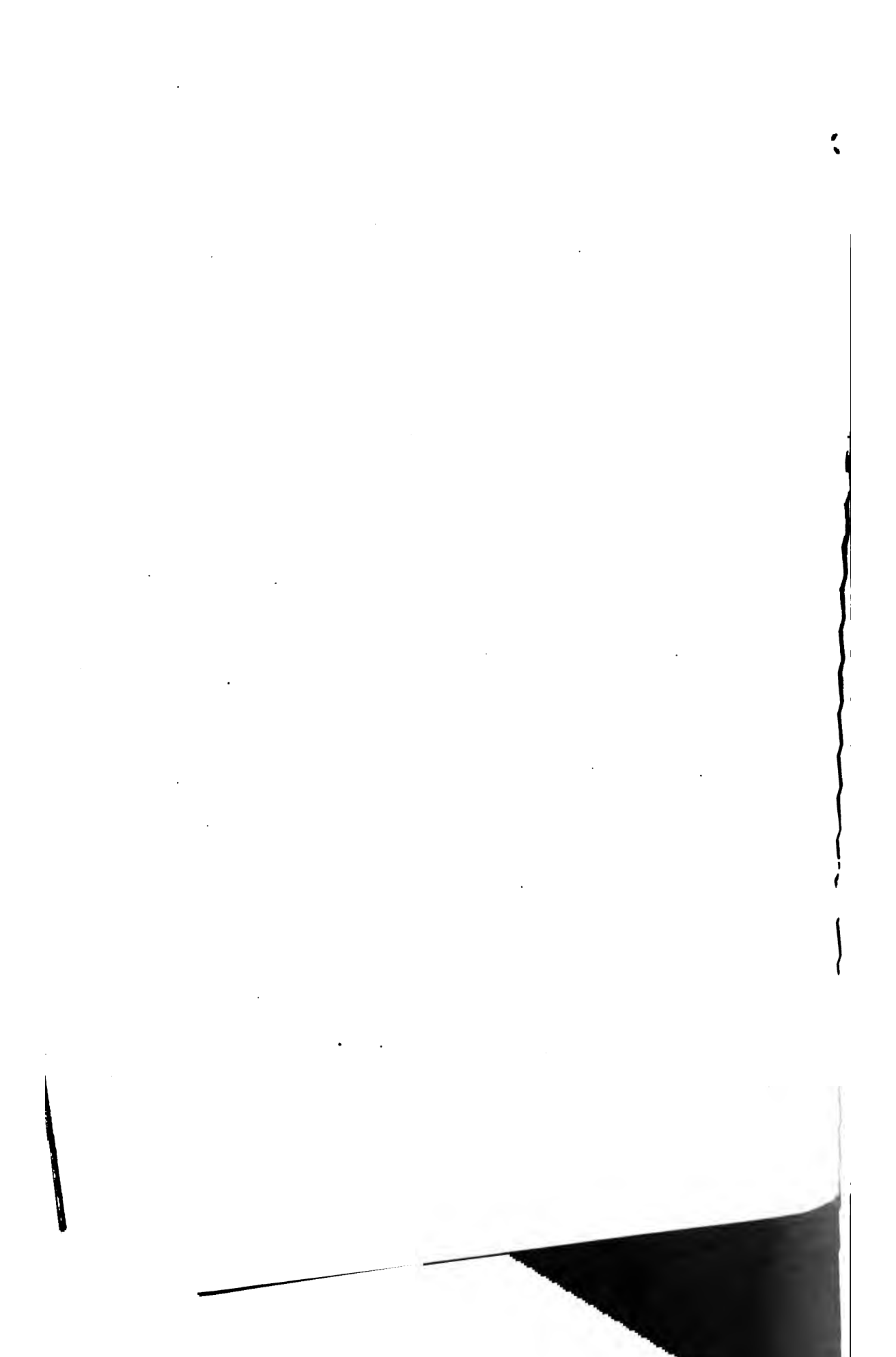

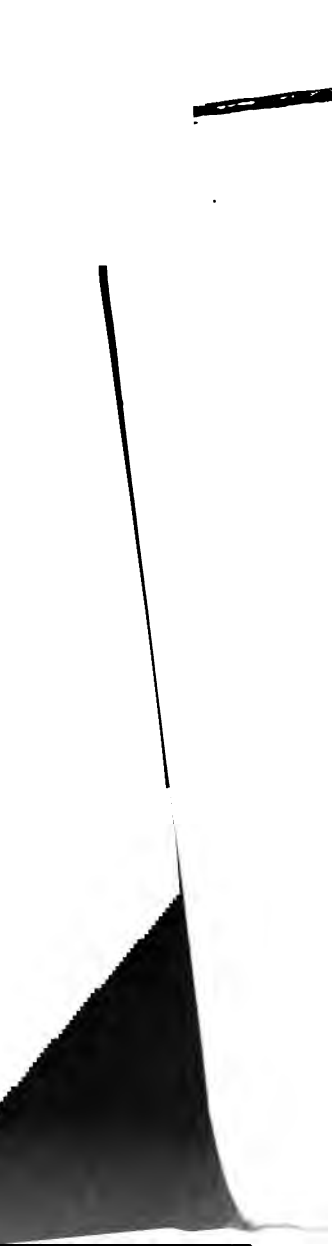

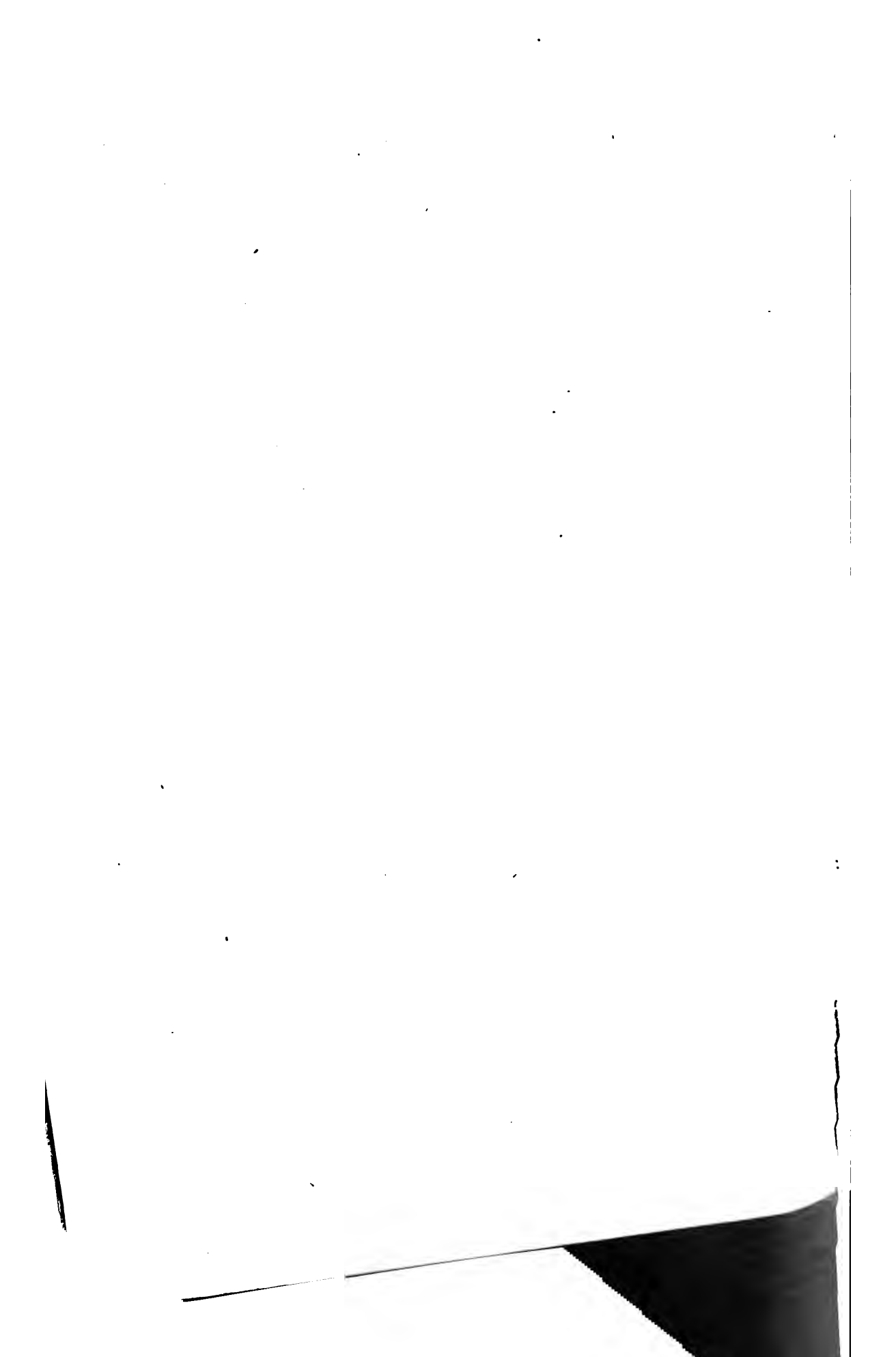

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